LOCAL GOVERNMENT PECUNIARY INTEREST TRIBUNAL

PIT NO 1/1995

DIRECTOR GENERAL
DEPARTMENT OF LOCAL GOVERNMENT
& CO-OPERATIVES

RE: COUNCILLOR GRAEME FRANK ROBERTS
HASTINGS COUNCIL

STATEMENT OF DECISION

Dated: 3 August 1995

INDEX

Page No.

LOCAL GOVERNMENT PECUNIARY INTEREST TRIBUNAL

PIT NO 1/1995

DIRECTOR GENERAL, DEPARTMENT OF LOCAL GOVERNMENT & CO-OPERATIVES

RE: COUNCILLOR GRAEME FRANK ROBERTS, HASTING COUNCIL

STATEMENT OF DECISION

INTRODUCTION

In December 1994 the Director-General of the Department of Local Government and Co-operatives received a complaint that Councillor Graeme Frank Roberts of Hastings Council had failed to declare a conflict of interest and failed to declare a pecuniary interest in relation to his participation in approvals by the Council of a sale of land and of a development application for a proposed shopping centre complex at Port Macquarie.

The legal basis for the complaint as regards the alleged pecuniary interest was s.451 of the Local Government Act 1993 which provides as follows:

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

The complaint was made to the Director-General under s.460 of the Act.

The Director-General conducted an investigation into the complaint pursuant to s.462(1) of the Act and on 19 May 1995 presented a Report to this Tribunal in accordance with s.468(1) of the Act. After considering the Report, the Tribunal, under s.469, decided to conduct a hearing into the complaint. It held a preliminary hearing on 20 June 1995. This was followed by further hearings on 19 and 20 July 1995. At those hearings the Director-General was represented by Mr Todd Alexis of counsel and Councillor Roberts appeared in person. By s.484 the Tribunal is required to provide a written statement of its decision.

BACKGROUND FACTS

During 1994 Hastings Council had under consideration an application by a developer, Consolidated Properties Pty Limited, a Queensland company, for development approval of a major project at Port Macquarie. The project was the construction of a large shopping centre complex on land part of which was owned by the Council. The land was referred to as the Hay/Murray Street site. The project involved acquisition by the developer of the Council's land and the closure of Hay Street. The proposed development, or aspects of it, gave rise to lively public debate and controversy in the local community. The Heritage Council became involved. A group calling themselves the Friends of Hay Street was formed to oppose it.

The builder designated for the proposed development was a company known as Concrete Constructions. That company had engaged Maffety Perl Nagy (Queensland) Pty Limited (MPN) as the consulting engineer. MPN was responsible for providing structural and civil engineering design, documentation, site inspection and certification services. Being based in Queensland, MPN set out to find a suitably qualified local consulting engineer willing to undertake for MPN site inspections of the work in progress and provide reports and certificates or information on which MPN could issue certificates.

Councillor Roberts was a consulting engineer. He lived and carried on his profession in Port Macquarie in partnership with Mr Terence David Walch, also a consulting engineer. They operated by means of a company in the name of Walch & Roberts Consulting Engineers Pty Limited (Walch & Roberts). They were equal shareholders in the company and its sole directors. Both were well qualified and experienced and held in high repute in their profession in Port Macquarie and elsewhere in New South Wales where they had worked.

Walch & Roberts had never previously had any association or worked with MPN or a senior engineer of that company, Mr Phillip Howard of Brisbane, when, on some date shortly prior to or on 1 August 1994, Mr Howard requested Walch & Roberts to furnish MPN with a "company profile" (basically a statement of the company's structure, management, personnel, qualifications and experience). A Walch & Roberts company profile sent by the company's secretary was received by MPN on 1 August 1995.

Subsequently, MPN, by letter signed by Mr Howard dated 19 September 1994, invited Walch & Roberts to submit "lump sum prices for carrying out civil and structural engineering quality control inspections for the Port Macquarie Shopping Centre during constructions." This letter described the site and the proposed structure and works in general terms and enclosed two preliminary drawings. The nature of the inspections required were outlined and it was said that construction on site was expected to start in October 1994 and be completed in October 1995. The letter concluded by requesting "an indication of your fee by Monday 3rd October 1994" and nominating Mr Howard as the contact person for MPN.

Walch & Roberts received MPN's letter on 21 September 1994 but had not responded to it by 7 October 1994 when Mr Howard telephoned to follow up his letter with an oral request for a response to it. There is an issue as to the person or persons to whom he spoke and what exactly was said. This will be dealt with later.

In consequence of this telephone call, Walch & Roberts, by letter dated 11 October 1994, signed by Terry Walch after consultation with Councillor Roberts, submitted to MPN what was called in the letter "a budget estimate for our fees for the services described." The letter set out a summary listing the classes of work and hours estimated for inspections with a total of estimated hours and a charge rate per hour, concluding with the statement, "therefore our estimate for the project is $28,200."

MPN received Walch & Roberts' fee proposal on 14 October 1994. Mr Howard, not being satisfied that it represented the tender of a fixed price for the work which MPN was seeking, telephoned Mr Walch on or about 18 November 1994 requesting a tender by Walch & Roberts of a single fixed lump sum fee. Mr Walch requested further engineering drawings to be sent to Walch & Roberts. On 18 November 1994 Walch & Roberts received from MPN a number of preliminary detailed structural drawings. On 22 November 1994, Mr Walch, after considering these drawings and further consulting with Councillor Roberts, despatched a letter from Walch & Roberts to MPN confirming the previous estimate of $28,200 as a fixed fee for the work. In December 1994 Mr Howard notified Mr Walch that MPN would engage Walch & Roberts for the project at the fee proposed in this letter.

ACTION ON COUNCIL BY COUNCILLOR ROBERTS

Councillor Roberts was elected to Hastings Council in a by-election on 21 September 1992 having previously stood unsuccessfully at a general election.

He was an active participant in Council affairs and took a particular interest in the Hay/Murray Street shopping centre proposal.

The proposal had been under consideration for some months prior to the time when MPN requested Walch & Roberts to furnish its company profile. The Council on 17 January 1994 had approved the granting to Consolidated Properties Pty Limited of an option to purchase the Council's land at a purchase price of $3,500,000. That company on 21 July 1994,

lodged a development application for approval of a proposal for a shopping centre to be constructed on the site at an estimated cost of $22,484,000.

Questions relating to both the contemplated sale of the land and the development proposal arose and were considered or dealt with at Special meetings of the Council, meetings of the whole Council in Committee and meetings of a committee of the Council called the Land Holdings Working Party of which Councillor Roberts was a member. There were seven such meetings between the receipt by MPN of Walch & Roberts' company profile, 1 August 1994, and the date of the submission by Walch & Roberts of their "budget estimate" of fees for the job, 11 October 1994. Two of those meetings had occurred after Walch & Roberts had received MPN's letter of 19 September 1994 inviting a lump sum fee proposal for work on the project. The dates and business of these seven meetings appear in a list to be quoted later.

Between 11 October 1994 and the date of the request by MPN to Walch & Roberts to submit a fixed lump sum fee, that is about 18 November 1994, there was a Special Meeting of the Council to decide whether it should approve the development application and, if so, on what terms and conditions. This meeting took place on 9 November 1994. The Council passed a resolution approving the development on a motion moved by Councillor Roberts at this meeting.

Councillor Roberts made no declarations of pecuniary interest and participated in the consideration and discussion of the business and voting at all of the above meetings.

The Special Meeting on 9 November 1994 did not dispose of all matters relating to the shopping centre proposal. There were later meetings of the Council and Committees to consider proposed amendments to the proposal relating to car parking facilities and other matters and also contractual matters relating to the proposed sale of the Council land.

The first of these later meetings took place on 21 November 1994. Councillor Roberts did not attend because of injury but, in notifying the Acting

General Manager of his inability to attend, he advised him that Walch & Roberts had acquired a "potential" pecuniary interest in the shopping centre matter and he would be declaring a pecuniary interest in the matter at meetings he attended.

He was also unable to attend further meetings which occurred on 28 November 1994 but was in attendance at the next meeting after that at which the shopping centre project came up for discussion. That was on 12 December 1994. By that date MPN had notified Walch & Roberts that they would be engaged for the project. Councillor Roberts declared a pecuniary interest in the matter and left the Council chamber. He did the same at every subsequent meeting at which such business arose.

ISSUES

None of the facts stated thus far are relevantly in dispute. No issue under the Act arises with respect to Councillor Roberts after 18 November 1994. As already stated, he either did not attend the meetings or, if he was in attendance, declared a pecuniary interest and did not participate in the business concerning the shopping centre at Council or committee meetings after that date.

Councillor Roberts' initial response to the complaint against him, a response which he has steadfastly maintained ever since, is that he did not have, within the meaning of the Act, a pecuniary interest in the matter before 18 November 1994. He contends that the circumstances in which Walch & Roberts submitted their company profile and their original budget estimate of fees to MPN did not give rise to the existence of a pecuniary interest as defined in the legislation and that, therefore, he was not bound to declare a pecuniary interest as a result of those transactions by his company. Claiming that in all respects he has acted properly in the matter he has offered explanations for the course of conduct that he followed and expects to be fully exonerated from the present complaint. His contentions and explanations call for a careful examination of the facts and circumstances and the meaning of the term "pecuniary interest" as used in the legislation.

Most of the relevant information was obtained by the Department's investigators and included in the Director-General's Report. The Tribunal treated the Report as material before it and admitted it as Exhibit B on the preliminary hearing. To identify the matters of fact and law that appeared to arise for determination the Tribunal, in a notice to the parties of its decision to conduct a hearing, set out particulars of the alleged contraventions and a statement of the apparent issues. It is convenient to reproduce that part of the notice here. It was Exhibit "A" at the hearing, the relevant part being as follows:

> ***"PARTICULARS of the contravention alleged are as follows:***
>
> ***Councillor Graeme Frank Roberts, being a councillor who had a pecuniary interest in matters with which the Council was concerned and being present at meetings of the Council and council committees at which the matters were being considered -***
>
> - ***failed to disclose the interest to the meetings;***
> - ***took part in the consideration and discussion of the matters;***
> - ***voted on questions relating to the matters***
>
> ***contrary to the provisions of s.451 of the Act.***
>
> ***The matters with which the Council was concerned and the meetings at which Councillor Roberts was present and the matters were being considered were:***
>
> ***3 August 1994 Special Council and Committee of the Whole Meetings - Question of extension of option to Consolidated Properties Limited to purchase from the Council the Hay/Murray Streets site.***
>
> ***23 August 1994 Landholdings Working Party (Committee of the Whole) Meeting - Consideration of correspondence from Consolidated Properties Limited regarding its shopping centre project involving the Hay/Murray Streets site.***
>
> ***23 September 1994 Landholdings Working Party (Committee of the Whole) Meeting - Consideration of approval of road closure in connection with sale of Council's land to Consolidated Properties Limited.***

4 October 1994 Landholdings Working Party (Committee of the Whole) Meeting - Question of recommendation to Council whether or not to rescind a condition for provision of access right of way proposed by Council to Consolidated Properties Limited for extension of abovementioned option but not acceptable to Consolidated Properties Limited.

4 October 1994 Special Meeting of Council (Committee of the Whole) and Special Council Meeting - Consideration of question of rescission of abovementioned condition and Landholdings Working Party's recommendation thereon.

9 November 1994 Special Meeting of Council - Consideration of Application by Consolidated Properties Limited for Development approval of proposal to develop the Hay/Murray Streets site for purposes of a Shopping Centre. (The Resolution to approve the proposal was moved by Councillor Roberts at this meeting).

The pecuniary interest of Councillor Roberts in the above matters was that the company Walch & Roberts Consulting Engineers Pty Limited, of which he was a shareholder and director, or, alternatively, the firm of Walch and Roberts, in which he was a partner, had at the times of the above meetings, prospects of securing employment as inspecting engineers on the Shopping Centre project by reason of having submitted a company profile or having tendered a price for the work to Mateffy Perl Nagy (Queensland) Pty Limited (MPN). MPN was an engineering company which had been engaged by Concrete Constructions, the designer and proposed builder of the project, to act as consulting engineers on the project if it was approved by the Council.

ISSUES

The contents of the Report of the investigation of this complaint received by the Tribunal from the Director-General on 19 May 1995 indicate that it is unlikely to be disputed that the meetings as listed and described above took place, that Councillor Roberts was present, that he did not disclose his alleged or any pecuniary interest to the meetings, and that he took part in the consideration and discussion of and voted on questions relating to the matters before the meetings. On that basis, the issue for determination by the Tribunal would appear to be:

Whether, in relation to the matters dealt with at the meetings, Councillor Roberts had, at the relevant times, a pecuniary interest within the meaning of the Act that he was required by s.451 to disclose.

Ancillary or incidental issues would appear to be as follows:

1. ***Whether, at the relevant times, there was, within the meaning of s.442(1) of the Act, a reasonable likelihood or expectation of appreciable financial gain to Councillor Roberts, his company or his firm by reason of the submission of the company profile and/or the tender of a price for the work in the circumstances in which those acts were done.***
2. ***Whether, Councillor Roberts did not have a pecuniary interest in the matters because his interest was, within the meaning of s.442(2) of the Act, so remote or insignificant that it could not reasonably be regarded as likely to have influenced any decision he might have made in relation to the matters.***
3. ***(a) Whether, at the relevant times, Councillor Roberts had any and, if so, what belief as to whether he had a pecuniary interest that he was required to disclose.***
   (b) Whether the existence of such belief, if any, is relevant to the question whether he committed a contravention of s.451 of the Act and, if so, in what way or to what extent is it relevant.
4. ***(a) Whether, at the relevant times, Councillor Roberts had any, and, if so, what belief as to whether he was justified in taking part in the consideration and discussion and voting on questions relating to the matters notwithstanding that he had a pecuniary interest.***
   (b) Whether the existence of such belief, if any, is relevant to the question whether he committed a contravention of s.451 of the Act and, if so, in what way or to what extent is it relevant.
5. ***If the Tribunal finds that one or more contraventions by Councillor Roberts have been proved, whether any and, if so, what action should be taken by the Tribunal."***

At the preliminary hearing a further issue was added in the following terms:

"3A. (a) Whether, at the relevant times, Councillor Roberts had any, and, if so, what mistaken belief as to matters of fact which, if they had existed, would have made

> ***his conduct complained of innocent, that is, not a contravention of section 451 of the Act;***
> ***(b) Whether such belief, if any, was an honest and reasonable belief;***
> ***(c) Whether the existence of such belief, if any, is relevant to the question whether he committed a contravention of section 451 of the Act and, if so, in what way or to what extent is it relevant."***

At the hearing additional material was tendered by both parties, Mr Howard gave evidence and was cross-examined by Councillor Roberts and Councillor Roberts also gave evidence and was cross-examined by Mr Alexis. Both parties made submissions. A transcript of the evidence and submissions was taken. (References herein to that transcript are prefixed by the letter "T.". References to transcriptions of tape recorded interviews are prefixed by the letter "I").

As the matter turns principally on the meaning to be given to the expression "pecuniary interest" in the Act, it is appropriate to quote the provisions of s.442 of the Act before looking further to the facts:

> ***"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 applies to this case. By that section a person is to be taken to have a pecuniary interest in a matter if he is a member of and holds a beneficial interest in a company that has a pecuniary interest in the matter. This applies to Councillor Roberts in respect of the company Walch & Roberts. Section 448 does not apply here).

Section 442 has a history to which it will be necessary to refer but first I propose to deal with the matters of fact to which it has to be applied in the present case. The facts will be stated as I find them to have been

established by the evidence and information before the Tribunal bearing in mind that by s.483 of the Act a finding of the Tribunal is to be made on the balance of probabilities and, as established by the decision in ***Briginshaw*** *v.* ***Briginshaw*** (1938) 60 CLR 336, the cogency of the evidence should be commensurate with the seriousness of the issue being considered.

WALCH & ROBERTS' PROSPECTS OF REMUNERATION FROM CONSTRUCTION OF THE SHOPPING CENTRE

According to the evidence there were in Port Macquarie several other consulting engineers capable of performing the services required by MPN. Councillor Roberts knew of five or more. It appears that MPN did not know of any. At the outset MPN unsuccessfully sought a recommendation from its geotechnical consultants on the project who had an office at Newcastle. Then a list of seven possible consultants at Port Macquarie was complied from the yellow pages of the telephone directory. This was in July 1994. Further investigations were made by a director of MPN prior to Mr Howard being brought into the matter. The director ascertained some information about those listed, including membership of professional engineers associations, their interest in the work and their availability. He noted the word "Councillor" against the name of Walch & Roberts as well as their membership of professional bodies. One consultant engineer, not from Port Macquarie, in notifying the director that he would rather not take the job, recommended Terry Walch of Walch & Roberts. Eventually the list was narrowed down to two of the seven possibles, James G McMahon and Walch & Roberts. (MPN's records of the above are Exhibit J). These two were then contacted by telephone and asked to furnish company profiles and details of relevant experience.

It was Mr Howard who telephoned James G McMahon and Walch & Roberts to make this request. (T.59/51). He does not recall to whom he spoke at Walch & Roberts or details of the conversation but believes that he would have explained what the project was, the nature of the work and the services required and invited them to submit a company profile if they were

interested (Exhibit F, para.7; T.58/32). As is readily understandable, Mr Howard did not in this conversation or later give any information to Walch & Roberts as to MPN's process of elimination of possible consultants for the work, their names, numbers or locality; he is quite positive about that (MPN letter 30 March 1995, Exhibit "B", Tab 8B, T.59/30). As mentioned above, Walch & Roberts' secretary forwarded their company's profile to MPN on 1 August 1994. James G McMahon had furnished a profile and references on 10 July 1994.

A letter inviting the tender of a lump sum price for the work, identical to that dated 19 September 1994 to Walch & Roberts, was sent by MPN to Mr McMahon who responded on 27 September 1994 with a fixed price quotation of $28,500. On a previous occasion Mr McMahon had successfully competed against Walch & Roberts for similar work on a large project, the construction of a hospital at Port Macquarie. Though Walch & Roberts were not made aware that he was competing again on this project, they might well have expected him to be a competitor. Mr McMahon did not know if he had competitors or who they might be. He knew there were five or six engineering firms who could do the work but several of them were sole professionals who, to his knowledge, did not contract for long term supervisory works (Exhibit "B", Tab 10).

At some point of time, probably after having received Walch & Roberts' company profile, Mr Howard formed the view that Walch & Roberts probably had an edge over Mr McMahon on the question of suitability for the job. This was, he explained, because the company had two very experienced engineers, they had had experience on similar kinds of work at Port Macquarie, their qualifications were excellent, and they had the distinct advantage over Mr McMahon of having two engineers which meant that if one was unavailable when inspections were required there was another to take his place to carry out the inspections (T. 60/9).

The fact that when there had been no response to his invitation to Walch & Roberts on 19 September 1994 to tender for the job, Mr Howard

took the trouble to follow it up by asking for a quote was a clear indication of MPN's interest, at least, in having Walch & Roberts considered for the job. However, at no time prior to 18 November 1994 did Mr Howard intimate to Walch & Roberts that they were a preferred tenderer in the process, what their competition was, if any, or that they may be or would be successful (T.62/55-T.63/12). Mr Howard conceded to Mr Roberts in cross-examination that although MPN's preference for two engineers instead of one was a factor, price remained "a major factor with the decision making process." He would not concede that it would be "the major factor", but, he said, "it was certainly a significant factor." (T.63/20-42).

In relation to Walch & Roberts' prospects of success prior to 18 November 1994 from that company's point of view, Councillor Roberts agreed in evidence that at the time their "budget estimate" of 11 October 1994 was submitted to MPN, they believed that they were the best consulting engineers (in terms of qualifications, staff, experience and quality of work) in Port Macquarie for the job but pointed out that they had entertained the same belief when they failed to get the hospital job and that their perception of their worth might not have been shared at the time by MPN (T.99/29).

Walch & Roberts' experience over the years had been that in a competitive situation, though they were highly competitive on quality of work, they were generally not competitive in the local area on price because of higher overheads and an unwillingness to undercharge. Councillor Roberts said in evidence that the bulk of their work was repeat business from previous clients all of whose work they did or who generally preferred them, in which case, quality rather than price was the deciding factor. As there had been no prior client relationship with MPN, the construction company, the developer or others involved in the project, they had no reason to suppose they had an inside edge over any competitor. They formed the view that MPN was basically price shopping for consultants to do the work as Walch & Roberts had been "solicited out of the blue with the focus being on provision of a fee." (T.156/23). When asked the basis for this view, Councillor Roberts said:

> ***"Their inquiry was directly for a price. The letter that they followed up was, you know, they weren't asking about more detail about our previous experience or what other jobs we had on, or how we could better provide services. They were asking for a price."*** (T.156/46)
>
> ***"We had no reason to suspect that price was not the basis on which they were making the decision."*** (T.157/42)

Councillor Roberts later said, because of the fact they were generally more expensive than other local engineers:

> ***"We had no reason to expect that we would be successful ... we did have a reason to expect we wouldn't be successful, because we know we are not competitive on a fee basis."*** (T.158/25,31).

However, Councillor Roberts agreed that when bidding for the job by their letter of 11 October 1994 Walch & Roberts wanted the job and hoped that their bid would be successful, otherwise they would not have put it in (T.97/15-27). Mr Walch said that the preparation of a bid involved a considerable amount of time and trouble (Walch I.17.9). Councillor Roberts also agreed that, in hoping for success, the interest Walch & Roberts had in the matter was significant because of the amount of the fees involved and that one crucial factor upon which it all depended was approval by the Council of the proposed development (T.97/29).

DID COUNCILLOR ROBERTS HAVE A "PECUNIARY INTEREST" WITHIN THE MEANING OF THE ACT

Some of Councillor Roberts' answers to questions related to Walch & Roberts' prospects of success prior to and after 18 November 1994 will serve to illustrate the problems that arise in this case as to the meaning of the expression "pecuniary interest" in the legislation.

> ***"Q. Do you acknowledge that by bidding for the work you had an interest of a financial character in the success of the application for development approval?***
>
> ***A. If our submission was successful ... Or was likely to be successful" (T.96/48-55)***

When then asked, "Or possibly successful?", he demurred on the ground that the Act did not require disclosure on the basis of a possibility of success, although he conceded that there might be perceptions to the contrary (T.96/57-T.97/7).

> ***"Q. And once that decision is made (that is, to submit a fee proposal) and the effort is put into preparing such a proposal, there's an expectation that it will be successful, otherwise you wouldn't bother?***
> ***A. I suppose if you thought you had absolutely no chance at all you wouldn't waste your time.***
>
> ***Q. Sure - and committing a day and a half or so of time to a fee proposal means that it is the sort of project you would like to get and there is an expectation that you will get it?***
> ***A. You use the term "expectation". I would simply say that it is worth the effort to do it. There is no reason to have an expectation that we will get the work.***
>
> ***Q. But, sir, if you don't have an expectation, you wouldn't bother preparing the proposal in the first place, would you?***
> ***A. I understand what you're saying.***
>
> ***Q. Do you agree with that --***
> ***A. There's a difference between having an expectation of getting it and having a chance of getting it.***
>
> ***Q. Well, if you have an expectation of getting something, there must be a chance of you getting it; would you agree with that?***
> ***A. I can compete in a race and have a chance of winning. It doesn't necessarily mean I have an expectation of winning, though.***
>
> ***Q. But if you have a chance of winning, surely there must be an expectation. It may be a small expectation, but there is an expectation, nonetheless?***
> ***A. We must have a misunderstanding of terms."***
>
> ***THE TRIBUNAL: Q. At least you'd have a hope - you'd be hoping to get it, would you not.***
> ***A. You certainly would be hoping to get it, otherwise you wouldn't be submitting it.***
>
> ***Q. And you would expect that you had a reasonable chance of getting it or you wouldn't bother to put it in.***

> ***A. We have some chance of getting it. I see that as being different from an expectation."*** (T.99/58-T.100/36).

Councillor Roberts said that his assessment of their prospects of obtaining the work changed when Mr Howard sought to have their fee estimate of 11 October 1994 confirmed as a fixed price and on 18 November 1994 furnished additional drawings to enable that to be done. When interviewed by the investigators he explained his position as follows:

> ***"Well all I can say, I suppose the critical thing is - my understanding ... ... with regards to the pecuniary interest was that if I had a reasonable expectation of getting the work I was required to declare a pecuniary interest. I believed at the time the DA was processed I did not have a reasonable expectation of getting that work, okay. When MPN came back to us and said, there was some discussion about firming up the price, in talking with Terry - they didn't say we've got the work they're just saying: Look, you know, you haven't submitted it the way we need it to be submitted, we need a firm price and all the rest. They're only coming back and asking for that because you know, we're pretty close to the mark and they're happy with the proposal. At that stage I formed the opinion that we've got a reasonable chance of getting this work and it's from that stage I felt, I felt that I fell under the provisions of the Act and was required to declare a pecuniary interest."*** (Exhibit "B", Tab 28, I.34-35).

He affirmed the above in giving evidence (T.173/38-T.174/12). He has used various expressions to describe his assessment of the prospects of getting the job as at 18 November 1994: "good chance" (I.39.1); "reasonable chance" (T.178/24); "reasonable opportunity" (letter 28 December 1994, p.3, Exhibit "B", Tab 3); and, "that was my expectation, that we would get the work" (T.180/37).

Throughout his evidence and submissions, Councillor Roberts has emphasised that he based his assessment of whether or not he was required to declare a "pecuniary interest" entirely upon his understanding and interpretation of that expression in the Act and that his failure to make a declaration before he did so was a deliberate and considered decision on his part based on his own assessment that a "pecuniary interest" under the Act had not arisen prior to 18 November 1994. (T.95/18; T.95/22-T.96/39).

What then is the meaning of "pecuniary interest" in the Act and how does it apply to this case?

THE DEFINITION IN SECTION 442

Councillor Roberts' argument seizes on the words "reasonable likelihood or expectation" where used in relation to financial gain in section 442(1) of the Act and seeks to apply those words directly to Walch & Roberts' prospects at different points of time of obtaining employment on the project as a result of its dealings with MPN. The argument weighs by degree the company's prospects of success with MPN according to the nature and circumstances of those dealings, rejects the "possibility" of success as a criteria and concludes that the relevant interest does not arise unless and until success is probable or better.

In the Tribunal's opinion this is a blinkered view that is too narrow an approach to the interpretation of the Act. It leaves out the vital factor that the legislation is focusing upon potential conflicts between public duty and private interest and is directed to the relationship between the potential outcomes of the matter in question before the Council and the potential financial interests of the Councillor or other person involved in making decisions on that matter. It is not confined, as was Councillor Roberts' assessment, to a consideration of the prospects of success of the Councillors' private dealings but is looking also to whether those prospects might be advanced or retarded by the outcome of the matter or question the Council has to decide.

It is to be noted that section 442(1) speaks of a pecuniary interest as being "an interest that a person has ***in a matter*** because of a reasonable likelihood or expectation of appreciable financial gain or loss." What is unexpressed but left to implication are the words, "as a result of the Council's decision in the matter." This causal relationship between the outcome of the matter and its possible effect upon the present or future financial position or prospects of the person is implicit throughout the pecuniary interest provisions of the Act.

In the present case, once Walch & Roberts responded to MPN's invitations, first, to furnish a company profile and then to submit a tender for the job, a relation arose between Walch & Roberts' financial interests and the outcome of the development application before Council. Walch & Roberts were in the business of providing services required for the job, they were highly qualified to do it, they wanted the work, they put in a tender hoping to get it; but unless Council approved the development they would have no prospects of getting it and Mr Roberts was a member of the Council which would decide the question. His interest in the matter was that approval of the development would necessarily advance his company's prospects of financial gain. In the opinion of the Tribunal this satisfies the test of reasonable likelihood or expectation of financial gain as a result of the outcome of the matter before the Council which is implicit in the terms of section 442(1) of the Act.

However, when the test is applied to the submission by Walch & Roberts of its company profile, it should be concluded that until MPN responded by inviting Walch & Roberts to tender for the work, the interest was so remote that it could not reasonably be regarded as likely to influence any decision Councillor Roberts might make in relation to the matter before Council and thus, by subsection (2) of section 442, he could not be considered to have a pecuniary interest in the outcome for the purposes of the Act. The same could not be said of Walch & Roberts' submission on 11 October 1994 of its fee proposal for the work. Councillor Roberts' interest could not then be said to be excluded from being a pecuniary interest on the ground of remoteness within the meaning of subsection (2).

Whether the existence of a pecuniary interest rests on a consideration of the expression "likelihood or expectation" of financial gain as related to the effect of a Council's decision on a person's interest, or to the potential outcome of some private transaction in which the person is engaged which may be affected by the Council's decision, or to a combination of the two, the proposition inherent in Councillor Roberts' argument that section 442(1)

poses a test only of probability and not possibility of financial gain or loss before a pecuniary interest arises, is open to question.

The word “likelihood”, because of its ordinary meaning of “probability” to which common usage and the dictionaries testify, supports the argument; but the word “expectation”, in the present context, is not so limited. “Expectation” imports the notion of waiting for or looking for something to happen (Oxford English Dictionary). The Australian Concise Oxford Dictionary (2nd Edition, 1992) adds the secondary meaning of something expected or hoped for. The notion of “probability” is not a necessary element of the meaning of the word “expectation”.

The idea of remoteness in subsection (2) of section 442 is not consistent with the suggestion that subsection (1) was intended to require a state of probability of financial gain or loss to exist before a pecuniary interest could arise. Reading both subsections together it is evident that the concept of pecuniary interest is intended to attach to chances or possibilities as well as to probabilities of financial gain or loss, otherwise there would be no room for the notion of remoteness depriving an interest of the status of a pecuniary interest for the purposes of the Act. An interest as remote as that described in subsection (2) could not qualify under subsection (1) as being an interest that a person had in a matter “because of a <u>probability</u> of appreciable financial gain or loss”. Being too remote to be a probability it would fail to be a pecuniary interest under subsection (1) with the result that the remoteness proviso in subsection (2) would never be applicable to it; it would never have any work to do.

It is clear that neither on the history of the legislation or the language used in section 442 can it be argued that a pecuniary interest was intended to exist only where there was a certainty of financial gain or loss. Both “likelihood” and “expectation” admit the possibility of failure and indicate that the language is being addressed to chances or possibilities as well as probabilities and to cases where the nexus between the Council's decision in a matter and the accrual of financial gain or loss to the person may be subject

to contingencies, uncertainties and the risk of non-fulfilment. This being so, subsection (1) of section 442, or at least the word "expectation" contained therein, should be interpreted as applying to cases where the prospects of financial gain or loss fell short of being a probability but consisted of a reasonable chance or possibility. This still leaves subsection (2) to operate as a proviso excluding cases of remoteness or insignificance.

The development of the case law on the subject of pecuniary interests in local government and the prehistory of section 442 made admissible on interpretation of legislation by section 34 of the Interpretation Act, 1987 are consistent with the foregoing conclusion.

HISTORY OF THE DEFINITION IN SECTION 442

The history of this type of legislation is quite old, well over 100 years in Australia: ***Allen*** v. ***Tobias*** (High Court) (1958) 5 LGRA 28, at p.35; and, due to its nature and conflicting objectives, there have always been some problems of interpretation for laymen and lawyers alike and practical difficulties to deal with. As Wells J., speaking as a member of the Full Court of the Supreme Court of South Australia in ***The Queen*** v. ***District Council of Victor Harbour*** (1983) 50 LGRA 255 said (at p.261):

> ***"Legislative provisions in pari materia ... which are to be found in various parts of the world that have systems of local government similar to our own, have notoriously and unremittingly presented difficulties of construction. The reason for this is that such provisions attempt to bring a host of cases, which are almost as various as human life itself, within the compass of a single formula comprising a few words of very general import."***

These difficulties have not all gone away with our new Local Government Act, 1993 and some already established principles from the earlier law will remain.

The object of such legislation and its effect upon interpretation has been many times expressed with little variation in the essential description. A few quotations will suffice to make the point. In ***Rands*** v. ***Oldroyd*** (1958) QBD 204, Lord Parker CJ. said (at pp. 211-212) "The all important matter is to consider the mischief aimed at" and went on to adopt statements of the law

made in ***Nutton*** v. ***Wilson*** (1889) 22 QBD 744 by Lord Esher MR. and Lindley LJ. Lord Esher said (at p. 747) "I adhere to what I have said before with regard to provisions of this kind. They are intended to prevent the members of local boards which may have occasion to enter into contracts from being exposed to temptation or even the semblance of temptation." Lindley LJ said (at p. 748) "To interpret words of this kind, which have no very definite meaning, and which perhaps were purposely employed for that very reason, we must look at the object to be attained. The object obviously was to prevent a conflict between interest and duty that might otherwise inevitably arise." In ***Downward*** v. ***Babington*** (1975) 31 LGRA 314, Gowans J. in the Supreme Court of Victoria adopted the principles stated in the cases just cited. He said (at p. 319):

> ***"The first matter to be considered is the proper construction of the statutory provision. I approach this matter bearing in mind the mischief the provision is aimed at - to prevent the conflict between interest and duty that might inevitably arise if the conduct referred to on the part of the Councillor were not prohibited. (See Nutton v. Wilson, per Lord Esher MR and Lindley LJ; and also Rands v. Oldroyd). The statutory provision ought to be treated as extending to the achievement of that object so far as the language permits."***

The Canadian approach to pecuniary interest legislation has been similar and is well expressed in a statement by Robins J. in ***Re Moll and Fisher et al.*** (1979) 96 DLR (3d) 506 at pp. 508-9 which was adopted in ***Re Greene and Borins*** (1985) 18 DLR (4th) 260 at p. 269 and ***Re Sacks and Campbell*** (1991) 87 DLR (4th) p. 342 at p. 347. Robins J. said:

> ***"The obvious purpose of the Act is to prohibit members of Council's and local boards from engaging in the decision-making process in respect to matters in which they have a personal economic interest.***
>
> ***... ... ...***
>
> ***This enactment, like all conflict-of-interest rules, is based on the moral principle, long embodied in our jurisprudence, that no man can serve two masters. It recognises the fact that the judgment of even the most well meaning men and women may be impaired when their personal financial interests are affected. Public office is a trust conferred by public authority for public purpose. And***

> ***the Act, by its broad proscription, enjoins holders of public offices within its ambit from any participation in matters in which their economic self interest may be in conflict with their public duty. The public's confidence in its elected representative demands no less.***
>
> ***Legislation of this nature must, it is clear, be construed broadly and in a manner consistent with its purpose."***

In respect of conflict of interest provisions in the Victorian Local Government Act 1946, the High Court said in ***Allen*** v. ***Tobias*** (supra) at p. 37, "In kindred provisions such terms have not been narrowly interpreted notwithstanding their privative and penal effect." The form of the legislation under consideration there differed from the present but the tendency of the courts to interpret such provisions broadly to achieve the objects of such legislation was again recognised.

SECTION 442 - A FRESH START?

An argument that must be considered in the present case is that the approach of the courts to interpretation of past legislation in this field is to be disregarded or modified in light of the fact that the new Local Government Act of 1993 is reformist legislation and, by section 442, has introduced a definition of "pecuniary interest" where none previously existed. It may be contended that a fresh start is called for and the words of the section should be construed according to their own terms uninfluenced by past decisions on different language.

Such an argument presupposes that this must have been the legislature's intention. However a review of the process by which section 442 came into existence throws doubt on the validity of that assumption. It was submitted by Mr Alexis for the Director-General that such an assumption would be incorrect and that the history of the section shows that, except for certain express exemptions and qualifications in other sections, there was no intention, by section 442, to narrow the accepted concept of pecuniary

interest or diminish a court's responsibility to construe the legislation broadly, case by case, so as to achieve its objects.

The history of section 442 would appear to have begun with the decision of Gowans J. In ***Downward*** v. ***Babington*** (supra). He was dealing with a provision of the Local Government Act 1958 of Victoria (section 181(1)) which required a Councillor to make disclosure and refrain from participation if he had any direct or indirect pecuniary interest in a matter in which the Council was concerned. The expression "pecuniary interest" was not defined. Gowans J., whilst acknowledging the dangers of attempting definition, concluded on the authorities that, "A Councillor should be held to have a pecuniary interest in a matter before the Council if the matter would, if dealt with in a particular way, give rise to an expectation which is not too remote of a gain or loss of money by him." (supra at pp. 321, 323). His Honour then turned to apply this test to the case before him. The Councillor in question owned and let a number of shops in the Council area and voted at meetings which were considering an application for a permit for a supermarket on a site close to his shops, a motion to compulsory acquire land adjoining his shops and the supermarket site for off-street parking, an application for approval of a shopping development adjacent to his shops and a motion to buy allotments for the proposed parking area. There was evidence that the addition of a shopping complex to a shopping centre was likely to increase the value of the existing shops if there were not already adequate facilities for the shopping population and, if there were, was likely to be detrimental to the centre but was not likely to have no effect and, further, that parking facilities close to shops have a potential effect on the trading of the shops and consequently on their rental value, and, following that, on their capital value. Gowans J. said (at p. 324):

> ***"It was open to him (the magistrate) to regard the evidence as being in substance that each of the various proposals could, if granted, have an effect on the level of rents receivable by the defendant for the letting of his shops and that if approved the projects would give rise to an expectation not too remote of a gain or loss by him in respect of rent. This is capable of being regarded as involving a "pecuniary interest".***

> ***... ... ...***
>
> ***But, in addition, it was open to the magistrate to regard the evidence as being to the effect that each of the proposals, if granted, could have some effect on the capital value of the defendant's property. I think it was open to the magistrate to regard that as an expectation of benefit or disadvantage that was not too remote. And if he went further and drew the inference that these properties were investment properties which might be realised upon and converted into money at any time, at an enhanced value or even a reduced value, I would think that that was open to him. And, I think, although no doubt it called for careful consideration, that he was not obliged to regard the prospect as too remote. This view, too, is capable of being regarded as involving a "pecuniary interest"."***

Two points about the word "expectation" used by Gowans J. should be observed. One is that the expectation of financial benefit or disadvantage being postulated is one related to the possible outcome of the matter for decision by the Council. The other is that the expectation of benefit or disadvantage for the Councillor is described in terms of possibilities, not probabilities, "each of the various proposals could, if granted, have an effect on the level of rents" and, "could have some effect on the capital value" and, "investment properties which might be realised upon and converted into money at any time at an enhanced value or even a reduced value." A further point to be noted is that Gowans J. did not purport, by attempting a definition, to make it exclusive of what might otherwise constitute a pecuniary interest for the purpose of the legislation.

The equivalent of the Victorian Act in New South Wales was section 30A(1) of the Local Government Act 1919-1979 when McLelland J. came to consider the meaning of "pecuniary interest" in ***Attorney-General ex Rel. Anka (Contractors) Pty Ltd*** v. ***Legg*** (1979) 39 LGRA 399. In that case the Councillor was a solicitor, one of whose clients was a developer who owned a shopping centre. The Councillor had acted on leases between the client and tenants and for other shop owners and tenants. Anka had an application before the Council for development approval of a proposed rival shopping centre which Anka claimed could, if it proceeded, affect in various ways the

Councillors' professional practice and, therefore, gave him a pecuniary interest in the matter which precluded him from voting on the proposal. McLelland J. referred to the decision of Gowans J. in ***Downward*** v. ***Babington*** (supra) and said (at p. 402):

> ***"After considering certain earlier cases his Honour formulated and applied the proposition 'that a Councillor should be held to have a pecuniary interest in a matter before the Council if the matter would, if dealt with in a particular way, give rise to an expectation which is not too remote of a gain or loss of money to him." I respectfully adopt this as a useful statement applicable to section 30A; it is open to the observation that the expression 'expectation which is not too remote' raises questions of degree, but it may well be that the statutory expression does not permit of any greater precision. Perhaps another way of putting the matter is to say that there is a pecuniary interest if there is a reasonable likelihood or expectation of appreciable financial loss or gain."***

McLelland J. applied this test to that case and reached the conclusion that whilst there was a reasonable likelihood and expectation that the establishment of a new shopping complex would withdraw some custom from other shopping centres it was not possible to conclude that that would affect the number or frequency of leases or the level of rents obtainable and even if that conclusion could be reached the likelihood or expectation of any consequential effect on the Councillor's income or practice would not be established. Another of Anka's arguments was rejected on the ground that "any consequential effect upon Mr Legg's practice as a solicitor from any such cause is not only too remote in the relevant sense but also entirely speculative." (p. 403).

Thus, it was McLelland J. In Anka's Case who, having adopted Gowans J's test of "an expectation which is not too remote", added the alternative test of "reasonable likelihood". In doing so he did not seek to elevate Gowans test of "expectation" from chances or possibilities to probabilities, nor did he purport to lay down the test which he formulated as an exclusive test of when a pecuniary interest might arise in relation to a matter before a Council. The fact that he rejected one suggested

consequential effect of the Council's decision on the Councillor's professional practice as "too remote" recognises that the concept of the relationship between the outcome of the matter before Council and the Councillor's financial interests is not one of certainty but of chances and possibilities dependent upon causative variables, uncertainties and contingencies.

In 1987 section 30A was replaced in the Local Government Act by section 46C which, though slightly reconstructed, was in the same terms. When the bill for this amendment (Local Government (Amendment) Bill 1987) was read a second time in the Legislative Assembly by the then Minister for Local Government, the Minister stated:

> ***"For the information of honourable members, the courts have held that a council member has a pecuniary interest in a matter before a council, if the matter would, if dealt with in a particular way, give rise to an expectation, which is not too remote, of a gain or loss of money to him or her. There is a considerable body of case law on this point and it is not intended by this legislation to disturb what are settled legal principles."*** (Hansard, 29 April 1987, Assembly 10763)

In July 1991 the Independent Commission Against Corruption published a discussion paper entitled "Conflicts of Interest and Local Government". The paper noted that the Act did not define "pecuniary interest" and referred to the case law as having provided a useful formulation which had been accepted in a number of Australian States. It restated the tests as formulated by both Gowans J. and McLelland J. in the cases discussed above (paras. 4.7, 4.8, p. 12). Later the paper stated:

> ***"It would seem that given the multiplicity of circumstances where a conflict might arise, a general definition capable of being applied broadly is desirable."*** (para. 6.4, p. 15)

Two options were offered for discussion:

(a) A definition of pecuniary interest could be inserted into the legislation such as, "A member has a pecuniary interest in a matter if he or she has a reasonable likelihood of financial gain or loss and that gain or loss is not trivial, insignificant or valued at less than $500; or

(b) The definition could be left to judges to determine according to the facts of each case that is brought before them. (para. 6.8, pp. 16-17)

It is to be noted that although it had earlier been referred to, the word "expectation" was omitted from the definition of pecuniary interests proposed by this discussion paper.

Reform of the local government legislation was not quick in coming. This was apparently due to the fact that the policy of the Government was to invite wide public and parliamentary discussion before attempting to reform the law. In December 1991 an "Exposure Draft Local Government Bill 1992" was released by the then Minister for Local Government. A definition proposed by this bill was, "A pecuniary interest is a reference to an interest which a person has in a matter because of a reasonable expectation of financial gain or loss to the person. 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 a person might make in relation to the matter." At this stage "reasonable expectation" was preferred to the "reasonable likelihood" introduced by McLelland J.

In March 1992 the Independent Commission Against Corruption presented to both Houses of Parliament its report of an investigation into local government, public duties and conflicting interests. The Report referred to the Commission's earlier discussion paper. The report states:

> ***"The law should be accessible to all, most involved in local government lack legal training, and assistance should be given within the four corners of the statute. Many witnesses and submissions call for a clear and precise definition. Most of them saw that as a panacea. They will be disappointed. A definition is by nature general, it must be applied to particular facts, there will always be cases close to the edge, and accordingly some degree of difficulty and interpretation is bound to arise.***
>
> ***Having said that, I do not doubt the statute should contain a definition for this basic concept."*** (P.37)

The report went on to describe Anka's Case as the leading case and refer to .the test of "reasonable likelihood or expectation" formulated by McLelland J. The report went on to recommend that an exception recommended for Canadian law could be adopted, namely, that "A Councillor does not have a pecuniary interest if an interest which exists is so remote or insignificant that it could not reasonably be regarded as likely to influence the Councillor." (p. 37). It is convenient to mention here for later purposes that the report was critical of the fact that the existing legislation made a breach of the pecuniary interest provisions of the Act a criminal offence and laid down criminal procedures and criminal standards of proof for dealing with it. The report suggested that a radically different system be introduced by the establishment of a Tribunal along the lines of those which existed under statute for professional disciplinary purposes. The above report was received and tabled in both Houses of Parliament in March 1992.

The Exposure Draft Local Government Bill 1992, mentioned above, was passed to the New South Wales Parliamentary Legislative Committee for review. That committee made two reports to the Parliament. The first report, made on 6 May 1992, recommended that the provisions of the draft bill dealing with disclosure of pecuniary interests be reviewed by the Minister in the light of the recommended guidelines contained in the report by the Independent Commission Against Corruption referred to above. (Hansard 8 May 1992, Assembly 4074). The second and final report of this committee was delivered to the Parliament on 17 September 1992 (Hansard, Assembly 5989), but added nothing on the present point.

The Local Government Amendment Bill by which the present Local Government Act came into existence was the subject of a second reading speech by the then Minister for Local Government in the Legislative Assembly on 27 November 1992 when, in relation to the subject of honesty and disclosure of interests, the Minister said, "The essence of the ICAC's recommendations are now incorporated in the new chapter of the bill dealing

with honesty and disclosure of interests." The Minister went on to list the main features of the revised scheme. These included the statement, "The common law definition of pecuniary interest as per the leading cases on the issue, has been included." (Hansard 27 November 1992, Assembly 10424). The Minister also stated, "Consistent with the ICAC view that this area of the law is inappropriate for criminal sanctions, an independent statutory disciplinary tribunal called the Local Government Pecuniary Interest Tribunal is to be established with a single member." (10425).

Parliamentary proceedings and debates on what became the Local Government Bill 1993 continued from time to time throughout March, April and May of 1993 but a perusal of the Hansards indicate that the subject of the definition of pecuniary interests as now appears in section 442 of the Act did not come up for further discussion. The new Act commenced on 1st July 1993.

About the time the ICAC report was published the New South Wales Court of Criminal Appeal delivered its judgment in ***Strathfield Municipal Council*** v. ***Elvy*** (1992) 75 LGRA 390. The court made a passing reference to the decision of McLelland J. in Anka's Case, stating, "His Honour accepted as the relevant test the question whether there was a reasonable likelihood or expectation of appreciable financial loss or gain. There is no issue before this court as to the appropriateness of that test, or as to its application to the facts and circumstances of the present case."

The foregoing review of the legislative process that produced section 442 does not provide an answer to the question whether the legislature intended the existence of a pecuniary interest to depend upon probabilities to the exclusion of possibilities of financial loss or gain arising from a Council's decision on a matter, nor does it support an argument to that effect.

All that may be extracted from it is that the Parliament was informed that, as recommended by the ICAC, there should be a definition of "pecuniary interest" inserted in the new Act and that the common law definition "as per the leading cases on the issue" had been chosen for that purpose.

Assuming that the legislature is to be taken to have adopted section 442 on that basis, the common law principles previously applicable to the interpretation of this kind of legislation (that is, a broad interpretation designed to achieve the object and purpose of the Act) continue to operate and the terms of the definition are to be understood in the sense in which they were used in the decided cases from which they have been derived.

Thus, there is nothing in the history of section 442 to deter the Tribunal from acting upon the interpretation of the expression "expectation" of financial loss or gain which it has arrived at independently of the legislative history of section 442.

OBJECTIVE OR SUBJECTIVE TESTS

A further question to be considered is whether a conclusion under section 442 that a pecuniary interest existed or did not exist was intended to rest on an objective judgment of the facts and circumstances, that is, one based on outward facts and indicia uncoloured by personal feelings or opinions or a subjective judgment, that is, one based on personal and individual feelings, opinions or perceptions.

It is a question of legislative intention as to which, in the present case, there appears little room for doubt. The language of the section evokes an objective approach. The familiar device in the common law and legislation of using the words "reasonable" and "reasonably" to call for an objective assessment to be made of a situation is present in both limbs of section 442. In subsection (1) it is a "reasonable likelihood or expectation" that has to be established. In subsection (2) the assessment to be made is whether, because of remoteness or insignificance the interest in question "could not reasonably be regarded" as likely to influence any decision.

The opposite view is untenable. If the existence of a pecuniary interest were to depend on the subjective judgment of each Councillor or other person affected by the legislation it would admit the influence of personal prejudice and bias, confusion where persons affected by the same

circumstances differed in their judgments, and abuse by the dishonest. It would make the legislation unworkable.

It is the Tribunal's view that section 442 calls for an objective judgment in each case as to whether in the circumstances of that case a pecuniary interest came into existence. And, who is to make that judgment? In the first instance it is the Councillor or other person, they being expected to know where their interests lie; but the judgment they are required to make is an objective one; and if there is a complaint and the matter comes to the Tribunal, it is for the Tribunal to make the judgment, and the judgment may be that they got it wrong.

This will appear to be hard lines for a conscientious Councillor who, faced with the question, makes an honest judgment and is found to have been wrong. This objection has often been raised and recognised in the cases and has always been met with the same answer, an answer driven by considerations of public interest and the need to promote public confidence in the integrity of the exercise of power in local government. Two examples will suffice. In ***Downward*** v. ***Babington*** (supra) Gowans J. said (at p. 320):

> ***"... What has to be examined for the purpose of determining what gives rise to the existence of a pecuniary interest is not the motives or actions of the Councillor in dealing with the matter at the meeting but the contract or proposed contract or other matter in which the municipality is concerned which is being considered at the meeting.***
>
> ***If when that matter is placed alongside the Councillor's interests it appears that he has a direct or indirect pecuniary interest in the matter, the obligation lies upon him to do what the statute requires him to do. Since the Councillor is the one who knows where his own interests lie, it is for him to make the comparison and ask himself the right questions and get the right answers. If he does not, and does not refrain as required, he will come within the statute and incur its penalty, unless he can exculpate himself under (an exculpatory provision of the legislation)."***

In ***Re Greene and Borins*** (supra) the court said (at p. 270):

> ***"Nor is it of any consequence how the vote was caste, the outcome of the vote, or the motive of the municipal official. The***

> ***very purpose of the statute is to prohibit <u>any vote</u> by one who has a pecuniary interest in the matter to be considered and voted upon. It is only by strict observance of this prohibition that public confidence will be maintained.***
>
> ***I express some sympathy for one called upon subjectively to make this pre-vote decision but make it he (or she) must. In the present case, Alderman Borins says that he did in fact consider the matter and concluded that no conflict existed. This was, at the same time, a recognition by him of his high duty <u>and</u> recognition that he was in a position where he might be said to be in conflict. He did not seek outside advice, which course he might have taken. He chose, rather, to take the risk, by not declaring his interest and refraining from voting that a court on an objective test could find him in breach ... ..."***

In the view of the Tribunal, contrary to that arrived at by Councillor Roberts, once Walch & Roberts decided, as they did on 11 October 1994, to tender for work on the project, Councillor Roberts, through his company, had a pecuniary interest in the question whether the proposed development should be approved by the Council because a favourable decision by the Council would inevitably promote the company's chances of being able to earn a substantial remuneration from the project. This gave rise to an expectation of appreciable financial gain from such decision, thus constituting a pecuniary interest within the meaning of section 442(1). The prospects of the company's earning remuneration as a result of the Council's decision was not so remote or insignificant that it could not reasonably be regarded as likely to influence Councillor Roberts' decision in relation to the development application. Accordingly, subsection (2) of section 442 did not apply.

The next question is whether, notwithstanding the existence of a pecuniary interest, Councillor Roberts has a defence to the complaint that he acted in breach of the Act in relation to the special meeting of the Council on 9 November 1994 which, on his motion, resolved to approve the development application.

Section 457 of the Act provides as follows:

> ***"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."***

Before dealing with the application of this section in the present case it is necessary to consider further Councillor Roberts' explanations for having refrained from declaring his interest prior to 18 November 1994.

COUNCILLOR ROBERTS' EXPLANATIONS

In a statement dated 24 June 1995 (Part Exhibit "D") Councillor Roberts said:

> ***"In all instances Councillors are informed that it is <u>their</u> responsibility to determine whether they have a pecuniary interest in matters before Council. The major problem is that in all but the simplest of instances there is very little guidance as to when <u>a reasonable likelihood or expectation of appreciable financial gain</u> may actually occur. There is no working definition readily available of how this definition should actually be applied. Reference to the Department of Local Government & Co-operatives usually results in a response that the Councillor should err on the side of caution, and this is the stance that is normally adopted, however it is of very little real value as guidance to a Councillor who wishes to undertake his duties as a Councillor without transgressing the Act."***

In his evidence, he said that he accepted that the onus was on the Councillor to declare an interest (T. 82/7) and that he generally applied the test of erring on the side of caution (T. 83/47). He instanced cases where he had declared an interest in matters involving a proposal where Walch & Roberts knew the builder or the applicant was a client who always gave Walch & Roberts the work even though at the time Walch & Roberts had not submitted a fee proposal for the work (T. 165/40). He said that erring on the side of caution was the easiest course for a Councillor to take and he took it in some cases because the matter was not one that called for a contribution to the Council of any special expertise which he possessed as a consulting engineer (T. 85/19). Mr Alexis invited Councillor Roberts to explain to the Tribunal his reasons for not erring on the side of caution in this particular matter. Councillor Roberts made a detailed response to this invitation which, in

fairness, should be quoted in full instead of being paraphrased. It was as follows:

> ***"A. As a Councillor who is professionally involved in the local building industry - when I say local building industry I mean Port Macquarie - there are numerous matters that come before council, committees of council on which I sit. In particular, I sit on the Planning Development and Environment Committee, which deals with development applications. There are a lot of minor applications that come before council that are largely routine, I suppose, the processing of those, and they are quite simple matters. Now, it is much simpler and easier and safer in all those instances, if there is any doubt whatsoever, to err on the side of caution and declare an interest. Whether - and I've done it many times - where my understanding would be I probably haven't, but it's just a lot simpler, rather than being in a difficult position, it's just simpler - there's nothing I can add to or be of assistance to council in dealing with those matters and it's just a much simpler situation to declare an interest and not take part in dealing with those matters. I hope I explained that clearly.***
>
> ***With respect to the development application for Hay Street, my attitude towards the development was that it was one of extreme importance to the community and business community of Port Macquarie. It was also a technically complex matter from a planning and development point of view. It was an area where I felt I could be of assistance to council, councillors, and could contribute. It's the sort of matter that, in putting myself forward to come to act on council, I had presented myself to the ratepayers as someone able to assist the community with these sorts of matters.***
>
> ***It was also an application of considerable community interest, debate and objection, a lot of which were quite justifiable. What I'm trying to say is this development, compared to a lot of routine matters, was of considerable importance to the community and it required a considered response by me as to my position towards it."***

Later, Councillor Roberts expressed the view that the existence of a pecuniary interest was a "grey area" and said, "It required me to make a conscious decision" (T. 121/32).

When it was put to him that he appeared to be seeking to justify his failure to declare his interest solely upon his interpretation of the Act, he said, "It's what, as a Councillor, I am required to act under. The only other guideline we have available to us is our own moral guidance, I suppose." (T. 97/44-49). When it was put to him that, regardless of his understanding of the Act, he might have been guided to step aside from participation on the Council in this matter for moral reasons or in deference to the possibility of public perceptions that he ought not to be participating, Councillor Roberts gave measured responses to both suggestions.

The first may readily be paraphrased. It was that he went by his understanding of the Act. The fact that Walch & Roberts wanted the job and had submitted a fee proposal might be perceived as immediately creating a conflict of interest but it posed no moral dilemma for him because he knew that the performance of his civic duties would not be affected whether or not their bid for the work might or would be successful and that if he had felt otherwise he would have stepped aside whatever the Act required. He recognised that irrespective of the absence of any moral turpitude or feelings of clear conscience on his part he would nevertheless be obliged to declare an interest and step aside when required by the Act to do so. That was the rule by which he was guided and by which he acted; but it necessarily involved his making a personal assessment of Walch & Roberts' prospects of getting the job (T. 95/22-T. 98/4). It was put to him:

> "***Q. Not on the moral question of whether you should have disclosed or not?"***

and he answered:

> ***"A. That becomes a very hard parameter to act by on a day to day basis, particularly for a professional on a local government body, because you will never satisfy all the people out there in the public. Regardless of how you act, you will still be accused of acting in your own interests. So it's not a workable judgment basis for acting as a Councillor in local government. Because the very fact you are a professional in an industry, people will accuse you and say the only reason you stand to be on Council is to further your own interests."*** (T. 96/28).

On the question of a public perception that as one of the few engineers in the area they were likely to get the engineering services contract, he said:

> ***"Perceptions - to me perceptions in local government are of no value. I'm talking personally here, because people will perceive whatever they wish to perceive. You know, people will hold the perception that anyone in business who goes into local government is only there to promote their own ends, so if you try and determine your actions by perceptions held by external individuals, you will always come to grief."*** (T. 189/48-T. 190/6)

Councillor Roberts acknowledged that in addition to his sense of public duty in the matter, he had private duties and responsibilities owed to his partner, their company and its employees to maintain a flow of work and remuneration. But he denied at any time putting his private duties ahead of his public duties or his obligation to declare pecuniary interests under the Act. (T. 88/57-T. 90/23). He said that his understanding was that neither his sense of public duty or private responsibilities would relieve him of his obligation under the Act to declare a pecuniary interest if he considered that one existed. (T. 89/21-38; T. 91/8-21; T. 92/4-17) As to the existence on his part of a belief or determination that his interest in a matter would not be allowed to influence him in his decision as a Councillor, he said, "If you believe as defined under the Act that you had a pecuniary interest then you were required to disclose it, end of story." (T. 91/51-T. 92/2)

As evidence of his good faith and to refute any suggestion that he had failed in his commitment as a Councillor to the welfare of the community or permitted his private interest to influence his public duty, Councillor Roberts pointed to the contributions he had made to the interests of the community and the Council in Council's dealings with the development proposal. He had put a great deal of effort and his considerable expertise into ensuring that the Council and the community gained as much as possible out of the project and that as many public objections to the development as possible were satisfied before it was approved. Prior to the meeting on 9 November 1994 at which it was approved, he insisted that it be made a condition of the approval that landscaping and streetscaping recommended by a firm of urban designing

consultants called Tract Consultants be carried out by the developer. This action on his part would have cost the developer several hundred thousand dollars in additional works. At that time the other Councillors had indicated to him that the development had their full support but he told them that he would vote against it unless Tract Consultants' recommendations were incorporated into the conditions of approval. He got his way and that is why he felt he should move the resolution for approval that was passed on 9 November 1994.

He also intervened with the Council's Director of Development and Environment to point out that the Director's report to the Council and the proposed conditions of approval could be construed as meaning that a demand of only 575 carparking spaces would be generated by the development when in fact the demand was for 620 spaces. As a result a correction was made at a later Council meeting which equated to a financial loss to the developer of over $500,000 when related to the value of those car spaces when credited against future expansions.

Part of the negotiations between Council and the developer involved the purchase by the Council from the developer of an additional 200 car spaces in the proposed shopping centre for which the developer was proposing to charge the Council more than $10,000 per space. Councillor Roberts went to considerable lengths to obtain information for the Council to establish that those spaces could be provided for much less per space. Councillor Roberts was unable to pursue these negotiations to the end because he had declared a pecuniary interest but as a result of his input on the issue the Council finished up better off and the developer worse off by a further $200,000 (Councillor Roberts' letter 28 December 1994, Exhibit "B", Tab 3).

The Director-General has not disputed any of Councillor Roberts' claims in the above respects. He repeated them in giving his evidence before the Tribunal and the Tribunal has no reason not to accept them as correct. It should be noted that he does not put his contributions to the public good and

the Council forward as justifications for not declaring a pecuniary interest. That he bases entirely on his assessment at the time that, under the Act, he had no pecuniary interest that he was obliged to declare.

COUNCILLOR ROBERTS' CREDIT

Mr Alexis thoroughly tested Councillor Roberts' credit in his cross-examination at the hearing. On two matters he submitted that Councillor Roberts' credit as a witness was wanting. They should be dealt with by the Tribunal. The first relates to the question whether Councillor Roberts had a conversation with Mr Howard on 7 October 1994 which led to the submission by Walch & Roberts of their fee proposal on 11 October 1994. In answer to the summons from the Tribunal MPN produced a number of documents. One was a printed form headed "Meeting/File Memo". It had been filled in in handwriting by Mr Howard. He filled in Port Macquarie as the project and noted the job number for the proposed shopping centre complex. Next to the printed words, "Phone conversation with" he wrote, "G Roberts". He wrote on the form notes of the conversation as follows:

- ***Inspections preferably be paid per hour →$120/hr.***
- ***Is on the council, so would prefer to submit proposal after DA given.***
- ***Will do lump sum proposal and include hourly rate.***
- ***Forward proposal after DA given.***

There was support for the fact that a conversation between Councillor Roberts and Mr Howard may have taken place on that day in a telephone message pad entry produced by Walch & Roberts recording that Mr Howard had left a telephone message for Councillor Roberts that he had telephoned and "returned your call". (Exhibit "B", Tab 27A) When asked by one of the investigators to explain this telephone message, Councillor Roberts replied by letter dated 23 March 1995 that he could not assist as he had no recollection of the call and believed that he had spoken to Mr Howard once, being "just recently". He suggested that the investigator ask Mr Howard if he had any recollection of the call as Walch & Roberts' records gave no

indication as to what the call might have been about. (Exhibit "B", Tab 28A)

When interviewed on 3 February 1995 Mr Walch had told the investigators that he had received a phone call from Mr Howard on 7 October 1994. He said Mr Howard rang him to follow up MPN's invitation to Walch & Roberts to submit the price for the work because he, Mr Walch, had not done anything about it. Asked to recall the nature of the conversation, Mr Walch said that he could not do so other than to say that Mr Howard asked him whether he could put the submission in. According to Mr Walch, he would have replied, "Look it's very vague, we have difficulty in putting a submission at this stage." Mr Walch went on to tell the investigators, "We did it anyway, so I can't recall what he told me or what I told him." Mr Walch explained the reason for the delay in responding to MPN's invitation was that they were reluctant to tender a "fixed fee" on the basis of drawings they had originally received from MPN and the very limited information that had been provided about the project. For this reason when he did respond he tried to make their fee proposal open-ended by specifying the hours and a rate per hour. (Walch I. 22)

Councillor Roberts was interviewed on the same date and was told by the investigators that Mr Walch had told them that there was a phone call on 7 October 1994 from Mr Howard asking for the quote to be submitted. He was asked whether he found that unusual and he replied, "Terry had actually dealt with it. I don't know whether he may well have been trying to avoid doing anything prior to the DA being considered, I'm not sure." Shortly afterwards he was asked by the interviewer whether he had had any contact direct with MPN. He replied, "No I haven't spoken to them. I'm a little bit out of touch with exactly what had occurred." (Roberts I. 37)

At the request of the Department, Mr Howard had twice furnished information by letter, 1 February 1995 and 30 March 1995 (Exhibit "B", Tabs 8A, 8B). The requests had asked for particulars of contacts between MPN and Mr Walch and Mr Roberts in the relevant period, the second request

asking specifically whether there was any contact between MPN and Walch & Roberts between 19 September and 14 October 1994, in particular around 7 October 1994. Mr Howard made no mention in his first letter of a phone call on 7 October 1994 and in his second letter his response was, "Just prior to 14 October I contacted Walch & Roberts in order to remind them to submit their fee proposal." For the purposes of the hearing Mr Howard furnished the Department with a statement of the evidence he could give which was dated 5 July 1995. (Exhibit "F") In this statement Mr Howard said that in the early stages of the process, possibly around the time he asked Walch & Roberts to submit its company profile he was told that Walch & Roberts would prefer that he dealt with Mr Walch on the matter due to Mr Roberts' position as Councillor and Council's involvement in the project. He said that he could not recall whether Mr Walch or Mr Roberts had made that request. His statement contained the following:

> ***"14. I telephoned Walch & Roberts at some time prior to 14 October 1994 and probably on 7 October 1994 in order to remind them to submit their bid, that is, their fee proposal. I do not recall who I spoke to but I believe it most likely would have been Mr Terry Walch. I would have asked him words to the effect of "are you going to submit a fee proposal". I do not recall his response on that occasion.***

> ***15. I do recall that in one conversation with Mr Walch he said words to the effect "We cannot give you a price until after the project is approved because Graeme Roberts is concerned that there may be some conflict of interest because he is a councillor." Equally however, it may have been words to the effect "we may not be able to accept the job until after the project is approved because Graeme Roberts is concerned that there may be some conflict of interest because he is a councillor."***

The statement went on to say that Mr Howard could not recall the date of the conversation mentioned in paragraph 15 but that it may have been between MPN's letter of 19 September 1994 and the receipt of Walch & Roberts' fee proposal dated 11 October 1994. No mention was made in the statement of the existence of the file memo of 7 October 1994 which MPN produced in response to the Tribunal's summons.

In giving evidence Mr Howard said that he was unaware of the existence of his file memo of 7 October at the time he prepared his statement of 5 July 1995. He said that he discovered the file memo afterwards when he was putting documents together to respond to the Tribunal's summons. (T. 64/10; 39). When Mr Alexis showed Mr Howard his file memo in the witness box, Mr Howard said that conversation recorded in the memo was with Councillor Roberts as the memo recorded. However, when cross-examined by Councillor Roberts, he agreed that, in giving evidence that he had had the conversation with Councillor Roberts and not Mr Walch, he was not relying on his memory but on his file memo and what was written on it. (T. 64/6-24)

When cross-examined, Councillor Roberts said that he did not believe the conversation recorded in the file memo had taken place between himself and Mr Howard. He swore that he had no recollection of it but, because of the existence of the file memo, he could not exclude the fact that he might have taken Mr Howard's call, of that he could not be sure; but he pointed out that, when interviewed by the investigators, Mr Walch had said that he had had such a conversation with Mr Howard on 7 October 1994 and that Mr Howard in preparing his statement of 5 July 1995 had attributed a conversation along the lines described in the file memo to Mr Walch. It was not until Mr Howard was shown his file memo in the witness box that he

attributed the conversation to Mr Roberts and then he did so only because Mr Roberts' name appeared in the document, not because it accorded with his recollection. (T. 193/22-42; T. 64/10-39)

It is important to record that Councillor Roberts did not seek to disown the matters recorded in the file memo of the conversation of 7 October 1994. Whilst he adhered to his belief that it was Terry Walch and not himself who had spoken to Mr Howard, he said that he and Mr Walch were of like mind on the matters recorded in the file memo and that he would not have wanted to repudiate the contents of the conversation as recorded, if he could recall it. He swore that at the time in question the facts were, and on this he and Mr Walch were in complete agreement, that, as recorded in the note, they would have preferred to "quote an hourly rate" and not give a fixed price on the sparse amount of information they had been given by MPN and because it is difficult to predict how efficiently or economically a builder will carry out the work and this affects the number of site inspections that might have to be made by the consulting engineer. They were also like minded on the preference not to submit a proposal before Council had dealt with the matter, that if they put in a lump sum proposal it would be accompanied by an hourly rate for extra work, and that they preferred to forward it after the development application had been approved. Mr Roberts said that he had discussed the matter with Mr Walch before Mr Walch submitted their fee proposal of 11 October 1994 and they had agreed that, on the limited information about the project which they had, their risk exposure would be too great to submit a fixed price; but, due to Mr Howard's pressure for a response to MPN's invitation, they would submit their open ended "budget estimate" with a view to preserving the opportunity to obtain the contract. (Walch I. 21, 22.10; Exhibit "B", Tab 27; T. 129/46; T. 33/51; T. 134/32; T. 137/49, 56; T. 138/4, 56; T. 146/24; T. 153/56; T. 154/49-22)

Mr Roberts was an impressive witness. He gave his evidence in a frank and forthright fashion, was thoughtful, reasoned and articulate. He did not seek to evade. He was always willing to explain his actions and was

confident in his assertions that he had acted in a reasoned, responsible and honourable way. The points he made as to the reliability of Mr Howard's memo-inspired claim that the conversation recorded was between himself and Councillor Roberts are legitimate points to be considered. The fact that he does not wish to disown the substance of the matters recorded by Mr Howard in any event do him credit. In these circumstances, the Tribunal is not prepared to reject the credibility of Councillor Roberts as a witness on the basis of Mr Howard's file memo of 7 October 1994.

On the basis of this memo the possibility was explored with Councillor Roberts when he was in the witness box that some arrangement might have been made between himself and/or Mr Walch and Mr Howard for Walch & Roberts to submit an open ended fee proposal which would assist Councillor Roberts to refrain from declaring a pecuniary interest until after the development application had been approved, after which the open-ended proposal would then be affirmed as a fixed price. Alternatively, it was suggested that the reason why they had submitted an open-ended fee proposal, contrary to Mr Howard's request for a fixed price, was to keep the contract opportunity open being sure that MPN would not accept the open ended proposal. If they had submitted a fixed fee there would be a risk that it might be accepted before the development application was approved. Then there would have been no escape from declaring a pecuniary interest in the matter.

Mr Howard and Councillor Roberts were closely cross-examined on these possibilities. Both gave categorical denials. (T. 72/58-T. 73/52; T. 123/14-29; T. 124/40; T. 136/1-25) Councillor Roberts said that the fact Walch & Roberts' fee proposal of 11 October 1994 was open ended had nothing to do with the fact that the development application was still pending before the Council. He swore that it was based entirely on commercial considerations, namely, to seek to avoid exposing Walch & Roberts to the risks involved in quoting a fixed price at that early stage of their knowledge of the project. Councillor Roberts gave logical and acceptable commercial

reasons for following that course. They were supported by Mr Walch in his interview with the investigators and indirectly by a letter from James G. McMahon Pty Limited dated 2 February 1995 to the Department in which he pointed out the difficulty he had had in submitting a lump sum price on the very basic preliminary drawings and limited information made available to him by MPN. (Exhibit "B", Tab 10)

I accept Mr Howard's and Mr Roberts' rejections of the propositions that were canvassed with them on the above matters. Their credit as witnesses was unimpaired by the close cross-examination to which they were subjected.

At the hearing, the Tribunal reserved the question whether Mr Walch ought to be summoned to the witness box to be questioned on his account of the conversation with Mr Howard on 7 October 1994. In the light of the foregoing review of the issues raised by Mr Howard's file memo, the Tribunal considers that nothing would be gained towards the resolution of the present complaint by pursuing these matters any further because, whether the matters recorded in the file memo were the subject of a telephone conversation between Mr Howard and Mr Walch or Mr Howard and Councillor Roberts, the relevance and significance of such a conversation would remain the same.

The second matter on which Councillor Roberts' credit was called into question arose out of the statement made by him on 24 June 1995 previously mentioned (Part Exhibit "D"). In that statement he said that, in adopting the belief that he did not have a pecuniary interest as defined in the Act, one of the sources of information on which he relied was informal discussion with Peter Hannaford, a solicitor. Mr Hannaford is the solicitor to Hastings Council, to Walch & Roberts and to Councillor Roberts personally. As a consequence he had regular dealings with Mr Hannaford. He said that on a number of occasions he had taken the opportunity to discuss a working definition of pecuniary interest that could guide him in his dealings on Council. Councillor Roberts had in the previous year sought and received a

written advice from Mr Hannaford in relation to the hospital project at Port Macquarie for which Walch & Roberts had tendered. This advice was by a letter dated 16 February 1993 which Councillor Roberts referred to in his statement and a copy of which he had previously furnished to the Department. (Exhibit "B", Tab 3) The letter stated as follows:

> ***"You inform me that the consulting engineers evidently retained by the developer, have contacted your Firm and, we understand, other similar Firms, and have indicated that there is some possibility that if the application is approved and proceeds then some part of the professional engineering management and/or design to be involved in the project may be sub-contracted by that principal consultant to some other Firms, one of which might be yours.***
>
> ***To that end, you have been asked to furnish to the principal consultant, some particulars of your Firm with details of the experience which your Firm has in relation to such matters. I further understand from you that there has not at this stage been held out to you any promise or undertaking or offer of work in relation to the matter and that the proposal which has been put at this stage is of a tentative and exploratory nature only."***

After referring to the provisions of section 46C of the Local Government Act 1919 which was then in force, the letter went on to state:

> ***"Pecuniary interest is a financial interest. The interest can include loss or gain. In our view it must be an interest which either is in existence at the time that the matter is considered or, will, with reasonable probability, come into existence depending upon the outcome of the Council's deliberation on the particular issue.***
>
> ***On the basis of your instructions to us, it is our opinion that at the present time, you have no pecuniary interest which would preclude you from participating in the Council's deliberations on this particular application. All that exists at the present time is an invitation to submit some particulars of your professional skills and experience in relation to a proposal which may or may not come into existence. So far as we understand from you, there is no certainty or reasonable likelihood that the principal consultant will in fact sub-contract any of the works and even if the principal consultant makes a decision to follow that course, there is no certainty or reasonable likelihood that your Firm would be***

> ***retained for any of those purposes. If those circumstances were to change in any material way between the date of this advice and the date upon which the Council finally considers the application then it would be necessary for this opinion to be reviewed."***

At the time Councillor Roberts was required to prepare his statement of 24 June 1995, Mr Hannaford was overseas and unavailable for consultation. Councillor Roberts says that he endeavoured to put in his statement his recollections and understanding of the legal opinions expressed by Mr Hannaford in these informal discussions. Councillor Roberts included in his statement the following:

> ***"... ... The basis of the opinion put by Mr Hannaford, in discussions, was that where there had been an approach to Walch & Roberts to provide details of the cost of engineering services it was not possible for me to have a pecuniary interest. A pecuniary interest did not exist until some form of contract was entered into between the client and Walch & Roberts (that may be verbal or written). Until there was some form of legally enforceable contract between the two parties then Walch & Roberts was in no position to reasonably expect any financial gain and the other party was not financially bound to Walch & Roberts in any way.***
>
> ***It is not until this legal agreement exists between the two parties that I could have a reasonable likelihood or expectation of financial gain. Certainly it is a fact that without such an agreement Walch & Roberts could not legally require financial compensation by a person or company."***

When Mr Hannaford returned from overseas, Councillor Roberts consulted him and sought to obtain for the purposes of the proceedings before this Tribunal confirmation that Mr Hannaford had expressed to him the views of the law represented by the above extract from Councillor Roberts' statement. However, Mr Hannaford declined to do so and instead wrote a letter to Mr Roberts, headed "Private and Confidential", on 11 July 1995, in which he stated that the only occasion on which he had given any formal advice to Councillor Roberts concerning pecuniary interest was when he provided the written advice contained in his letter dated 16 February 1993 and that was in

relation to specific circumstances. He said that he had no particular recollection of Councillor Roberts having sought clarification of this written advice although it was possible that he may have done so; but he did recall having spoken to Councillor Roberts on a number of occasions about Council matters and it might be that they had discussed the issue of pecuniary interest from time to time. However, in relation to the above quotation from Councillor Roberts' statement, Mr Hannaford wrote, "So far as I am concerned, it is the position that I have never given you advice in those terms. There would be no foundation for such advice and your statement does not it any way reflect an opinion which I have now or have at any time had in relation to the issue of pecuniary interest for Councillors."

Councillor Roberts was severely cross-examined about the above quoted assertions in his statement. It was suggested that he had attempted to mislead the Tribunal by suggesting that he had had an honest and reasonable belief that he had no pecuniary interest to declare that was based upon legal advice received from Mr Hannaford. Councillor Roberts rejected this imputation on the basis that, in the absence of Mr Hannaford overseas, he had only his recollection of informal discussions and his personal understanding of what Mr Hannaford's views were. These were based upon Mr Hannaford's letter of advice of 16 February 1993 and informal discussions. He said that he had not meant to attribute to Mr Hannaford the words that he chose to use in his statement to express his understanding of the law. (T. 113/27, T. 114/56) He agreed that in relation to the Shopping Centre proposal there had been a material change in the facts and circumstances compared to those on which Mr Hannaford's letter of advice of 16 February 1993 had been based. He agreed that he had taken it upon himself to extrapolate beyond that advice in stating his understanding of the law. (T. 107/17-23)

Councillor Roberts' statement had put forward as being the legal position that a pecuniary interest would not exist until some form of legally enforceable contract between the client and Walch & Roberts had been

made. This view would postulate a certainty of financial gain before a pecuniary interest could arise. In fairness to Councillor Roberts it should be pointed out that in Mr Hannaford's advice on the provisions of section 46C of the old Act he twice used the expression "no certainty or reasonable likelihood" that the principal consultant would subcontract any of the works or would engage Walch & Roberts. This expression is calculated to convey the idea that chances or possibilities of financial gain are excluded from being capable of giving rise to a pecuniary interest.

It may be said that Councillor Roberts was foolhardy to attempt to extrapolate from legal advice given on different legislation and facts the legal position under a new Act on a new set of facts. However, I take account of the fact that he forwarded Mr Hannaford's private and confidential letter to him to the Tribunal and the Department out of fairness to the position taken by Mr Hannaford and appreciating that it would not assist his case. Councillor Roberts admitted that he was in utter conflict with Mr Hannaford as to what advice had been given (T. 117/18-29); but he strongly denied that he had intended to mislead the Tribunal (T. 116/42). The Tribunal accepts his denial. He has corrected any false impression as to what advice Mr Hannaford may have given him. In these circumstances to reject Councillor Roberts as an untruthful witness would not be justified. The Tribunal regards Councillor Roberts as a reliable witness although, as indicated earlier, it does not accept all of his views on the subject of pecuniary interests.

DEFENCE UNDER SECTION 457

The predecessor of section 457 was section 46G(2) of the Local Government Act 1919 which provided that it was a defence to a prosecution for an offence by virtue of a failure to comply with section 46C if the defendant satisfied the court that "The defendant did not know that a contract, proposed contract or other matter in which the defendant had a pecuniary interest was the subject of consideration at the meeting." It can be seen that this defence presupposed that the person had a pecuniary interest in a matter but did not know that that matter was under consideration at the meeting. A

decision to that effect was given by Abadee J. in ***Marshall*** v. ***Trovato*** (1990) 72 LGRA 165 at p. 172 where his Honour says:

> ***"The statutory defence is one of a limited nature. It is only if the defendant can satisfy the court that he did not know the contract, proposed contract or other matter in which there is a pecuniary interest was to be the subject of consideration at the meeting, that the statutory defence is made out. In my view the subsection is not concerned whether the defendant had knowledge that he had a pecuniary interest in the contract, proposed contract or other matter. The subsection contains no such requirement. The words "subject of consideration at the meeting" refer back to the words "contract, proposed contract or other matter" (in which the defendants had the relevant pecuniary interest), and not to any other situation."***

Section 457 is worded differently. It is directed to the question whether the person knew that he or she had a pecuniary interest in the matter under consideration at the meeting. Like section 46G(2) it presupposes that the person had a pecuniary interest in the matter but unlike section 46G(2) it also presupposes that the person was aware that the matter was under consideration at the meeting. The defence is provided if, though there was a pecuniary interest in the matter, the person did not know and could not reasonably be expected to have known it. Commenting on the change of language, Linda Pearson in ***Local Government Law in New South Wales*** (1994) at p. 65 said, "The wording of section 457 suggests that the lack of knowledge of the existence of a pecuniary interest is now crucial to this defence." The Tribunal agrees with that comment, but it leaves the question "what knowledge?"

It is knowing, not believing or holding an opinion, that matters. In this context a distinction has to be made between fact or a state of facts, on the one hand, and their legal effect or the legal conclusion to be drawn from the facts, on the other. In the Tribunal's view, the section should be construed as relating to knowledge of the facts which would within the meaning of the Act constitute a pecuniary interest in a matter. Thus, if a person knew all the relevant facts, it is no defence to say, "But I did not know that those facts

gave me a pecuniary interest in the matter", or, "But I believed (or held the opinion) that those facts did not or would not amount to a pecuniary interest in the matter."

In applying section 457 the kind of distinction that has to be made between knowledge of the facts and a conclusion of law involving or based on the facts is similar to that which has to be made in a criminal case (where the defence applies) in considering, whether the defence of honest and reasonable but mistaken belief of facts which if true would make the act in question innocent has been made out. This matter was considered by the Court of Criminal Appeal in ***Strathfield Municipal Council*** v. ***Elvy*** (1992) 75 LGRA 390. The case concerned section 46C of the Local Government Act 1919 and a question was whether the defence of honest and reasonable mistake was available. The court held that it was available in that case but was concerned that the court below may have misconceived the nature of the defence. Gleeson CJ. in delivering the judgment of the court said, at p. 395:

> ***"Having regard to the subject matter involved, I cannot accept as a matter of construction of section 46C that the legislature contemplated that members of Council being aware of the relevant primary facts giving rise to a pecuniary interest in a particular matter, could then sit in judgment upon that issue for themselves, and make out a defence to a charge of a breach of section 46C based upon giving themselves the benefit of the doubt. It is one thing (leaving aside questions of onus of proof) to accept that a member of Council has made an honest and reasonable mistake about a matter of primary fact. It is another thing to treat as decisive the member's judgment upon matters of opinion or degree which may be involved in proceeding from a premise as to the existence of certain primary facts to a conclusion as to the existence of "pecuniary interest". Once one goes past the relevant primary facts, such questions of opinion and degree will often be closely bound up with a view as to what kind of interest one is obliged by the statute to disclose; these may be mixed questions of fact and law. Mistakes on matters of that kind would not ordinarily constitute mistakes of fact."***

In that case, the Councillor in question had given thought to whether his ownership of property might have given rise to an obligation of disclosure and having done so concluded that he did not have to disclose. He had reasoned

that because of the processes that a rezoning proposal needed to go through before the matter was resolved there was so much uncertainty as to the outcome that might affect the value of his property that he did not at that stage have a pecuniary interest. Gleeson CJ. dealt with this kind of reasoning by a Councillor as follows:

> ***"What Mr Elvy actually said in his evidence was that there were so many things that would have had to happen before the Council's (or Committee's) resolution led to any practical or concrete result that the resolution itself would not affect the value of his property. That process of reasoning appears to involve, amongst other matters of opinion or judgment, an assumption to the effect that, if a number of other contingencies need to be fulfilled before a resolution that has the potential to affect the value of a member's property actually has the effect, then there is no pecuniary interest in the matter under consideration. That assumption is questionable. More important, it is an assumption of law. This was not an issue before us, and I intend to express no concluded view, but merely to indicate my reasons for the reservations expressed earlier."*** (p. 396)

In the present case, Councillor Roberts knew all of the facts upon which depended a conclusion as to whether a pecuniary interest existed but he placed an incorrect legal interpretation upon them in arriving at his assessment that he did not have a pecuniary interest to declare. In those circumstances, section 457 cannot afford him a defence.

DEFENCE OF HONEST AND REASONABLE MISTAKE

In his statement of 20 June 1995 (Exhibit "D"), Councillor Roberts said, "The formation of my belief that I did not have a pecuniary interest was based on an honest and reasonable assessment of my understanding of the facts at the time and of my understanding of the Act."

In so far as this assertion of belief is based upon his knowledge of the facts, the question was raised at the hearing whether the defence of honest and reasonable mistake of fact discussed by the Chief Justice in ***Elvy's Case*** (supra) applied to the disclosure provisions of the new Act.

Trovato's Case and ***Elvy's Case*** both held that this defence was available in a prosecution for breach of section 46C even though a specific defence was provided by the legislation in section 46G(2) of the old Act.

For the Director-General it was submitted that there was no place for such a defence under the new Act and that the intention of the legislature should be taken to be that, if the existence of a pecuniary interest in a matter was established, a failure to comply with the requirements of the Act would constitute a contravention unless the Councillor or other person subject to those requirements could show that they did not know and could not reasonably have been expected to know that they had had a pecuniary interest in the matter; in other words, the legislature had stipulated in section 457 the only defence that was to be available.

In the Tribunal's view that submission should be accepted as correct. As the cases of ***Trovato*** and ***Elvy*** demonstrate, the defence of honest and reasonable mistake of fact is derived from the principles of the common law which govern criminal responsibility and which, subject to contrary legislative intention, will apply in an appropriate way to statutory criminal and penal offences as well as to common law crime: see ***He Kaw Teh*** v. ***The Queen*** (1985) 157 CLR 523, per Gibbs CJ at pp. 528-535; ***R.*** v. ***Wampfler*** (1987) 11 NSWLR 541 at 547'; ***Trovato*** (supra) pp. 174-175; ***Elvy*** (supra) pp. 393-394.

Under the old Act, a contravention was a criminal offence attracting criminal procedures in a criminal court and were subject to the criminal standard of proof beyond reasonable doubt. As has been mentioned above, the Independent Commission Against Corruption recommended a radical change of system, eliminating criminality and establishing a more benign disciplinary system under an independent tribunal. That recommendation was adopted by the Government and has passed into the new legislation.

Under the new Act the stigma of a criminal offence has been eliminated and criminal proceedings abandoned. There is now a pre-hearing investigation of complaints and a report thereon to the Tribunal to decide

whether the matter will proceed to a hearing. The Tribunal itself has investigative powers, determines its own procedures, is not bound by the rules of evidence, may (subject to the public interest) hear a mater in private and may make suppression orders where appropriate. Answers given and documents produced by a witness at a hearing before the Tribunal are, if objection is made, not admissible against the witness in other civil, criminal or disciplinary proceedings. The Tribunal is required to apply the civil standard of proof, the balance of probabilities. The Tribunal may apply at its discretion a range of measures if it finds a complaint proved - counselling, reprimand, suspension for up to two months and disqualification from civic office up to five years. An appeal on all grounds lies to the Supreme Court from any decision of the Tribunal. The legislature has thus not only provided by the new Act an entirely different system but has also so comprehensively dealt with the subject of disclosure of pecuniary interest and the consequences which are to flow from breach of its requirements that, in the Tribunal's opinion, the legislative intention should be taken to be that any defences are to be found in the Act and it is no longer appropriate to seek to import other defences by reference to the criminal law which has been made no longer applicable.

The above survey of the new Act leads to a number of conclusions:

1. The fact that a prospect of appreciable financial gain or loss which may result from a Council's decision on a matter is not certain or probable does not prevent an interest in the matter from constituting a pecuniary interest for the purposes of the Act.
2. If a Councillor or an associated person is seeking to be engaged and tenders a substantial price for services to be rendered on a development project which will proceed only if the Council approves the project, the Councillor will have a pecuniary interest in the matter because the prospects of financial gain to the Councillor or the associated person will be

promoted if the Council approves and this constitutes a reasonable likelihood or expectation of appreciable financial gain from a favourable decision by the Council.

3. The judgment to be made as to whether on the facts and circumstances a pecuniary interest exists is an objective judgment, the onus of making which rests initially on the Councillor or other person subject to the Act and, if the matter comes before the Tribunal, on the Tribunal.
4. If, within the meaning of the Act, a pecuniary interest arises, the requirements of the Act as to declaration and abstinence from deliberation and voting must be complied with and non-compliance will not be excused by the absence of dishonesty or corruption, good motives, good intentions, perceptions of public duty to participate, refusal to be influenced by the existence of the pecuniary interest or an honest belief that participation is justified notwithstanding the pecuniary interest.
5. The defence of honest and reasonable mistake of fact available in answer to some statutory criminal and penal matters is not applicable in relation to a breach of the pecuniary interest requirements of the Act.
6. Proof that the person did not know and could not reasonably be expected to have known that he or she had a pecuniary interest in the matter under consideration at the meeting is a defence under section 457 of the Act; but the defence must be based on ignorance of the facts that constituted the pecuniary interest not on a mistaken view of the law or the legal effect of those facts.

The point made by Item 4 above conforms to the law as enunciated in a number of cases of comparable legislation. I will mention a few. In ***Ex Parte Elliott; Re Mowle*** (1935) 12 LGLR 157, a person had been found guilty of having a direct or indirect pecuniary interest in an agreement with the Council while acting in a civic office. The court said at pp. 159-160:

> ***"The object of the section is to prevent a possible conflict of duty and interest and preserve purity in local government administration.***
>
> ***... ... ...***
>
> ***It is fair to say that neither in the court below nor before me was any suggestion made that the applicant had been in any way actuated by any improper motive, or that he had in fact been influenced in his actions as an alderman by the existence of the agreement in question to which he was a party."***

In ***Brown*** v. ***Director of Public Prosecutions*** (1965) 2 QB 369 Councillors had declared their pecuniary interest in a matter before Council but had then voted on a resolution which was not favourable to but against those interests. They were prosecuted for voting contrary to section 76 of the English Local Government Act 1933. Lord Goddard, CJ. said at p. 374:

> ***"Let me say at once that there is no suggestion in the present case of any corruption or improper motive on the part of the appellants, and the justices, in convicting them, only inflicted a nominal fine because they recognised that there was no dishonesty or corrupt motive in the appellants in voting as they did. The simple question is whether or not the vote they gave on the occasion in question was contrary to section 76 of the Local Government Act 1993. It is no doubt of the greatest possible importance that there should be a strict observance of the Act."***

His Lordship went on to say (at p. 376):

> ***"I think that Parliament has laid down that on any matter in which a member of a local authority has a pecuniary interest ... ... he should not vote at all, and it is no answer to say: "The vote which I recorded was a vote against my pecuniary interest." The answer to that is: "It was a vote in respect of your pecuniary interest, and you must not vote at all."***

In ***Rands*** v. ***Oldroyd*** (supra) the Councillor was the managing director of and held a controlling interest in a building company which had made building contracts with the Council but, in view of his position on the Council, the Councillor decided that the company would not tender for such contracts in the future. Later a motion was proposed in the Council that when it required

tenders for building work the borough engineer should submit a tender on behalf of his department to compete with outside tenderers. The Councillor voted on the motion. The Councillor was found guilty of an offence against section 76 of the Local Government Act 1933, the same Act as was referred to in the case last mentioned. Lord Parker, CJ. said (at p. 214):

> ***"... ... The justices say: "We were of opinion that the (Councillor) was sincere in his statement to us that his company did not intend to tender for any further Council work." I cannot think that that can affect the question whether there has been an offence committed or not. It goes very clearly to mitigation but not, I think, to defence, because at any time the defendant and the company could have changed their minds and could have tendered."***

The above views are echoed in the Canadian cases. See for example the quotation above from ***Re Greene and Borins***.

FINDINGS

The Tribunal finds that the complaint has been proved as to the Council Special Meeting on 9 November 1994 but has not been proved in relation to the other meetings listed in the Notice of Decision to Conduct a Hearing dated 31 May 1995 (Exhibit "A").

For the reasons stated in this statement of decision the Tribunal makes the following formal findings:

1. The Tribunal finds that Councillor Graeme Frank Roberts, being a member of the Hastings Council, had a pecuniary interest within the meaning of the Local Government Act 1993 in the matter of an application by Consolidated Properties Limited to the Council for Development Approval of a proposal to develop the Hay/Murray Streets site at Port Macquarie for the purposes of a shopping centre and being as such Councillor present at a Special Meeting of the Council on 9 November 1994 at which that matter was being considered failed to disclose such pecuniary interest to the meeting, took part in the consideration and discussion of the matter and voted

on questions relating to the matter contrary to the provisions of section 451 of the Act.

2. The Tribunal finds that the complaint that Councillor Graeme Frank Roberts acted contrary to section 451 of the Act in relation to meetings of the Council and committees held on 3 and 23 August 1994, 23 September 1994 and 4 October 1994 has not been proved and orders that the complaint in relation to those meetings and each of them be dismissed.

ACTION BY THE TRIBUNAL

Reference has already been made to the action open to the Tribunal if a complaint against a Councillor is proved.

At the hearing both parties declined to make submissions on what action the Tribunal should take if the complaint was found to have been proved. As both parties had their opportunity to make submissions and the outcome of the hearing of the complaint is within the possibilities then predictable, the Tribunal does not think a further opportunity need be given.

Councillor Roberts is a relative newcomer to civic office although he told the Tribunal he had long been interested in civic affairs before being elected. There is no need to add to what has been stated above as to his active and valuable participation as a Councillor on the Hastings Council or as to his conscientious endeavours to act as a Councillor with due propriety. In relation to the Hay/Murray Streets Shopping Centre Development, he was keen to serve and protect the interest of the Council and the community to the best of his ability, and did so by contributing his expertise with beneficial effect. He was alive to his statutory obligations with respect to pecuniary interests and declared them when he believed they existed or might exist. In relation to this project because of a sense of public duty to participate as long as he believed he was legally able to do so, he rejected what he saw as the luxury of erring on the side of caution. He took a risk but did so believing that he was acting responsibly and out of a feeling that he had no choice if he was to perform his public and private duties without letting anybody down. But it

involved him in choosing to be his own lawyer when legal advice was called for, would have been available, and could have been directed specifically to the instant problem. The advice he had received of erring on the side of caution was sound advice. If in doubt, declare and don't participate, or, seek advice before doing so, legal advice if necessary. Whilst public perception may be, as Councillor Roberts feelingly said, an unworkable basis for action it must nevertheless be respected where Councillors' financial interests are potentially involved if public confidence in local government is to be maintained.

The foregoing is to be taken by Councillor Roberts as counsel from the Tribunal to him. The Tribunal does not believe that in this case more action is called for by the Tribunal.

A copy of this statement of decision will be furnished to the complainant, the Director-General, Councillor Roberts and the Hastings Council.

DATED: 3 August 1995

PECUNIARY INTEREST TRIBUNAL
ORTA RECENS QUAM PURA NITES
LOCAL GOVERNMENT NSW

K J HOLLAND Q.C.
Pecuniary Interest Tribunal