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1980

PARLIAMENT OF NEW SOUTH WALES

REPORT

OF THE

OMBUDSMAN

OF

NEW SOUTH WALES

For the Year ended 30 June, 1980

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THE OMBUDSMAN OF NEW SOUTH WALES

The Honourable Neville Wran, Q.C., M.P.,
Premier of New South Wales.

Sir,

In accordance with section 30 of the Ombudsman Act, 1974, and section 56 of the Police Regulation (Allegations of Misconduct) Act, 1978, I submit herewith, to be laid before both Houses of Parliament, the Fifth Annual Report on the work and activities of the Ombudsman for the period from 1st July, 1979, to 30th June, 1980.

K. SMITHERS,
Ombudsman.

November, 1980.

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THE OMBUDSMAN OF NEW SOUTH WALES

FIFTH ANNUAL REPORT

Under the Ombudsman Act, 1974, I am required as soon as practicable after the 30th day of June in each year to prepare and submit to the Premier to be laid before both Houses of Parliament, a report of my work and activities for the twelve months preceding that date. By virtue of section 56 of the Police Regulation (Allegations of Misconduct) Act, 1978, the requirement to make such annual report is extended to cover my work and activities under that Act also. Consequently this report covers all aspects of the work of the Ombudsman.

I have divided it into two parts. Part I deals with my activities under the Ombudsman Act and general matters. Part II deals with my activities under the Police Regulation (Allegations of Misconduct) Act.

PART I

OMBUDSMAN ACT

Complaints

During the year a total of 2 751 new written complaints under the Ombudsman Act was received in respect of public authorities (including local government authorities), and the investigation of 891 carried over from the previous year was continued. Of this total of 3 642, 154 were completely outside my jurisdiction. In addition 120 were excluded from investigation by virtue of the list of excluded conduct set out in Schedule 1 to the Act. In respect of 10, the conduct complained of took place prior to 18th October, 1974, or in respect of local government authorities, prior to 1st December, 1976.

I declined to investigate 334 complaints exercising one or other of the discretions contained in section 13 (4) of the Act. In addition, in 23 cases relating to local government authorities where there was a right of appeal or review and where there were no special circumstances, I declined to investigate. 55 complaints were withdrawn at varying stages of my investigation.

I completed an investigation in 1 721 complaints and of these I found 277 to be sustained. I should point out that in addition to those found to be sustained, there would be a number that would have been so found if the investigation had not been discontinued when some action had taken place to remedy the matter complained of during the course of the investigation, although at that stage it may not have been clear that there had been wrong conduct by the authority. The number of complaints discontinued totalled 332.

Whilst the total number of complaints received under the Ombudsman Act for the full year showed a decrease, this was mainly as a result of a reduction in the number received up to 31st December, 1979. After that date the volume of complaints increased quite substantially and the present rate at which complaints are being received is as high as it has been at any time during my period of Office.

I should add that in addition to the above complaints, some 741 complaints were received in respect of the conduct of members of the police force under the provisions of the Police Regulation (Allegations of Misconduct) Act, and these are dealt with separately in Part II.

The figures relating to complaints received against public authorities under the Ombudsman Act since my appointment are as follows:

	Within Jurisdiction		Bodies Outside Jurisdiction	Total
	Ordinary	Local Government		
12th May, 1975 to 30th June, 1976 ..	1 928	....	453	2 381
1st July, 1976 to 30th June, 1977 ..	1 442	532	235	2 209
1st July, 1977 to 30th June, 1978 ..	1 796	855	278	2 929
1st July, 1978 to 30th June, 1979 ..	2 060	999	239	3 298
1st July, 1979 to 30th June, 1980 ..	1 608	989	154	2 751

In addition to the written complaints there were many telephone calls received from persons wishing to make complaints or requesting information. The number of these approximated 4 600.

800 interviews of prospective complainants were carried out during the year. Many of these were of a general nature and did not result in a complaint being lodged.

Amendments to The Ombudsman Act

During the five years in which I have been in office I have made certain submissions for amendment to the Ombudsman Act arising from my experience in carrying out my function as Ombudsman. Most of these have been referred to in my previous annual reports.

I am hopeful that before my term of office expires that these may be brought forward for consideration by Parliament as I feel that it is important that some at least of these should be incorporated into the legislation at the earliest opportunity.

However, I am aware that one proposal which I made with regard to an extension of jurisdiction to cover complaints by employees of public authorities in respect of matters in connection with or arising out of their employment, and which proposal was supported by the Review of Government Administration, is not at present favoured. It was in fact quite strongly opposed by the Public Service Board and by the Public Service Association. I do not accept that their objections to the proposals are valid and whilst, of course, I accept the decision not to proceed with this suggestion at the present time, I still consider that some extensions of jurisdiction into this area is warranted. I have set out in previous reports my reasons.

In my view the item in the Schedule which precluded me from investigating such complaints should be amended so that the Ombudsman has the right to investigate such matters where, in his view, injustice might otherwise occur. There is no suggestion that matters covered by awards or which are dealt with by unions should be the subject of investigation.

Staff

Again it has been necessary because of the increase in the work carried out by this Office and in particular arising from complaints in respect of the conduct of members of the police force, for a small increase to be made in the staff. Approval was obtained for the appointment of two additional Investigation Officers.

Unfortunately, some changes have occurred during the year as some of the staff have taken other appointments. The opportunity for promotion within this Office is limited and it is not unexpected that from time to time positions elsewhere are sought.

Local Government Authorities

989 complaints relating to 161 different councils were received during the year. These figures were very similar to those of last year.

329 complaints had still been under investigation at the beginning of the year making a combined total of 1 318. Of these 315 were still under investigation at the end of the year. I declined to investigate 154 complaints for various reasons, 9 were found to be outside jurisdiction and 22 were withdrawn. Of the others, investigations were completed in 704 and 50 were found to be sustained. In addition, in 114 cases which were discontinued for varying reasons during the progress of the investigation, a number would have been found to have been sustained should the investigation have been fully completed.

Again many matters related to the actions of neighbours in carrying out extensions to, or rebuilding of, properties or to their conduct in keeping barking dogs, causing pollution by the use of incinerators, diverting drainage on to adjoining properties and otherwise acting legally or illegally in such a way as to cause annoyance to their neighbours. In some cases the Council had a responsibility to act, and it was necessary in others to make preliminary inquiries from the council to determine the facts and the extent to which the council may be involved, and what action had been taken by it. By far the majority of these complaints were found to be not sustained.

Under the provisions of section 342ZA of the Local Government Act a council is obliged where application is made for consent to the erection of a residential flat building to give notice to adjoining owners and to advertise such application. I was surprised to find in respect of one council that it had taken the view that this applied only to the erection of new residential flat buildings and did not apply to alterations to existing flat buildings.

This council assured me that it now had become aware of the deficiency in its interpretation of the section and now ensures that all alterations and additions to existing residential flat buildings are advertised and appropriate notification given to adjoining owners and notice placed on the site.

In the case of another council, I found that whilst the initial application for a new residential flat building had been the subject of notice and had been advertised, nothing was done to give notice of a further application which involved quite substantial amendments from that previously dealt with by the council. I received an assurance from that council that it would in future adhere rigidly to the requirements as to advertising as provided in the section.

Occasionally councils have expressed concern that I am following through every complaint which I receive from the public about local government matters and take the view that I should first endeavour to establish whether the complaint has sufficient merit.

In fact a considerable number of complaints are not taken up with the authorities whether they be local government or public authorities where the facts are clear without further inquiry and the complaint is of such a nature that it does not warrant investigation.

However, in many cases, information supplied by the complainant and which is probably all that is available to him, is insufficient to determine whether a complaint should be fully investigated and, therefore, it is necessary to obtain information from the council before deciding whether the matter should be further investigated or not.

The Local Government Association and the Shires Association have again raised the question as to the extent to which the Ombudsman should investigate the conduct of councils. Their concern relates particularly to decisions or actions of councils as opposed to those of its officers. They appear to regard these decisions or actions as policy matters and not within the jurisdiction of the Ombudsman.

However, the Ombudsman Act makes no mention of matters of policy and defines the conduct which may be the subject of investigation as "any action or inaction relating to a matter of administration" and I can only repeat what I said in my 1978 Report that "whether in fact a decision is made by the Council as a whole or not does not of itself preclude it from investigation".

Prisoners

The current year has seen a considerable drop in the number of complaints received from prisoners.

Complaints were received from 228 individual prisoners as compared with 409 last year. Of those received, 198 related to the Department of Corrective Services, including the Prison Medical Service, and 30 related to other bodies, some of which were outside my jurisdiction. The number of separate items of complaint total 264 against 547 last year.

Particulars of separate items of complaint received since the commencement of the Ombudsman Act are as follows:

	Corrective Services	Others	Total
12th May, 1975 to 30th June, 1976	249	23	272
Year ended 30th June,—			
1977	196	40	236
1978	443	82	525
1979	484	63	547
1980	234	30	264

In addition to the 234 complaints in respect of the Department received during the year, 158 from the previous year were still under investigation. Of the total of 392, 42 were declined for various reasons, 71 were withdrawn or discontinued, and 144 were still under investigation. Inquiries and investigations were completed in 135 cases and of these 35 were found to be sustained.

As mentioned in my last Annual Report, the complaints received from prisoners showed an appreciable drop from about March, 1979, and this has been continued throughout the present year with the total complaints now received less than half that in respect of each of the previous two years.

This reduction has probably been brought about by a number of different factors. There has been a different approach by the Corrective Services Commission with the result that the inmates of prisons appear to have less to complain about. My officers have been able to pay more visits to the prisons from time to time and some potential complaints have been disposed of on the spot.

Whilst initially the appointment of Mr Vincent as Assistant Ombudsman last year did not help appreciably in the ability to deal with prisoners' complaints, because of his appointment to supervise also the complaints made under the Police Regulation (Allegations of Misconduct) Act, the position altered as the section headed by him to deal with complaints in respect of members of the police force became better established with the result that more time was available to deal with prisoners' complaints.

Publicity

I have continued my endeavours to publicize the existence of my Office by appearing on television and speaking on radio as the occasion has arisen. One or two somewhat controversial subjects have led to further publicity. It all increases the public's awareness of the Ombudsman and his functions.

In addition I have addressed over 20 different bodies and organizations during the year. Members of my staff have addressed a further 16.

I have been giving consideration to proposals to publicize the office further but with the constraints imposed on my budget I will not be able to carry this out to the extent to which I feel it is warranted.

Some evidence of the extent to which there is knowledge of the existence of the Ombudsman, even though the limits to his power may not be realized, came from a letter I received in the following terms:

> "Dear Sir,
>
> I'm 6 and the shows I like to watch are on too late so I will write them down, Chips (The Dukes of Hazzard) and (Battlestar Galactica).
>
> It would be better if you could put them on earlier at 5.30.
>
> Luke and Ben."

I explained to my correspondents that I could not help them but referred their letter to the two television stations concerned. At least one of the stations explained why the shows could not be shown early enough for six year olds.

A Matter of Jurisdiction

From time to time the question of my jurisdiction to investigate is raised but satisfactorily resolved.

One such instance was when the chairman of the Health Commission suggested to me that I might lack jurisdiction to investigate a complaint that the Commission had unreasonably refused to take part in informal discussions with a Judge of the Industrial Commission.

In writing to me, the Chairman said, inter alia—

> "As you are aware, the Commission is always ready to give your Office its fullest co-operation in regard to matters which are the subject of investigation pursuant to the provisions of the Ombudsman Act, 1974.
>
> However, insofar as the particular matter referred to in your letter is concerned, the Commission's attention has been drawn to paragraph 8 (b) of Schedule 1 of the Act.
>
> The Commission considers that its decision in regard to this matter was a decision related to the carrying on of proceedings within the terms of paragraph 8 (b) of Schedule 1.
>
> Consequently, it would appear that your office is precluded from investigating this matter and, in these circumstances, the Commission considers that it would be inappropriate for it to provide further information to your office insofar as the matter is concerned."

I replied to the Chairman in the following terms:

"I note your contention that the Commission's decision in this particular matter is excluded from my jurisdiction by virtue of paragraph 8 (b) of Schedule 1 of the Ombudsman Act. Paragraph 8 (b) excludes from my jurisdiction conduct of a public authority relating to the carrying on of any proceedings before any Court or any person or body before whom witnesses may be compelled to appear and give evidence.

I must say that I disagree entirely with your contention. In the first place, it is clear that the proposed informal discussions with Mr Justice . . . could not be defined as "proceedings" within the ordinary meaning of the word as used in paragraph 8 (b). The proposed informal discussions, in my view, were simply that and no more.

In the second place, it is clear that Mr Justice . . . in agreeing to meet informally with the Commission and (the complainant) was not sitting as a Court or adopting a role that enabled him to compel witnesses to attend and give evidence.

In the circumstances, I am of the view that the conduct of the Commission is not excluded conduct in terms of Schedule 1 of the Ombudsman Act. I, therefore, reiterate my invitation to you to make submissions to me before I reach any formal decision about the Commission's conduct."

The Chairman subsequently provided me with the information I was seeking but indicated that, "for more abundant caution", he had referred to the Crown Solicitor the question of my jurisdiction and would let me have a copy of the Crown Solicitor's advising when it came to hand, and he did so.

I was gratified to note that the Crown Solicitor supported the view that I had expressed.

Visits

I have been visited by the Ombudsmen from Fiji, Victoria, Western Australia, and the Northern Territory and by members of the staff from the last two offices. In addition, I have seen Mr Ulf Lundvik, recently retired as the Chief Swedish Ombudsman, Mr Justice Samdani of the High Court of Lahore, and Mr Patrick Downey, the Chief Human Rights Commissioner for New Zealand. Members of the English Royal Commission Investigating Criminal Procedures and of the Canadian Commission of Inquiry into the Royal Mounted Police called on me to discuss particularly my experiences in dealing with complaints in respect of members of the police force.

Australasian Ombudsmen

The Fourth Australasian Conference of Ombudsmen was held in Adelaide from 24th to 29th September, 1979. As usual the topics dealt with were wide ranging. All Australian Ombudsmen were present including the newly appointed Ombudsman from Tasmania, together with the Ombudsmen from New Zealand, Papua New Guinea and Fiji.

In addition I was able to attend the Conference of Australian Administrative Law Jurisdiction held in Melbourne in February, 1980.

This proved valuable and useful information was obtained relating to the work of the Ombudsmen, the Administrative Appeals Tribunal and various other Appellate Tribunals, particularly in New South Wales, Victoria and South Australia.

During the year several Australasian Ombudsmen were recognized in the award of New Year and Birthday Honours. The Fijian Ombudsman became Sir Moti Tikaram, K.B.E., the Victorian Ombudsman became Sir John Dillon, C.M.G., Gordon Combe of South Australia was awarded a C.M.G. and Oliver Dixon of Western Australia was awarded an I.S.O. The last three have now retired. In South Australia Mr R. D. E. Bakewell has been appointed, in Western Australia Mr Ivor Evans, and in Victoria Mr C. N. Geschke.

General Matters

(a) *Amendments to Legislation*

In my 1978 Annual Report I referred to a problem relating to the imposition of minimum rates where the land was situated on the boundary of two local government areas and portion of the land was rated in each area. My particular concern was that one portion of small size could bear a minimum rate far in excess of that which would have been payable if it had been imposed ratably on the value. The Minister for Local Government when the matter was raised with him approved a proposal

being placed before Cabinet for a suitable amendment being made to the Local Government Act. Unfortunately the proposed amendment created other difficulties and has not yet been put forward. My last advice from the Minister was that it had been referred to the Committee of Review of Land Rating and Taxation Systems.

(b) *Department of Lands*

During the year, I investigated a matter concerning the inability of the complainant to extend the term of a lease over Crown land. In the course of my investigation, it came to my notice that it was the practice to issue letters, in response to general inquiries, which outlined a lessee's right to apply for conversion, purchase or extension of term of lease but that such letters made no mention of the fact that such applications might not be approved.

I wrote to the Under Secretary for Lands and sought his views about the desirability of altering the terms of such letters to make it abundantly clear that, whilst there was nothing to prevent such application being made, there was no certainty that they would be approved.

I was pleased, therefore, when the Under Secretary replied and said—

> It is agreed that letters issued regarding a lessee's right to apply for conversion, purchase or extension of term of a lease should be qualified, where appropriate, by making it clear that no assurance can be given that any such application would be successful.
>
> Directions to the abovementioned effect have been formulated and are being promulgated throughout the Crown Lands Office.

(c) *Department of Youth and Community Services*

During the year, I investigated a complaint which involved the deferment of action to place a child for adoption with a couple whose names had been entered on the register of persons approved as suitable persons to adopt.

My investigation revealed that, because of information which came to light in the normal course of events, the Department, quite properly, had decided to reassess the suitability of the male applicant. The only problem was that the applicants were not told of the Department's decision and the problem was compounded because the applicants were actually due to have a child allotted to them.

I was pleased, therefore, at the conclusion of my investigation, when the Director wrote to me and, inter alia, said—

> ". . . following further consideration of your letter I feel that departmental practice could be improved by ensuring that, in as many cases as possible, applicants are informed when a case is being re-assessed.
>
> An instruction has now been given that where an applicant has been approved, and subsequently new information comes to light which suggests that the approval may have to be reconsidered and possibly revoked, it should, as a general rule, be the practice to inform the applicants that the case is being re-assessed; I have no doubt that there may well be cases where this would not be appropriate but nevertheless as a general rule applicants will be advised."

(d) *Public Transport Commission*

Cases occur from time to time where comparatively minor injuries are suffered by passengers in buses following accidents or near accidents with other vehicles. The Commission denies liability on the basis that there is no negligence on the part of the Commission or its employees and that the fault lies with the driver of the other vehicle. Where it can do so, it supplies particulars of the driver or owner of the other vehicle.

It is difficult for the injured passenger to accept the position that there is no liability on the part of the bus driver or the Commission, and as a result complains to me. The amount involved is generally quite small and does not warrant the cost of litigation.

In one particular case I sought the Commission's comments as to whether the existing policy and practice was adequate for a public authority. Not only did the Commission arrive at an amicable settlement with the complainant but it also advised of a change in its practice in the following terms:

"On the question of the practice followed in the past on referring claimants to the Nominal Defendant or to the offending driver in the circumstances surrounding this case, I am advised that from a legal point of view, it is the responsibility of an intending Plaintiff to elect to take proceedings against the Commission, Commission employees, a private motorist, the Nominal Defendant or any combination thereof. While the view is held that the practice adopted by the Commission to date has been legally correct, it is proposed in future to deal directly with the Nominal Defendant or the Government Insurance Office with a view to negotiating a sharing arrangement in the settlement of each individual claim.

It is anticipated claimants will be more positively assisted in the future and the settlement of such claims will be expedited which I trust will satisfy your enquiry."

Not only was my complainant well satisfied but the change effected in procedures should result in other claimants being assisted and not feeling the need to come to the Ombudsman.

(e) *Abandoned Cars*

From time to time I receive complaints directed either towards a local council, the police or the Department of Motor Transport arising from frustrations experienced as a result of cars being abandoned in residential streets and the inability of a resident to obtain any satisfaction as to the disposal of the abandoned motor vehicle which is proving unsightly in the street, particularly as it gradually disintegrates. There is confusion as to where to turn. The problem is eventually resolved by a substantial portion of the vehicle being removed and ultimately the final piece of scrap metal is taken away.

I was grateful to see that this problem has been investigated as a result of an inquiry under the terms of the State Pollution Control Commission Act and its report was published in February, 1980. I understand that the report has not yet been considered by the Government but the implementation of its recommendations should help to resolve the problem which seems to be a constant one.

(f) *Patients in Psychiatric Hospitals*

A matter on which I have commented previously and which is of considerable concern is the burden imposed on long term patients in psychiatric hospitals and particularly is this so in the case of pensioners.

The fees are not covered by any hospital fund or by social security benefits or by Medibank.

The position is best summarized by quoting from correspondence received from the Protective Commissioner:

"The question of collecting maintenance from a patient's estate is one which is dealt with on an individual basis having regard to a patient's circumstances. This charge is considered in the light of the extent of the estate and the available surplus income and subject to the needs of the patient, the dependent members of his family and other necessary expenditure from his estate receiving first priority. Normally the maintenance charge is considered on an annual basis at this Office. The Mental Health Act provides that the cost of a patient's maintenance is a Crown debt which is payable only by the patient or his estate before or after his discharge or from his estate after death. The Protective Commissioner also has the authority under the Mental Health Act to waive the maintenance debt completely or accept a smaller sum in satisfaction thereof if he considers undue hardship would be occasioned by enforcement of the debt or other circumstances warrant the granting of a concession.

Fees at Psychiatric Hospitals are fixed on the basis of cost figures compiled by the Health Commission each year, being the average cost of maintaining one patient in that hospital for one year. The maintenance fees are not covered by any hospital fund or by Social Security benefits, and Medibank will not accept responsibility for their payments. It is the practice of the Health Commission to collect two-thirds of patients' Social Security pensions towards the cost of their maintenance whilst they are in Psychiatric Hospitals."

The Commissioner further assured me that during the lifetime of the patient and whilst his or her affairs remain under the control of his Office, payment of the maintenance debt is not enforced in any way detrimental to him or her personally or to cause him or her undue hardship. However, in the event of death the matter is reconsidered in the light of changed circumstances and the patient's estate becomes liable to meet the charge, subject to what has been quoted before.

As New South Wales Ombudsman there seems little I can do to remedy the situation but the many similar instances of which I am aware warrant action being taken, if possible, to bring such charges into the same category as hospital fees. Where such a person is a patient in an annexe to a hospital the fees are covered.

(g) *Complaints as to Delay*

Complaints received relating to delay are often met with the reply that because of shortage of staff and the imposition of staff ceilings delay is inevitable. This is most regrettable but other than checking to ensure that the excuse offered appears to be a valid one, and that those matters deserving priority are dealt with, there is little that I can do.

(h) *Acquisition of Land*

From time to time complaints are received relating to proposals to acquire property where no notice has been given of planning proposals which will involve the acquisition of property.

In dealing with these complaints I have been made aware of the report made by the Interdepartmental Committee on Land Acquisition Procedures in January, 1978, and I agree whole-heartedly with the proposals in the report that adequate notice of all land acquisition proposals should be given and the public given the right to object. In a summary of its recommendations the Committee said "the principal right of objection should be at the planning stage and thus at a time when the proposal to acquire land for a public purpose is, in fact, still a proposal and while as a matter of practical reality alternatives could still be considered".

(i) *The Role of the Ombudsman*

On occasions since my appointment I have received criticism from those who fail to appreciate the true role of the Ombudsman. Many expect me to be of the nature of a knight on a white charger curing the ills of the world and bringing down the "bureaucracy" at will. The way in which I consider the Ombudsman should function is indicated in this and previous annual reports.

My sentiments have been clearly expressed by the Ombudsman for Nova Scotia in his recent Annual Report. With his consent I repeat some of what he said:

> "During the course of the year, a very articulate person gave voice to the opinion that if the Ombudsmen are not seeking out the disadvantaged, using as examples, the native peoples, the homosexuals, the imprisoned, the physically and mentally handicapped; if they are not striving to make contact with those souls that lie outside the mainstream of the governed, then the Ombudsmen are not doing their job. Such idealism, however well couched, is received with something less than patience by those of us who have been helping thousands of people for years, but who have not been seeking the headlines by announcing special forays into areas inhabited by the so-called disadvantaged.
>
> It should be made clear that people from all walks of life come to our office, or telephone or write. Conversely, we call upon them when beckoned. Some are advantaged; some are not. Some are crippled; some are not. All receive equal treatment.
>
> We talk to many poor people knowing that they will continue to be poor. For more than eight years we have been listening to the woes of paraplegics who will never walk as we do. Some days are joyful and others are sad, but let it be made clear that the Ombudsman Act is not a piece of legislation calling out for reforms. Once again, *let me remind the reader that it is not the Ombudsman's role to be 'a constant thorn in the side of government'*. Our main function is to investigate alleged maladministration of the laws of the province. Many provisionally disadvantaged people are given the advantage of easier access and resolution of problems through the bureaucracy by means of the Ombudsman."

Appendices

A selected number of cases dealt with during the year are set out in summary form in Appendix "A". With the exception of one matter I have endeavoured to ensure that the identity of the complainant is not revealed. It has not been possible to include some matters of general interest as the identity of the parties involved would be readily apparent.

Appendix "B" is a statistical summary of complaints.

In conclusion I again thank my staff for the support given to me in carrying out the Ombudsman's functions both under the Ombudsman Act and under the Police Regulation (Allegations of Misconduct) Act.

APPENDIX A

CASE NOTES

APPENDIX A

CASE NOTES

ALBURY–WODONGA (N.S.W.) CORPORATION

Normally I take care to ensure that as far as possible the identity of complainants is not disclosed in my reports.

However, in this case before my investigation was completed a copy of a draft interim report which was furnished to the complainant was read into the proceedings of the Legislative Council by a member thereof and therefore the identity of the complainant was revealed.

As the final report varied appreciably from the draft interim report, I consider it proper to include it in its full form as furnished to the complainant and to the corporation.

The Complaint

1.1 The complaint made by Mr V. D. S. Weatherall, as a Director of Weatherall Holdings Pty Ltd is that the Albury–Wodonga (N.S.W.) Corporation (herein called the corporation) is acting wrongly in continuing to retain portions 18 and 21 and part portions 16, 17, 19 and 20, situated within the City of Albury, Parish of Mungarimba, County of Goulburn, within an area determined as a designated area under section 25 of the Albury–Wodonga Development Act, 1974 and designated land under section 4 (1) of the Growth Centres (Land Acquisition) Act, 1974.

1.2 The subject complaint was lodged with me on 8th February, 1979. Mr Weatherall had previously lodged a complaint in June, 1975, but at that stage I was unable by virtue of the provisions of Item 5 in Schedule 1 to the Ombudsman Act, to investigate the conduct of a public authority constituted pursuant to an arrangement between the State of New South Wales, any other State and the Commonwealth. The Albury–Wodonga (N.S.W.) Corporation was so constituted and its conduct was excluded from my jurisdiction. My investigation then was limited to the conduct of the Planning and Environment Commission. However, on 26th January, 1979, Item 5 in Schedule 1 to the Act was deleted and I was no longer excluded from investigating the conduct of the corporation.

1.3 It is important to point out at this stage that the Albury–Wodonga Development Corporation (that is, the Commonwealth body) was involved in a number of matters related in this report. However, it is the New South Wales body (i.e., the Albury–Wodonga (N.S.W.) Corporation) which has been the subject of the investigation. Although this was so, as far as I am aware all relevant information, whether from the Commonwealth body or the New South Wales body, has been made available.

I should added that the conduct of the Commonwealth body was the subject of a similar complaint to the Commonwealth Ombudsman but as the conduct involved was in fact that of the New South Wales body he was unable to proceed further. Relevant information was supplied by him to me.

The History of the Investigation

2.1 The property, containing some 203 acres, is held by Johnco Nominees Pty Ltd, as trustee for Weatherall Holdings Pty Ltd and was zoned Industrial 4 (c) Offensive and Hazardous Industries under Interim Development Order No. 7 of the City of Albury, notified in the Government Gazette No. 58 of 10th June, 1966.

2.2 This zoning was still in force on 23rd October, 1973, when the Albury–Wodonga Development agreement was entered into by the Commonwealth, New South Wales and Victorian Governments.

2.3 The various zonings under that Interim Development Order were as follows:

1. *Non-Urban*
   (a) Non-Urban "A".
   (b) Non-Urban "B".
2. *Residential*
   (a) Residential "A".
   (b) Residential "B".
3. *Business*
   (a) General Business.

4. *Industrial*
   (a) General Industry.
   (b) Special Industry.
   (c) Offensive or hazardous industry.

5. *Special Uses*
   (a) Special Uses "A".
   (b) Special Uses "B" (Railways).

6. *Open Space*
   (a) Recreation.
   (b) Special Purposes.

7. *Development Area.*

2.4 When the three Governments signed the Albury–Wodonga Development Agreement they also agreed to "side letters" prescribing principles and policies to be adopted by the three Governments in implementing the agreement. The document is entitled: "Albury–Wodonga Area Development Agreement Principles and Policies to be adopted by the three Governments in implementing Agreement". (I refer to it herein as the "policy statement".) Clauses 28–32 of that document are as follows:

> *Land Policy in Albury and Wodonga*:
>
> 28. There will be no compulsory acquisition of land *within* the city of Albury within those areas presently zoned urban or the new areas to be zoned urban under the recently exhibited Interim Development Order which would provide for a city population capacity of approximately 40 000. Similiarly, in the case of Wodonga there will be no compulsory acquisition of land for which all planning consents required for urban subdivision have been granted.
>
> 29. As a result development in those areas will proceed in accordance with the expanded State planning requirements (for Albury).
>
> 30. The Ministerial Council may, however, agree unanimously to the Development Corporation developing land within the areas referred to in (28) if such land becomes available on a voluntary sale basis.
>
> 31. It is intended that the Development Corporation will become a developer within existing municipal boundaries of the City of Albury and the defined urban boundaries of the Rural City of Wodonga but on lands which are *outside* the particular areas referred to in (28).
>
> 32. All lands outside those particular areas referred to in (28) which in Albury are at present zoned non-urban and which will need to be rezoned urban for purposes of the growth complex, and in the case of Wodonga, land for which planning consents have not been granted, will be publicly acquired, if necessary by resumption.

2.5 At the same time a Ministerial Council Press Statement dated 23rd October, 1973, was issued and included in it as paragraph 9, was the following:

> "There will be no compulsory acquisition of land within the city of Albury within those areas presently zoned urban or the new areas to be zoned urban under the recently exhibited Interim Development Order which would provide for a city population capacity of approximately 40 000. Similarly, in the case of Wodonga there will be no compulsory acquisition of land for which all planning consents required for urban subdivision have been granted.

2.6 The implications of that policy, announced to the public through the media, for the information and guidance of property owners in the Albury–Wodonga area, will become clear from this report. However, its status may most appropriately be assessed from the following extracts of correspondence which passed between the then Prime Minister and the then Premier of New South Wales:

Prime Minister to Premier—

> "As you are aware, it is necessary, as a consequence of the signing of the Albury–Wodonga Area Development Agreement, to set out in a systematic form the principles and policies that will be observed by the Australian Government, the New South Wales Government and the Victorian Government in implementing that agreement.

In the attachment hereto are set out principles and policies which have been arrived at by consultations between the three Governments. I should be glad to have from you your confirmation that these are the principles and policies that will be adopted in implementing the agreement and that those principles and policies to be adopted by the Australian Government are acceptable to your State."

Premier in reply to Prime Minister—

"I refer to previous correspondence concerning the Albury–Wodonga Area Development Agreement and wish to formally advise you that the Agreement as finally drafted is in a form acceptable to this State.

As to the principles and policies which have been agreed upon between our Governments for inclusion in the 'side' letters to the Agreement, I understand that certain minor amendments were proposed by my officers late last week and that these have been incorporated in the latest drafts. Accordingly, I am also pleased to confirm that the principles and policies now set out in the attachments will be adopted by this State in the implementation of the Agreement.

I might add that it is most pleasing that the three Governments involved have been able to bring this preliminary but very important stage in the establishment of the growth complex to a satisfactory conclusion. The various decisions we have reached should provide a firm foundation on which the future of the new complex can be built."

The principles and policies confirmed by the Premier included those quoted in the preceding paragraph. However, it might be noted that when the Agreement was incorporated as a Schedule to the Albury–Wodonga Development Act, 1974, the policy statement was not made part of the legislation.

2.7 On 7th December, 1973, by Interim Development Order No. 16—City of Albury—the zoning of the subject land was altered and the whole of it was zoned as "Non-Urban 'A' ".

2.8 On 19th March, 1974, the Growth Centres (Land Acquisition) Act, 1974, was assented to. Section 4 (1) provided that the Minister may by notification published in the Gazette, declare that any land being the whole or any part of growth centre land, described in the notification, is designated land for the purposes of this Act. Inter alia, the effect of designation is to provide that where designated land is the subject of resumption, the value is to be determined in accordance with that Act.

2.9 On 3rd May, 1974, the Albury–Wodonga Development Act, 1974, was assented to (so far as the relevant sections are concerned). Under section 25 of that Act provision is made for the Governor by proclamation to declare any area of land wholly within the Albury area to be a designated area. Under section 10 of the same Act provision is made for the Corporation, for the purpose of the growth complex, to acquire land, being land within designated areas and land outside designated areas which the Corporation considers should be made available in the public interest for any purpose of the growth complex. Section 11 provides that where any land so resumed is designated land within the Growth Centres (Land Acquisition) Act, 1974, that Act applies to and in respect of that resumption.

2.10 Prior to this and on 22nd February, 1974, the company which owns the land sought advice from the Albury–Wodonga Development Corporation (herein called the Development Corporation) as to whether it would confirm that the land would not be subject to compulsory acquisition. The Development Corporation replied on the 5th April, 1974, indicating that the issue had been referred to the then State Planning Authority of New South Wales for advice and that "in the meantime, the Development Corporation does not intend to take any action but will be guided by the Authority". The Authority is now the Planning and Environment Commission of New South Wales and will hereinafter be called "the Commission".

2.11 On the 8th April, 1974, the Albury–Wodonga Planning Co-ordination Committee accepted the recommendations conveyed in a report submitted by the Chief Planner of the Commission on an application by the complainant for a variation of the zoning which had been applied to the land by Interim Development Order No. 16 —City of Albury which had come into effect on the 7th December, 1973. The following extracts from the report are particularly relevant to the subject issue and are quoted verbatim for that reason—

"14. There are two points to be considered in this application, the first and most important being that of rezoning and the second being the question of acquisition.

15. Taking the second matter first, there is no doubt that on 23rd October, 1973, the whole of the subject land was zoned Industrial 4 (c)—Offensive or Hazardous Industry under Interim Development Order No. 7—City of Albury. Notwithstanding that proposed Interim Development Order No. 16 had been exhibited Interim Development Order No. 7 was the one in force, so that *the land was in fact zoned for urban purposes.* (Emphasis added.)

16. On 23rd October, 1973, the Ministerial Council issued a press statement in which it was stated, inter alia, 'there will be no compulsory acquisition of land within the City of Albury within those areas zoned Urban or the new areas to be zoned Urban under the recently exhibited Interim Development Order.'

17. This is clearly a statement of intent and, as such, it is considered that it means exactly what it says. It is clear, therefore, that on this point the applicant is right. *The land was zoned for an Urban purpose at the relevant date and, as such, is not subject to compulsory acquisition.* (Emphasis added.) However, if the land is in an area required for Urban purposes there is nothing to stop the appropriate authority negotiating for acquisition of this land."

2.12 By Notices in the Gazette of 28th June, 1974, the subject land, inter alia, was included in land designated under section 25 (1) of the Albury–Wodonga Development Act and under section 4 (1) of the Growth Centres (Land Acquisition) Act, 1974. Notification of the inclusion of the land was forwarded to the complainant's company.

2.13 Subsequently on 15th July, 1974, the solicitors acting for the complainant made a further approach to the Development Corporation expressing the view that the subject land came within the zoning of urban land under clause 28 of the policy statement and requesting that the land be removed from the respective categories of designated area and designated land.

2.14 Referring to the above report in a minute addressed to the Chairman of the Development Corporation on the 26th July, 1974, an officer of the commission, then attached to the development corporation, commented as follows:

"4. There is no doubt that on October 23, 1973, the whole of the subject land was zoned Industrial 4 (c) Offensive or Hazardous Industry under I.D.O. No. 7, City of Albury *and as such was zoned for urban purposes.* (Emphasis added.)

The claim by the Company that the land was excluded from the programme and hence *is not subject to compulsory acquisition is correct.* (Emphasis added.) This was agreed up by the Task Force and the holding letter of 5th April, 1974, forwarded pending a reply to the applicant by the Authority, upon another allied matter.

That reply did not specifically answer the question now raised although the matter appears to have been fully covered in a report to the Planning Co-ordination Committee (paras 15–17) and should be available to the Corporation.

It was earlier agreed between members of the Task Force that the subject land could not be acquired under the Growth Centres (Land Acquisition) Act and it is unfortunate a letter was served. (Emphasis added.)

It is recommended a letter under the hand of the Chairman of the Corporation should be forwarded acknowledging that the land can be only acquired by negotiation and further, subject to the free market price ruling at the date negotiations, if any, are satisfactorily completed."

2.15 The copy of the minute held in the office of the Commission carries the following notation:

"Note for file

Discussed with Mr Muir on 29th July, 1974—particularly the relevance of section 25 of A/W D. Act when compared with section 4 of GC (Acq.) Act. It is imperative the Designation under section 25 be *not* removed in view of the subsequent lack of *planning* control in the hands of the Corporation. The question of acquisition is not so important and as earlier agreed, there is no

real reason for the Corporation to buy the land in the foreseeable future. Consequently it could be agreed to ask the Minister to remove this land from designation under section 4 of the Growth Centres (Land Acquisition) Act if the company forces the issue. Otherwise I would recommend that no action be taken other than that outlined above."

2.16 On the 30th July, 1974, the Deputy Chairman of the Development Corporation forwarded the abovementioned solicitor's letter of 15th July, 1974, to the Commission seeking advice on the issues raised in regard to the nature of the Industrial 4 (c) zoning and the question of designation, and stating that—

"Should it be ruled that the Corporation has no power to acquire this property under its Growth Centres (Land Acquisition) Act, 1974, it is essential that the Corporation have planning control over the land in question if at all possible."

2.17 Whilst the papers originally furnished to me by the Corporation did not record any previous approach to the Commission, I was subsequently furnished with a copy of correspondence between the Development Corporation and Johnco Nominees Pty Ltd in which the company had requested confirmation that there would be no compulsory acquisition of the subject land. The company was advised by the Development Corporation that it was understood that the State Planning Authority was examining the position and in the meantime the Development Corporation did not intend to take any action but would be guided by the Authority. (This is referred to in para. 2.10.)

2.18 The major section of the Commission's recorded examination of the validity of the designation, as set out in a report dated 7th August, 1974, is quoted verbatim as follows:

"Comment:

15. By notification in Government Gazette No. 79 of 28th June, 1974, the land was designated under section 4 (1) of the Growth Centres (Land Acquisition) Act, 1974. It is against this designation that the applicant is complaining.

16. The real question to be considered in this request is whether at 23rd October, 1973, the land was zoned for urban purposes. There is no doubt that on 23rd October, 1973, the whole of the subject land was zoned Industrial 4 (c) Offensive or Hazardous Industries under Interim Development Order No. 7—City of Albury which was the planning control measure then in force. Even under the proposed new Comprehensive Interim Development Order No. 16 which had been exhibited some months earlier the subject land was still partly zoned Industrial 4 (c)—Offensive or Hazardous Industries and partly Non-Urban 'A'.

17. It should be noted, however that the only uses permissible in the Industrial 4 (c) zone were those listed in paragraph 9 above under the heading Zoning History, all of which deal with the processing and treatment of by-products from an abattoir or meatworks. The zone therefore is not the generally accepted Offensive or Hazardous Industrial zone which does not restrict the usage to the processing of by-products of a particular industry.

18. In order to appreciate fully the limitation of usage the 'raison d'etre' for the industrial zoning was investigated. Council's former town planner and engineer Mr J. Sarvaas was contacted. He advised that at the time of preparation of Interim Development Order No. 7 late in 1965 Council proposed to re-establish its abattoir on the land immediately south of the subject land and a private company had commenced the necessary investigations to establish a meatworks in Hume Shire on land immediately to the north. There were also enquiries from people about the processing of the by-products from these establishments which, in the main, were very offensive because of the smell associated with them. Council therefore decided that as this area was isolated at that time it should be set aside for the purpose of these noxious trades. Although they were permitted in the Non-Urban 'A' zone of the Order Council felt that it could not substantiate refusal of such trades in non-urban zones close to urban lands if it could not provide an area in which they could establish. As well as being isolated the area was close to the source of raw material thus avoiding transport through urban areas.

19. The fact that the abattoir was not transferred from its original site and the meatworks did not eventuate and that the land is still vacant has no bearing on the present argument.

20. The abattoir and meatworks themselves, which are not declared trades under the Noxious Trades Act, did not require any special zoning being rural industries and so permitted in the Non-Urban 'A' zone. The Industrial 4 (c)—Offensive and Hazardous Industries zone was therefore a special zone created solely to permit processing of the noxious by-products of truly rural industries.

21. The real criteria to be applied is what the zoning of this land would have been if it had not been set aside for this special purpose. There is no doubt whatsoever that the land would have been zoned Non-Urban 'A' in accordance with the surrounding land and its present zoning and not for industrial, commercial or residential purposes.

22. It is fully realized that in a report in late November, 1973, prepared for a meeting of the Albury–Wodonga Planning Co-ordination Committee concerning this land the writer of this report stated in relation to clause 28 of the Principles and Policies document accompanying the side letter to the Albury–Wodonga Area Development Agreement dealing with public acquisition of land in Albury—

'This is clearly a statement of intent, and, as such, it is considered that it means exactly what it says. It is clear, therefore, that on this point the applicant is right. The land was zoned for an urban purpose at the relevant date and, as such, is not subject to *compulsory acquisition.* However, if the land is in an area required for urban purposes there is nothing to stop the appropriate authority negotiating for acquisition of this land.'

(See paragraph 2.11 of this report.)

23. In fairness it must be said that the report in which the above statement was made concerned a request for rezoning of this land from Non-Urban 'A' to a general Offensive or Hazardous Industrial zone. The land had not been designated pursuant to Section 4 (1) of the Growth Centres (Land Acquisition) Act, 1974 so that the question of compulsory acquisition was only a side issue and not deeply investigated. In replying to the applicant and Albury City Council on the rezoning issue the question of acquisition was not mentioned.

Conclusions:

24. After fully considering all aspects of the matter including the earlier report the very firm conclusion was reached that the land zoning at the 23rd October, 1973, of Special Industrial 4 (c)—Offensive or Hazardous Industries was, in fact, a special non-urban zone and not a true urban zone. The land was therefore not zoned urban and could be made subject to compulsory acquisition. Designation of the land was correct and should not be altered.

Recommendation:

25. It is RECOMMENDED that the Albury–Wodonga Development Corporation be advised that—

(a) the zoning of the land at the 23rd October, 1973, was industrial 4 (c)—Offensive or Hazardous Industries;

(b) the uses permitted in that zone were limited solely to the processing of noxious by-products of abattoirs and meatworks, both rural industries;

(c) the zoning therefore was for a special non-urban purpose and not an urban purpose;

(d) the land was therefore not zoned urban and was correctly designated (pursuant to Section 4 (1) of the Growth Centres (Land Acquisition) Act, 1974; and

(e) the land is subject to compulsory acquisition pursuant to Section 10 of the Albury–Wodonga Development Act, 1974."

2.19 The report was addressed to the associate chairman of the commission, who determined that the corporation should be advised in the following terms, which are a verbatim extract from a letter sent to the corporation by the commission on the 20th August, 1974:

"10. In relation to the definition of 'urban land' in terms of the policy statement previously mentioned, the Authority is of the opinion that this is a matter for interpretation by the authors of that policy. It does appear however, that a strong case *could be made to suggest* (emphasis added) that the 'special noxious industrial zoning' which, at one time, was proposed for this land was *not* an *urban* zoning for the following reasons:

(a) the zoning of the land at 23rd October, 1973 was Industrial 4 (c)—Offensive or Hazardous Industries;

(b) the uses permitted in that zone were limited solely to the processing of noxious by-products of abattoirs and meatworks, both rural industries;

(c) the zoning therefore was for a special non-urban purpose and not an urban purpose;

(d) had the land not been identified for a special non-urban purpose there is no doubt that a Non-Urban 'A' zoning would have been applicable. This zoning would have been in accordance with that for the surrounding land and not for industrial, commercial or residential purposes; and

(e) the land was therefore not zoned urban and was correctly designated pursuant to section 4 (1) of the Growth Centres (Land Acquisition) Act, 1974.

11. In summary, therefore, the Authority feels that—

(i) *the question of whether the land is Urban or Non-Urban* within the terms of the Policy Statement referred to *is one for determination by the Development Corporation and perhaps the Ministerial Council;* (Emphasis added.)

(ii) *interpretation of 'urban land' in terms of the Policy Statement is a matter for interpretation by the authors of that policy.* (Emphasis added.)

12. At the same time, the question of whether the land in question should be acquired appears to be a matter for determination by the Corporation."

2.20 However, in a letter dated 27th August, 1974, the Development Corporation informed the owners' solicitors that a reply had now been received from the State Planning Authority and that—

"*In summary the Authority outlines the background to this* case, which, in the main, follows the pattern set out in your letter and finally agrees that designation hinges on the definition of 'urban land' in terms of the Policy Statement made after the signing of the Agreement on 23rd October, 1973, and accordingly interprets as follows:

'that the 'Special noxious industrial zoning' which, at one time, was proposed for this land was not an urban zoning for the following reasons:

(a) the zoning of the land at 23rd October, 1973, was Industrial 4 (c) —Offensive or Hazardous Industries;

(b) the uses permitted in that zone were limited solely to the processing of noxious by-products of abattoirs and meatworks, both rural industries;

(c) the zoning therefore was for a special non-urban purpose and not an urban purpose;

(d) had the land not been identified for a special non-urban purpose there is no doubt that a Non-Urban 'A' zoning would have been applicable. This zoning would have been in accordance with that for the surrounding land and not for industrial, commercial or residential purposes; and

(e) the land was therefore not zoned urban and was correctly designated pursuant to section 4 (1) of the Growth Centres (Land Acquisition) Act, 1974.'

As the Corporation has previously stated that it would be guided by the interpretation of the State Planning Authority of N.S.W. in this matter, we now *concur* (emphasis added) that the subject land was correctly designated and as such may be subject to acquisition."

2.21 The complainant then informed the corporation that he proposed to take legal action. However, in the meantime some further consultation with the corporation's officers ensued and the following report addressed to the corporation's chief planner records one such interview which took place on the 25th October, 1974:

"Mr Viv. Weatherall called at the office today and requested my opinion on a matter of statutory planning interpretation. He wished to know if I had ever found an industrial zone which could be considered to be a non-urban zone. I refused to give him an opinion and informed him that I am aware of the reason for his question. He outlined the status of his discussions with Mr Muir. Apparently we admit that his land had a noxious industrial zoning, but are not prepared to admit that this is an urban zone.

As you are aware, clause 28 of the side letter to the Agreement and clause 9 of the press release specify that 'there will be no compulsory acquisition of land . . . within those areas presently zoned urban' in the City of Albury. Of course, the land owned by Mr Weatherall was zoned urban at the date of signing of the Agreement and has been included in the designated area by mistake, or in ignorance that the concept of 'urban zones' applied to land at 23rd October.

Mr Weatherall then asked me another question, complaining that I had told him nothing so far. In making an interpretation of the situation if called upon to do so, would I make a genuine assessment of the statutory situation relating to his land, or would I produce an answer which would earn me the praise of my superiors!!

After receiving an appropriate reply, Mr Weatherall left less than satisfied.

I feel that we are in a position where a lot of bad publicity could result from any efforts to stall or fob him off. Some attempt should be made to settle the dispute, preferably by offering to purchase at current market value if necessary."

2.22 Action proceeded towards the legal proceedings foreshadowed by the complainant and the Corporation sought to obtain evidence to support its defence, from the Albury City Council (hereinafter referred to as "the Council"). The following minutes addressed to the Deputy Chairman record these efforts, and the outcome:

"19-2-75

Johnco Nominees—evidence

I have been requested by Geoff Goodwin to endeavour to obtain written statements from J. Sarvaas and/or F. Brum verifying the portion of his evidence (attached) which is to be used in the Supreme Court hearing on February 27th.

As advised I have been unsuccessful in obtaining written evidence from either of the two gentlemen, who are loath to commit themselves in writing to recalling events from so long ago.

Up until yesterday I was unable to obtain information or even a commitment to search from Council Officers in particulars, Messrs Carter and Brum. Terry Pearce has had his staff commence the searching of old records on our behalf although he is not confident that the required material will be found. This matter is obviously of extreme urgency and importance to the Corporation, but I am at a loss to suggest where we move from here. We have offered to provide manpower to help search Council records but this has been rejected on the basis that some idea of where to look is necessary. To add to the confusion Geoff Goodwin advised yesterday that he is refusing to sign an affidavit prepared by the Commission's barrister.

In the matter of evidence from Mr J. Sarvaas it appears that the only alternative will be for the P.E.C. to subpoena him to appear at the hearing.

21-2-75

In view of the complete lack of information to support the specific reasons for the land being zoned Industrial 4 (c) *outlined in Geoff Goodwin's report* (emphasis added), I visited Mr J. Sarvaas today at his home. The following is a summary of the points covered and Mr Sarvaas' response.

(a) Proposed relocation of abattoirs—there was not a serious proposal to relocate, and therefore this did not generate the need for a noxious industrial zone.

(b) Meatworks and by-products establishments—Mr Sarvaas has no recollection of any such proposal at the time of I.D.O. 7 being proposed and they did not give rise to 4 (c) zone.

(c) *Reasons for the zoning*—Mr Sarvaas had prepared during the late 1950's a draft planning scheme which he presented to Council for adoption as I.D.O. No. 1 or 2 (he could not recall precisely). This contained a noxious or offensive industrial zone in the vicinity of the abattoirs for the purposes of accommodating associated uses. Council however, resolved to delete the zoning because it felt that such uses would intrude on the amenity of both the existing residential area and the Mungabarina Reserve. When the City of Albury was extended by annexation of part of the Shire of Hume and a new I.D.O. (No. 7) prepared for the enlarged area, the City Council took the opportunity to provide the noxious zoning at a distance from the nearest residential area on the subject site. The reason for this action was purely to accommodate a previously acknowledged need for such a zone.

In addition, Mr Sarvaas denied having provided Mr Goodwin with information about proposed by-products establishments and meat-works as contained in the attached extract of Mr Goodwin's report. (Emphasis added.)

24-2-75

Following receipt of your memo dated 19th February, 1975, I contacted Mr F. J. Carter, Town Clerk, Albury City Council, regarding the obtaining of documentary evidence as to the 4C zoning given to the subject land when preparing I.D.O. number 7.

Mr Carter stated that his staff was at present searching the archive records of the council and that he would do all in his power to produce the documents as soon as possible. I advised him that the matter was now urgent and he appreciated this and would do his best.

In order to bring you up to date with matters that have transpired since the date of your memo I have been contacted by Mr Knox of the State Crown Solicitor's Office, Sydney, asking that we obtain low level aerial photographs of the subject land and these have been done and sent to Mr Knox in Sydney. The object of these photos was to indicate the isolated nature of the subject lands and their integral part of other non-urban lands in the area.

Mr Knox requested that you as Statutory Planner to the Corporation together with Mr Derek Ross professional photographer, who took the photographs for us, proceed to Sydney on Wednesday the 26th February, 1975, in order to be briefed for the hearing on the 27th.

In the subsequent conversation with Mr Bignold of the P. and E.C. it was felt that *the case might finally have to be fought on the legal basis rather than a planning basis as it appears that Mr Sarvaas will either be giving written evidence or will be subpoenaed to give verbal evidence in order to disprove the affidavit already prepared by Mr Geoff Goodwin of the P. and E.C. regarding the reason for the original zoning.* It appears that Mr Sarvaas will be denying that the zoning of the land was to meet a specific proposal for the re-establishment of the Albury City Abattoir on the subject land or adjacent thereto." (Emphasis added.)

2.23 In short, the officers of the council were not prepared to support the corporation.

2.24 The complainant sought a declaration from the Supreme Court in its Administrative Law Jurisdiction that the subject land was on 23rd October, 1973, zoned "urban". On 23rd May, 1975, Mr Justice Waddell found that the question whether the land was zoned "urban" within the meaning of clause 28 of the policy statement did not give rise to a justiciable issue. The Summons was dismissed. An appeal lodged with the Court of Appeal of the Supreme Court was dismissed on 25th February, 1977.

2.25 After lodgment of the appeal and apparently following an appeal by the complainant on the 3rd June, 1975, the Council communicated the following advice to the complainant:

"In the case of the parcel of land mentioned in your correspondence it would seem that the land should be deemed urban in character because—

(a) The land was zoned for a purpose other than 'Non-Urban' purposes.

(b) There was a right under the provision of the town planning control operating when the land was zoned for Industrial purposes to develop the land for specified industries 'without the consent of the Council', but subject to conditions imposed by Council, and as such there could well have been intense building development over the site."

2.26 In his reasons for judgment Mr Justice Waddell said—

"What the plaintiff seeks to establish by these proceedings is that its land was then zoned urban within the meaning of clause 28. It is perfectly clear that if a declaration to this effect is made, it will not have any effect at all upon the liability of the plaintiff to have its land resumed by the defendant for the compensation stated. The only assistance which such a declaration would afford the plaintiff is that it might then say that a Court had placed a meaning on the document which indicates that the defendant and those having responsibility for the matter within the Government of New South Wales were by the proclamation and the notification in the Government Gazette acting contrary to the public statement which represented the common intention of the three contracting Governments. This may be of some value in making representations to enable the plaintiff to escape from the legal position in which it now finds itself in relation to its land.

> As might be expected it is submitted for the defendant that the plaintiff's claim is not one which the Court is entitled to entertain because it does not in any way seek a determination of any existing legal rights of the plaintiff. On the other hand, it is submitted for the plaintiff that the correspondence which is in evidence between the plaintiff and the defendant establishes that, if a declaration were made in the plaintiff's favour, steps would be taken to withdraw the land of the plaintiff from the areas mentioned above. It is appropriate at this stage to say that I do not place this interpretation upon the correspondence. The effect of the correspondence is this. The plaintiff claimed that its land was included in the areas in question contrary to the statement of policy. The defendant sought the comments of the State Planning Authority upon the claim of the plaintiff that its land was zoned urban. The State Planning Authority expressed the view that it was not zoned urban. the defendant then stated that it would be guided by the interpretation of the State Planning Authority and concurred that the subject land was correctly designated and as such might be subject to acquisition. In my view the correspondence reflects an entirely proper and reasonable administrative resolution of the claim made by the plaintiff to the defendant. However, it is not completely inconceivable that, if the Court were to express a view which is contrary to that expressed by the State Planning Authority, the defendant might reconsider its attitude. I return, therefore, to the defendant's submission."

Part of this has been relied upon by the Corporation as strong support for its contention that its actions were correct. I do not agree with this. No decision was made by the Court other than that the question as to the meaning of clause 28 of the policy statement did no give rise to a justiciable issue.

In addition, I should point out that the reference in the judgment to the view of the State Planning Authority that it was not zoned "urban" is not correct as what in fact was said by the Authority was "it does appear however, that a strong case could be made to suggest that the 'special noxious industrial zoning' . . . was not an urban zoning.

In concluding his reasons the Judge said—

> "The policy statement to which the complainant's claim for relief is related does not affect his legal rights in any way. It does no more than present him with an argument to be addressed to the government authorities involved that the proclamation and notification to which I have referred are, in so far as they relate to its land inconsistent with that policy statement. Accordingly, the question whether the plaintiff's land is zoned 'urban' within the meaning of clause 28 of that statement does not give rise to a justiciable issue. The summons is dismissed with costs."

2.27 As stated earlier, the Supreme Court dismissed the appeal on 25th February, 1977, on the grounds that declaratory relief should not be given but for differing reasons.

The Chief Justice, in reaching the conclusion that the appeal should be dismissed, said—

> "Having stated by view upon jurisdiction, I have no hesitation in concluding that in the light of the present facts and circumstances, the case is one in which, as a matter of discretion, no declaration should be granted. Even assuming, but not conceding, that as at 23rd October, 1973, the Court would have adjudicated upon the claim for the declaration sought by the plaintiff, the Parliament and Ministry of this State have spoken twice during 1974 in terms negating any continuing significance attaching to the relevant portion of cl. 28 of the statement of principles and policies. Section 9 of the Albury–Wodonga Development Act charges the Corporation with the responsibility of acquiring and managing land including land in designated areas as is the plaintiff's. The formal agreement establishes a relationship between the Corporation and the Council of Ministerial representatives of the three Governments. The Corporation's duties and powers under the statute are not seen to be fettered by the preliminary policy statement, and the Council of Ministers could not be considered to have had its hands tied for the future by the policy statement as distinct from the formal terms of the agreement by which the three Governments bound themselves.
>
> The notification of the plaintiff's land as designated land for the purposes of the Growth Centres (Land Acquisition) Act was a valid Ministerial action not subject to being called in question by reason of any statement having no greater authority or binding force than inclusion within the policy statement."

Mr Justice Moffitt in the course of his decision dealing with the problems of construing political documents went on to say—

> "So far as it can be properly called an agreement, it is, as it describes itself, an agreement upon principles and policies. If occasion did arise to construe it, it would have to be so construed and as a political document. Statements of policy or political understandings or agreements upon matters of policy in relation to future planning are frequently in terms which are intended to leave undisclosed or reserved matters of detail and need to be construed against other political events or pronouncements. This is illustrated by the very provision in question. Reference is made to land 'zoned urban' within the City of Albury. However it is difficult to think that u'rban' means any land provided it is within the City of Albury. We are told the area of that city is extensive and that much land in fact is rural rather than urban in its current use and appearance. The Interim Development Order for the City of Albury dated 10th June, 1966, did not zone any land under the term 'urban'. There is a classification 'non-urban' with a subdivision 'non-urban A' and 'non-urban B' but the other six categories are not described as 'urban'. Even if the agreement had to be construed as an ordinance, it would be difficult to conclude all other land i.e. in the other 6 categories including e.g. that of 'Special Uses' could be said to be zoned 'urban'. The answer to the problem is not to be found by torturing the documents for an answer to be found from their terms alone, when in truth the documents are but statements or understandings upon matters of broad general principle, intended to provide the basis on which various legislative and executive bodies will, by discussion, investigation and other means, evolve details of and translate the proposals into a legal framework in exercise of their respective powers.
>
> The appellant's position, then, can be summarized as follows. The declaration it seeks declares no legal right of the appellant and can have no legal consequence to any right or disability of the appellant in respect of the land which it owns. At most it seeks to have the Court make a pronouncement, which if favourable, might provide it with an argument capable of offering in some appropriate quarter some political persuasion to alter the law. The purpose of the appellant is no different, to that of a plaintiff, who incensed at the state of the law in relation to his property due to recent legislative amendments or failure to amend the law, seeks a declaration to construe a policy speech of a political leader or the platform of a governing political party in terms calculated to demonstrate the state of the law is contrary to the policy or platform.
>
> In my view it would be contrary to the policy of the Courts at the suit of a person in the position of the appellant for the purposes referred to, to exercise its powers to make a declaration in this class of case. This is so at least on the ground that, irrespective of the precise quality of the statement and 'agreement', the declaration sought has no sufficient connection with any right of the appellant to warrant exercise of the power. The connection of the declaration sought with the appellant is that it is hoped it will provide a step toward establishing what the appellant claims the law should be if legislative steps are taken in accordance with the policy and principles already referred to."

Mr Justice Hutley dealing with the same aspect had this to say—

> "A political document such as the agreement is inherently incapable of proper investigation according to the ordinary standards of judicial enquiry, for example, in this particular case, construed as a mere document there can be no reference by the court to anterior negotiations. These perhaps could explain why the word 'urban' which finds no place in the plan governing the City of Albury at the time the agreement was entered into came to be used. Where there is a statement of policy on how powers given by an Act of Parliament are to be used, one would assume that parties would be able to explain any inelegancies in their statement of intention without the hindrances required for good reason by the rules relating to construction of business contracts. The legal system after formal agreements are completed enforces them according to their terms. When, however, there comes into existence a purely political agreement unenforceable between the parties, in my opinion, a court is not a suitable interpreter of such an arrangement. This is a case where the arrangement of its very nature is unfit for the declaratory jurisdiction."

2.28 As the Courts made no finding on this question of interpretation of the meaning of the word "urban" in the policy statement, I am of the view that the various decisions do not carry the force which the corporation submits they should in determining the issue as to whether the land should or should not remain designated land.

However, the comments made in the Judgments raise valid matters for consideration in deciding whether the conduct of the Corporation in this matter is wrong in terms of the Ombudsman Act.

2.29 At a meeting of the Ministerial Council held on 8th November, 1976, the Council resolved that only the lands shown on the plans before them would henceforth be subject to compulsory acquisition and that all other lands would cease to be subject to compulsory acquisition under the Growth Centres (Land Acquisition) Act, 1974. A plan of the reduced areas was prepared and placed on public exhibition. In a note on the plan the Ministers emphasized that the decision was final, that areas removed from the threat of compulsory purchase would remain in the planning area as part of the Growth Centre and that the Victorian and New South Wales Governments would consider specially designed planning controls to ensure that the areas were protected. The subject land remained in the area subject to compulsory acquisition.

2.30 In the meantime further correspondence had been received from the complainant. On 21st September, 1977, the subject land remained included by the Ministerial Council in a list of lands to be finally acquired by the Corporation following which the acquisition programme would cease. The Corporation informed me that following that meeting of the Ministerial Council, Mr Weatherall was personally advised that his property remained within the acquisition area.

Conclusions

3.1 Whilst the complaint which has been the subject of investigation is the conduct of the Corporation in continuing to retain the land within the areas designated under the Albury–Wodonga Development Act and the Growth Centres (Land Acquisition) Act, it has been necessary to look at the conduct of the Corporation prior to 18th October, 1974, and also conduct of the Development Corporation prior to and subsequent to that date. I am excluded by the provisions of the Ombudsman Act from investigating conduct prior to 18th October, 1974, but I have of necessity been looking into the actions of the Corporation prior to that date to determine whether or not it should now take steps to remove the land from the designated area. So far as the Development Corporation is concerned, this is, of course, a Commonwealth body and its conduct cannot be the subject of investigation by me; however I have, as mentioned earlier, had access to its files in reference to this issue partly supplied to me by the Corporation and partly through the Commonwealth Ombudsman. I might add that prior to the creation of the Corporation in May, 1974, and subsequently, much of the conduct which has been looked at was more that of the Development Corporation than the Corporation. However, the fundamental issue involved affects the Corporation and not the Development Corporation.

3.2 The problem which arises in this matter has been brought about by the use in the policy statement issued by the Ministerial Council of the words "urban" and "non-urban" in clauses 28 and 32. Whilst "non-urban" is a term used constantly in planning schemes, the word "urban" does not appear. It is, of course, not clear what the Ministerial Council meant by the word "urban" and several alternatives can be put forward. Was it intended that all land within the City of Albury be divided into only two categories, namely urban and non-urban? Was it intended that urban land should be taken to mean all land not zoned under the planning scheme as "non-urban"? Or was the word "urban" to be given some special significance in relation to the City of Albury and the proposed acquisitions?

A view put to me by the Corporation was in these terms—

> "Clause 28 of the policy statement adopts a composite or compound phrase 'areas presently zoned urban or the new areas to be zoned urban' so that the ascertainment of land exempt from compulsory acquisition requires consideration of the existing *and* proposed zonings.
>
> Therefore, if land was presently zoned urban but was to be zoned for a non-urban purpose it could not be regarded as exempt."

I do not accept this view and consider that if the land was in fact zoned urban (whatever that may mean) as at 23rd October, 1973, it would come within the terms of the policy statement as land not to be compulsorily acquired irrespective of any subsequent change in its zoning.

3.3 The subject land was, as set out before, zoned as Industrial 4 (c) Offensive and Hazardous Industries under Interim Development Order No. 7—City of Albury of 10th June, 1966, but when the Interim Development Order of 7th December, 1973, was issued, the zoning had been changed completely to Non-Urban A.

3.4 However, in the events that followed, whether or not the land was to be regarded as urban, it was in fact included in the area of the designated land under the Growth Centres (Land Acquisition) Act and in the area designated under the Albury–Wodonga Development Act. The practical position was then that under the

Albury–Wodonga Development Act, the land was made subject to the provisions of that Act including planning and other matters and if it was to be acquired, it was subject to the particular provisions of the Growth Centres (Land Acquisition) Act as to compensation.

3.5 I deal first with the actions of the Corporation in regard to the inclusion of the land in the relevant areas and in relation to the Corporation's dealings with the complainant following his request to have the land removed from those areas.

3.6 Although the status of the subject land was raised with the Corporation by the complainant some months before designation took place, I have been furnished with no evidence of any decision or consideration relating specifically to the nature of its zoning, and liability for designation, prior to that action being taken, other than the internal minute addressed to the Deputy Chairman of the Corporation on the 26th July, 1974, indicating that the Task Force had agreed that the land could not be designated. Following receipt of the letter dated 22nd February, 1974, referred to in paragraph 2.10 from Johnco Nominees Pty Ltd the question may have been referred by the Development Corporation to the State Planning Authority but there is no indication that this was in fact done. In regard to the Task Force, the Corporation recently informed me that no evidence could be found to support the statement that it had agreed that the land could not be designated. On the contrary, the Corporation stated that the then Director, Mr B. Dwyer, had indicated that it was at all relevant times the intention of the Task Force to recommend the land for inclusion. There has been no documentary evidence produced one way or the other.

3.7 Two months before the designation was effected on 28th June, 1974, the Albury–Wodonga Planning Co-ordination Committee had accepted a report from the Commission (see paragraph 2.11) referring specifically to the question and stating quite clearly that the land was zoned for urban purposes at the critical date and was therefore not open to designation. The Corporation's comment on this is that although the report contained references to the status of the subject land in the event of it being required for growth centre purposes, the report was solely in response to an application for rezoning; the extracts referred to were merely of peripheral interest and not germane to the subject matter of the report; the recommendation confined itself strictly to the rezoning question; and whilst the recommendation as to zoning was accepted, there was no indication that any specific consideration had been given to this section of the report.

3.8 Only two weeks after the Planning Co-ordination Committee had dealt with the abovementioned report, recommendations were made to the Ministerial Council based on recommendations by the Co-ordination Committee for the designation of areas which included the complainant's land. As the Corporation has pointed out, the decision as to what land was to be included in the total acquisition programme (which included the subject land) was made by the same Ministers who were responsible for the policy statement.

3.9 When the issue was subsequently referred to the Commission as a result of the representations made by the solicitors for the complainant, the responsible officer performed what must have been considered to be a remarkable about face (see paragraph 2.18). In any event, the Commission's Associate Chairman hesitated to adopt the officer's recommendations re-defining the nature of the zoning and quite plainly told the Corporation that the Commission would not accept responsibility for deciding the question. However, the Corporation modified the Commission's advice (as indicated at paragraph 2.19 of this report), and informed the complainant that the Commission had in fact, interpreted the Industrial 4 (c) zone as a *non-urban* zoning, and that the Corporation, being guided by that interpretation, concurred in the Commission's alleged conclusion that the land was correctly designated.

3.10 The situation which developed when that advice led to the issue being referred to the Court will be clear from the evidence detailed before. The local government officers involved refused to support the Corporation and, indeed, the former town planner for the Council, who was a primary agent in the introduction of the Industrial 4 (c) zoning, completely repudiated the evidence attributed to him which was material to the Commission's advice to the Corporation that "a strong case could be made out to suggest" that the zone was a non-urban zone. Although in the minute referred to in paragraph 2.22 of this report reference is made at the end thereof to the question of the case being fought on a legal basis rather than a planning basis and although it has been suggested that the attitude of the council officers may have been sufficient to induce the Corporation and the Commission to seek to establish that the issue was not one that the court was competent to determine, the Corporation refutes this suggestion and in any case I would agree that the Corporation could not be criticized for the matter being dealt with before the court on the basis upon which it was ultimately determined, namely as to whether the court had jurisdiction in the circumstances to make an appropriate declaration as to the meaning of the policy statement.

3.11 The Corporation in its submissions to me put forward the opinion that as the complainant had pursued the issue before the Court, and, to quote the Corporation, "on each occasion the ruling was not prepared to acknowledge that the land was zoned urban at that date" (namely, 23rd October, 1973) he has had an alternative and satisfactory means of redress in terms of the Ombudsman Act. Further, it has been explained that the legislation under which the Corporation operates has not excluded land zoned for urban purposes at the 23rd October, 1973, from designation for compulsory acquisition.

I understood from these submissions that the Corporation may have felt at liberty to disregard the policy statement announced by the three Governments excluding land zoned urban at the above date from compulsory acquisition, and that the matter should not be investigated by the Ombudsman. I was unable to agree. The complainant clearly had no alternative and satisfactory means of redress.

The Corporation has also submitted to me that the issue has been the subject of a ruling by the Commission. In my opinion, the Commission's letter of the 20th August, 1974 (quoted at paragraph 2.19 of this report), quite clearly conveyed that the Commission was *not* prepared to make a ruling on any aspect of the issue.

3.12 It could of course be contended that the Corporation, as a major planning authority, ought to have been able to identify the nature of the zone without referring the matter to the Commission. All of the evidence on the Corporation's files, involving reports and comments by officers with regard to this question, point to a recognition of the zone being "urban" in nature and no documentation has been sighted recording any deliberation by the Corporation on the issue. The Corporation, however, states that these officers' views were never adopted by it.

3.13 However, after the designation had been effected on its recommendation, the Corporation felt that it had need to seek a ruling from the Commission presumably on the basis that as the zoning was applied on the recommendation of the Commission then that body would be the appropriate one to give advice as to the nature of the zoning. However, as indicated before, the Commission declined to make a ruling. It replied in terms as set out in paragraph 2.19..

3.14 If one analyzed the Commission's basis for informing the Corporation that a strong case could be made out to suggest that the zone was a non-urban zone, it could be said that the arguments advanced were not conclusive by any means that the zoning should be regarded as a "non-urban" one. The question as to whether the fact that abattoirs and meatworks are rural industries, and, as the undertakings to be located within the Industrial 4 (c) zone were to be involved in the processing of their by-products, and that then the zoning was for non-urban purposes, must be disputed as it is clear that rural industries and offensive and hazardous industries are not necessarily the same and the location of offensive and hazardous industries could not always be said to be in what would otherwise have been known as non-urban areas. In addition, the suggestion that if the land had not been zoned as Industrial 4 (c), it would have been zoned non-urban is not, of course, a conclusive argument.

3.15 In my view it is by no means clear that the land should have been regarded as zoned urban within the meaning of clause 28 of the policy statement and not included in the designated land. The difficulty is that an "urban zone" is not a planning term. There are strong arguments which can be put, both to endeavour to establish that the land was zoned "urban" and that the land was zoned "non-urban". I find it difficult to determine the answer and whilst I incline towards the view that the nature of the zoning is more an urban zoning than a non-urban zone, the doubt is such that it could not be found with certainty that the Corporation or the Development Corporation was wrong in determining that it be so included. As stated earlier, I am not determining and cannot determine this on the basis of whether or not it is wrong conduct under the Ombudsman Act. I am considering it as part of the question as to whether the Corporation is now wrong in not taking steps to have the land removed from the designated land in that it should not have been regarded initially as urban land.

If the matter was to be dealt with on the one single issue of whether or not the land should have been included in the designated area or classified as designated land, no matter who was the authority responsible, it would still be most difficult to arrive at a decision that the responsible authority's conduct was wrong.

3.16 During the course of my investigation I submitted to the Corporation a draft interim report and invited comments. In replying on 30th May, 1979, the Corporation, inter alia, said—

"The only complaint referred to in paragraph 1 of the report is—

'that the Corporation is acting wrongly in continuing to retain the subject land within the area designated for compulsory acquisition'.

Conversely, the Corporation maintains that it would have acted wrongly to seek the removal of the land in the light of—

(a) the advice given to it by the State Planning Authority; and

(b) the judgments of the Court which on two occasions confirmed the legality of the designation of the land."

I do not accept either of these propositions. In regard to the State Planning Authority, it did not express any definite view. It only said that "a strong case could be made to suggest that the 'special noxious industrial zoning' which, at one time, was proposed for this land was not an urban zoning."

I have already expressed earlier my views as to the judgments.

3.17 Whether or not the Corporation has been wrong in its actions is but one aspect. The policy statement was made on behalf of the three Governments by the Ministerial Council consisting of the three Ministers directly concerned. Being only a policy statement, the fact that its terms are not as clear as they might be is not surprising. The statement has created the problem by not spelling out in clearer terms what was meant by land zoned "urban", but whilst it was a policy statement and should generally be followed in the implementation of the growth centre, it was no more than that and subsequent to its issue the responsible Governments combined to pass the various Acts and to designate the land under the appropriate Acts. It may be of some significance also to point out that whilst the Albury–Wodonga Development Agreement was made a schedule to the respective Acts, the policy statement was not included and is not referred to. In view of the lack of clarity as to the meaning of clause 28, I agree with the comment made in the letter from the State Planning Authority of 20th August, 1974, that it was appropriate for either the Development Corporation or the Ministerial Council to determine its meaning. It is important to note: (a) that in June, 1974, the three Ministers who had issued the policy statement saw fit as the result of a joint decision to include the subject land in the designated area; (b) that subsequently whilst proceedings were still pending in the Supreme Court over the subject land they (or their successors) determined in November, 1976, that the area involved remain in the area proposed to be acquired, and (c) that they did so again in September, 1977. It is not clear from the papers whether any actual consideration was given to the question of this particular land by the Ministers on each occasion, but it is certainly relevant that the Ministers, whose predecessors were the authors of the policy statement and who were the ones who should interpret any doubtful issues arising from it, should retain the land within that designated under the respective Acts. The conduct of Ministers is of course outside my jurisdiction and I cannot investigate that.

3.18 Whilst I must be critical of the way in which the Corporation and the Development Corporation, as the case may be, dealt with the question as to whether or not the land should be or had been included in the land regarded as other than urban, I do not consider that this leads to the conclusion that the Corporation's conduct is wrong in not recommending the removal of the complainant's land from the designated area either under the Albury–Wodonga Development Act or the Growth Centres (Land Acquisition) Act.

3.19 I have not dealt with this matter on the basis of whether or not the subject land was zoned urban within the meaning of the policy statement, but on the basis of whether the conduct of the Corporation is wrong in not taking steps to recommend the removal of the land from that designated under the Growth Centres (Land Acquisition) Act, 1974, and, thus, not subject to compulsory acquisition under the terms of that Act.

Irrespective of the conduct of the Corporation and of the Development Corporation of which I have been critical and, in particular, the modification of the views expressed to the Corporation by the State Planning Authority, the fact is that whether the land comes within the category of land zoned urban is by no means clear and this, coupled with the actions of the Ministerial Council on three separate occasions, leads me to find that the Corporation's conduct in not recommending the removal of the land from the designated area is not wrong. If the policy statement had made its intention clear, the whole question would have been a much simpler one to determine.

3.20 As mentioned earlier, during the course of the investigation I saw fit to have an interim draft report prepared which was submitted to the Corporation for its comments. Comments were received and a request made by the Minister, as he was so entitled, for a consultation. This consultation was held with him and with officers of the Department and the Corporation. A copy of the interim draft report was then furnished to the complainant by the Deputy Ombudsman. It was stressed to him that it was a progress report and that the position disclosed should be considered tentative until such time as the investigation was concluded. Such report was substantially the same as that furnished earlier to the Corporation and did not include reference to matters which the Corporation raised in opposition to numerous aspects of the report and which are referred to earlier in this report. Many amendments have been made to the draft report following further consideration by me.

DEPARTMENT OF CONSUMER AFFAIRS

Retraction of Approval for Sale of Power Tool Accessory

I received a complaint from a company in the following terms:

> "Some months ago we purchased some equipment from an American Manufacturer, that was approved for sale from both the State and Commonwealth Consumer Affairs Departments. We committed ourselves for a fairly large shipment of these items, and were suddenly faced with an unexpected retraction of these approvals, which has put us in a position where we cannot readily sell our product."

My complainant explained that the Department had inserted an advertisement in the press which implied that these devices would need to be inspected and submitted to a safety committee to determine whether they could be marketed. This resulted in major retail outlets cancelling their orders with his company. He went on to say—

> "We have acted with caution and regard to public safety, and we would not have committed ourselves for large quantities of stock of this item had we had any inkling that the rug could literally be pulled out from under us by the insertion of such an advertisement."

My investigation with the Commissioner of Consumer Affairs revealed the following situation:

(a) The devices concerned first came to the attention of the Department in February, 1978, when complaints were received from the public. These complaints alleged that metal flails attached to the devices could fly off at high speed and might therefore cause serious injury, particularly to the eyes.

(b) In April, 1978, the Queensland Minister for Industrial Relations called upon the Commonwealth Government to prohibit the importation of one such device which had been tested by the Queensland Institute of Technology and assessed as being dangerous. In June, 1978, the journal of the Australian Consumers' Association, "Choice", published a report on the devices and demanded their withdrawal from sale.

Amongst those brands of the device named in the "Choice" article was the one being handled by my complainant. That brand was also tested by the Queensland Institute of Technology and assessed as being dangerous.

(c) Soon after the first complaints were made, all known distributors of the devices gave assurances to the Department, or to the Commonwealth Department of Business and Consumer Affairs, that the goods would not be supplied until the question of their safety had been resolved. Amongst those companies which gave such assurances to the Commonwealth Department was the Australian agents for the brand my complainant was concerned with.

The Commissioner told me that, to the best of his knowledge, those assurances were honoured until June, 1979, when the further developments described later took place.

(d) By November, 1978, the consumer protection authorities of several States had carried out tests upon the devices in an attempt to determine the degree of danger which they presented in normal use.

Several test methods were employed, however, and their suitability became the subject of considerable discussion.

(e) A Commonwealth/State Consumer Products Advisory Committee (CSCPAC) had been set up to co-ordinate consumer protection activities between the Commonwealth, States and Territories, particularly with reference to product safety. With continuing discussion on the test methods, the matter was placed before that committee for resolution.

(f) Acting upon the best information then available, CSCPAC concluded at a meeting held on 14th November, 1978, that only the "fine" model of one brand, that being sold by my complainant, should be permitted to be sold, providing that it was labelled—

"WARNING. Protect eyes from flying particles. Wear safety glasses when using this tool. Do not allow bystanders."

Accordingly, on the 14th December, 1978, the Department responded to a request from the Australian agents and stated that it had no objections to the sale of the "fine" model of the device. It strongly recommended, however, that the goods be sold only with the label shown above and clearly indicated the preliminary nature of the testing which had been carried out.

(g) Objections to the sale of the "coarse" model of the device and to all other brands and models were not withdrawn.

(h) When the Department withdraw its objections to the sale of the "fine" model, the results of testing in Tasmania and preliminary testing by the Health Commission of New South Wales appeared to support that action, which was in line with the CSCPAC recommendations.

However, further extensive testing by the Health Commission of New South Wales and State authorities in Western Australia cast fresh doubt on the safety of the "fine" model. In March, 1979, the Government of Western Australia acted upon these results and probihited the sale of all such devices.

(i) On 1st June, 1979, CSCPAC again discussed the safety of these devices in the light of the later tests carried out in New South Wales and the action taken by Western Australia.

Following that meeting, the Commonwealth Government unexpectedly withdrew all its requests that these devices, including the "fine" model of the brand being handled by the complainant, should not be sold.

(j) The Commissioner expressed the view that, by withdrawing its requests to withhold the supply of these goods, the Commonwealth Government abrogated its responsibilities in this matter and left the control of such devices to the States and Territories.

(k) As the Department had withdrawn its objections to the "fine" model, in December, 1978, this model appeared on sale in New South Wales towards the end of June, 1979. Although the testing of the devices was co-ordinated through CSCPAC, the resultant actions taken by each State and Territory varied widely. This disparity reflects the very real difficulties in assessing the dangers of these devices.

(l) My complainant was aware that in the Department's letter of the 14th December, 1978, objections were withdrawn only to the "fine" model of the device and that the Department strongly recommended that a particular warning label be attached to the goods. However I ascertained that his Company proceeded to import approximately equal quantitles of both the "coarse" and "fine" models of the device and that neither of those models carried the warning label which had been recommended.

(m) The Commissioner commented to me in the following terms:

"I feel that if the company had the best interests of its customers and indeed its own best interests at heart, it would have taken action to comply with the requests made by my Department. The company can scarcely have been unaware of the doubts raised concerning the safety of these goods, nor of the considerable investigations which had already been undertaken in this and other States.

When the responsibility for the control of these goods was placed upon each Sttae and Territory by the Commonwealth Government, the situation clearly required formal resolution in New South Wales. For that reason, the Minister for Consumer Affairs . . . approved of the formal referral of the question as to the safety of these goods to the New South Wales Products Safety Committee, in accordance with the provisions of section 39c of the Consumer Protection Act.

Whenever such a question is referred to the Committee, the Act states that a public notice of referral must be published in the press. I believe that it was the publication of the notice relating to (these devices) which may have led certain retailers to cancel their orders . . .

I have enclosed a copy of that referral notice for your information. As you can see, it does not refer to the brand of the device by name, nor does it state that the devices are dangerous.

As I have explained, the notice of referral is required by law. Goods which are so referred to the Committee are by no means certain to be the subject of prohibition or restriction, as the record of the Committee shows. That some retailers may have chosen to draw their own inferences from the publication of the notice is a matter entirely beyond my control."

My inquiries revealed that at the direct request of the Minister, representatives of the complainant's company and the Australian agents for the device had been given every opportunity to make their views known to the Products Safety Committee. The complete reports of the tests carried out by the Health Commission of New South Wales were made available to them and they have been given the opportunity to discuss the methods employed with the Scientific Officers of the Health Commission who carried out the tests.

My inquiries also revealed that, prior to the publication of the referral to the New South Wales Products Safety Committee, the Department was quite unaware of the interests of the complainant's company in these goods. In addition, an adjournment of the Products Safety Committee meeting had been granted to enable the American manufacturer of the devices to attend and place his opinions before the Committee members.

The Commissioner concluded his report to me by saying—

"No one would wish to prohibit goods of this kind if they were shown to be safe but I am sure you will agree that it would be tragic if goods which were already prohibited in another State were to cause injury in New South Wales. I feel certain that the resolution of this matter is best left to the expert technical opinion of the Products Safety Committee, a body with considerable expertise in this area."

I noted that the Department was unaware of my complainant's involvement in the sale of the devices at the time the relevant advertisement was placed in the press and, therefore, was not in a position to give him prior notice in this regard.

The Minister's decision to approve referral of the question of the safety of the devices to the Products Safety Committee was not a matter that I was able to investigate. In any case, I would not see that the Department, in recommending to the Minister that this be done, could be said to have acted wrongly in terms of the Ombudsman Act.

In view of the Department's responsibility in relation to products safety, I took the view that the action taken in this case was reasonable and, therefore, I regarded the complaint to me to be not sustained.

CORRECTIVE SERVICES COMMISSION

Loss of Clothing

An inmate who had been transferred from Silverwater to Parramatta Gaol complained to me that his clothing had been lost in the transfer. In his complaint to me he informed me that before leaving Silverwater all his clothing was checked and recorded in the presence of three officers. After being transferred from Silverwater to Parramatta he was then transferred to Milson Island and found that all his clothes were missing. He made numerous inquiries and applications but received no answer and complained that unless something was done he would find himself being released with neither money nor clothes.

Unfortunately in response to the complaint I was advised by the Department that the missing items of clothing could not be located and investigations continued. Whilst these were continuing, the prisoner had been released and as no further contact could be made with him the matter could not be taken any further.

As a result of the complaint it was found that the problem was initially created by the fact that he arrived at Parramatta Gaol late at night when the normal property and storage procedures could not be followed. However, as pointed out by the Chairman of the Corrective Services Commission, it should have been possible for his clothing to be clearly labelled and secured and taken into the property store on the next day when the store was open.

As a result of the complaint, a circular was issued to all institutions to ensure that new procedures were applied in respect of prisoners property received at times when the property store was closed. Whilst this should assist in preventing similar cases, it proved of little satisfaction to my complainant.

DEPARTMENT OF CORRECTIVE SERVICES

Loss of Property by Prisoner

I received a complaint from a prisoner (hereafter referred to as Jones, which is not his name) who told me that, when his property eventually arrived at Grafton Gaol, following his transfer from the Central Industrial Prison, Long Bay, the seals on the property containers were broken and 25 pre-recorded cassettes were missing. He had made a claim for compensation to the Department but this had been rejected by the Officer responsible for property at the Central Industrial Prison (referred to hereinafter as "C.I.P."). Jones said that he had been transferred, with little notice, following a period of prisoner unrest at the C.I.P. and his property had not been completely checked when he delivered it to the Reception Room at the prison prior to leaving for Grafton.

Jones' complaint was referred to the Department on 16th November, 1978. On 21st December, the Commissioner replied and forwarded copies of reports prepared by—

(i) Superintendent, Grafton Gaol;

(ii) Superintendent, C.I.P.;

(iii) The Officer-in-Charge of the Reception Room (C.I.P.).

In addition, Jones was seen at Grafton Gaol on 13th December and his complaint was discussed with him. At my request, he provided a list (to the best of his recollection) of the cassettes missing. During my investigation, it was necessary for me to seek further information from the Department, the complainant and the Superintendent at Grafton, and one of my officers discussed certain aspects of the matter (relating to property recording procedures) with the Acting Executive Officer (Establishments) of the Department, and inspected available property receipt books at the C.I.P.

My investigation established that Jones arrived at Grafton Gaol on 25th August, 1978, and that he delivered his property (i.e., the property that he had in his personal possession, including his cassettes) to the Reception Room at the C.I.P. on 24th August, 1978. The Certificate of the "Issuing Officer" on the relevant Property Card supported this contention.

In his report, the Officer-in-Charge of the Reception Room said—

> "(Jones) was unable to check his property due to the fact that he was locked up following the riot here a few days before. There was so much movement in the Gaol at that time that I cannot remember too much specifically about this prisoner's transfer, but as far as I can remember, he brought his cell gear down after I had checked his property kept in the reception room and because of the conditions prevailing at the time, his cell gear—mainly 4 cartons, a guitar and hobby material were entered on his card and then placed in a locked cubicle awaiting his transfer the next day."

Jones' property remained at the C.I.P. until 3rd September when the Officer-in-Charge of the Malabar Emergency Unit picked it up. The property was delivered to Grafton Gaol on 10th September, 1978.

The copies of the Property Cards made available to me by the Department did not assist a great deal. However, it was quite clear that Jones' cell gear was simply entered on the Property Card as "4 Ctns. cell gear". No check or record was made of the actual items of property which made up such "cell gear". This was confirmed by the terms of a report made on 18th January, 1979, by an Establishments Officer, which said—

> "I have as requested interviewed (the O.I.C. Reception Room) about the alleged missing cassette tapes. (He) informed me that the facts are as stated in his report, namely that Jones brought his cell gear to the reception room in four (4) cartons. These were sealed and entered on property card C71543. *(The O.I.C.) further stated that he has no recollection whatever of counting the cassette tapes as claimed by Jones in his statement. (He) pointed out that if he had counted the tapes he would have entered them on the property card, therefore, (he) is unable to confirm the existence of sixty-five* (65) *cassette tapes as claimed."* (My emphasis.)

Jones claimed that he had 65 cassettes when he took his property to the C.I.P. Reception Room on 24th August and that a large number of these had been either purchased through Activities buy-ups or brought into him on visits by relatives and friends. The latter, he said, were all issued to him via the Reception Room after being left at the prison gate. His comments in his various letters to me were obviously based on the assumption that, as the cassettes came into his possession with the official approval of the prison authorities, there would be a proper record kept of their issue to him.

My officer's discussion with the Executive Officer (Establishments) revealed the rather startling fact that both property purchased by a prisoner through Activities buy-ups and property left at the prison for a prisoner, might *not*, at time of issue, be entered as issued to the prisoner on his property card. Such property issues, the Executive Officer said, should be elsewhere recorded, at least (e.g., Activities buy-up records; Gatekeeper's property book).

In this case, unfortunately, the Activities buy-up records for the relevant period of time had been destroyed in a riot at the C.I.P. on 22nd August, 1978, so one avenue of record had disappeared. The Property Cards themselves contained minimal mention of cassettes (tapes). A card prepared at Grafton when Jones arrived there recorded that "1 case + tapes" was received from the Emergency Unit on 10th September and that "1 case + tapes" was issued out to Jones the same day. The only other mention of cassettes occurred on 18th May (?) 1978, when Jones was issued with a "Cassette reqd. instruction" (presumably a player) and "11 tapes" (presumably blank).

The only entry my officer could find relating to Jones in the property receipt books at the C.I.P. related to a guitar and case which had been left for him on 30th June, 1978. Unfortunately, not all the books could be found. However, one of the officers remembered Jones and made inquiries with one of the Wing Sweepers in the Wing in which Jones had been housed. The officer told my officer that the Sweeper confirmed that Jones had a large number of cassettes, "at least 50 or 60", he said.

As a matter of interest, I compared the Property Card for Jones which had been in use at the C.I.P. with the one prepared at Grafton. The range of discrepancies between the two, even so far as basic items were concerned, pointed to an obvious inadequacy in recording methods. (See Appendix A.)

Jones' property, apart from one bag of clothing, had been separated from him for 16 days (24th August to 10th September). Both the prison authorities and the prisoner agreed that the property was sealed on 24th August at the C.I.P. The O.I.C., Reception Room, claimed that the property was still sealed when it left the C.I.P. on 3rd September.

Jones claimed that, when he was summoned to the Wing at Grafton to check his property on 10th September, he noticed that the seals were broken. He, reasonably, surmised that the seals must have been broken either before the property arrived at Grafton, or by the Wing Officer at Grafton after the property arrived but before Jones was present. The assistance of the Superintendent, Grafton, was sought on this aspect (the Wing Officer having since resigned) and, in his report to me the Superintendent made no bones about the matter, and said—

> "On today's date I contacted (the former Wing Officer) by 'phone and asked him whether he could remember if the seals were broken on the containers belonging to prisoner (Jones) when the property was checked. (He) said that he has no specific recollection of breaking the seals on the containers. He also said that if the containers had been sealed then he would have removed the seals in the prisoner's presence, and not whilst waiting for the prisoner to arrive. I would also subscribe to this view as it is the procedure followed at this gaol when prisoners' property is checked. Therefore, I believe that it can be assumed that the seals were already broken when the property was received at Grafton gaol."

All available evidence, therefore pointed to the strong possibility that the seals on Jones' property had been broken sometime between 3rd and 10th September, that is, after the Emergency Unit collected the property from the C.I.P. but before it was delivered to Grafton. The Department had not said a word to me about where the property had been in this period and none of the Emergency Unit personnel had been asked to comment or report. As the Department, apparently, had not considered this aspect to be of any great significance. I took the view (for reasons which will be obvious) that I should not bother to peruse it either.

Jones made an application on 12th September, 1978, seeking the return of his missing cassettes or, alternatively, compensation. The matter was referred to the Superintendent, C.I.P., and then to the O.I.C., Reception Room, who endorsed it, on 25th or 28th September, in the following terms:

> "The property for (Jones) was sealed and placed behind the partition in the reception room. At no time was it interfered with prior to its collection by the M.E.U. on 3rd September, 1978, and forwarded on. I do not like the insinuation that it was interfered with by the personnel of the C.I.P. reception room."

The application was, on 11th October, sent back to Grafton and, on 18th October, Jones was informed of the "outcome" of his application. Little wonder he immediately complained to me; no effective action had been taken on his application at all.

The Department, in its reply of 21st December, 1978, to me said—

> "The Department has not the facilities at present to escort a number of prisoners and also take their private property on the same escort. If a prisoner's property cannot be taken with him on escort, then every possible attempt is made to ensure that it is taken on the next available escort. Mr (Jones') property was received at Grafton on 10th September, 1978, and I do not consider this to be an unreasonable delay.
>
> I am unable to finalize the matter of Mr (Jones') missing cassettes as *no record can be found to confirm that sixty-five* (65) *cassettes were ever held in his private property.* Accordingly, I have requested the Director of Establishments to conduct an investigation and I will write to you again as soon as his report comes to hand." (My emphasis.)

On 8th February, 1979, the Department wrote and said—

> "The Director of Establishments has completed his investigation into this complaint. (The O.I.C. Reception Room) has stated that he has no recollection whatever of counting the cassette tapes. Mr (Jones) brought his cell gear to the Reception Room in four cartons, where it was sealed and entered on his property card.
>
> . . . the Reception Room Officer, has made a thorough search of his Establishment and assures me that there is not any property belonging to Mr Jones at the Reception Room, Central Industrial Prison."

I then asked the Department to provide all papers relating to the investigation, copies of relevant property cards and copies of relevant Activities buy-up records. These were provided (except the lastmentioned records, which had been destroyed) under cover of letter dated 15th March. The most significant item appearing in the Departmental papers was a minute made on 6th February by the Acting Director of Establishments, which said—

> "(The O.I.C., Reception Room) states that if he had counted the number of cassettes in (Jones') property he would have entered the number on his property card; the performance of this Officer left a lot to be desired; however, *we have only the prisoner's word that twenty-five* cassettes are missing and I am not prepared to recommend compensation on that basis." (My emphasis.)

Conclusions

(a) It seemed perfectly clear that Jones' Property Card was not an accurate and/or complete record of his property because—

> (i) all property issued to him was not recorded on the card at the time of such issue; and
>
> (ii) the way in which some property was recorded on the card was completely inadequate and, in any case, sufficient steps were not taken to ascertain the nature and quantity of his property.

An entry on a property card such as "4 cartons of cell gear" was quite useless. Jones could not be held responsible for that.

(b) This unsatisfactory state of affairs was compounded because the Department did not transport all of Jones' property at the time of his transfer. Again, whilst the reasons for not doing so may well have been excellent, this was not Jones' fault either. Neither was it his fault that certain Departmental records were destroyed or that those that did exist were plainly deficient.

(c) The prisoner's claim that his property was sealed when he last saw it at C.I.P. had been confirmed. His claim that the property was not sealed when he next saw it at Grafton had not been refuted and, in fact, the only evidence available (which my Office sought) tended to support his claim.

(d) (i) The Department was unable to produce any evidence to refute Jones' claim that he had 65 cassettes, when he left the C.I.P. Strangely, however, the Department appeared to expect the prisoner to produce *proof* of his claim.

(ii) In rejecting his claim for compensation, the Acting Director of Establishments, in effect, said that the prisoner's word alone could not be accepted and that there was no official confirmation of what the prisoner claimed because the officer responsible did not do what he should have. I assumed that the Acting Director's views represented the views of the Department for there was nothing in the Department's letter of 15th March to indicate otherwise.

In my view, this line of reasoning was quite unfair and insupportable. The only way Jones had to *prove* that he had 65 cassettes was via official Departmental records maintained by the Department's officers. It was clear, from what he had said in his letters to me, that Jones expected that the Department would have recorded accurately and completely those items of property issued to him officially. Such an expectation was not unreasonable in my view. That the Department had failed to do so was not Jones' responsibility but the Department's and, I took the view that unless it could be proved that Jones did *not* have 65 cassettes, the Department should act in accordance with such responsibility.

The other aspect which, I feel, deserved criticism, related to the completely inadequate way in which Jones' application of 12th September had been treated. No real attempt had been made to investigate Jones' claims and the matter merely attracted a rather "huffy" rebuke from the O.I.C., Reception Room. It was not until Jones' complaint to my Office had been referred to the Department that any worthwhile action was taken.

I, therefore, wrote to the Chairman of the Corrective Services Commission and said that, in my view the basis of the apparent decision to reject Jones' claim for compensation (namely, that the prisoner's word alone was insufficient) was conduct which might be found to be wrong in terms of the Ombudsman Act in that it was unreasonable and unjust, particularly in the light of the admitted failure of the Department's officers to count the number of cassettes held by the prisoner and the obvious deficiencies in the recording of Jones' property, both at the time of his transfer and, beforehand, during his stay at the C.I.P. I asked the Chairman, therefore, to reconsider the matter of compensation.

In addition, I suggested that the Commission investigate—

(i) the introduction and utilization of a more appropriate method of recording/checking property, including property purchased by a prisoner through the Department (Activities) and property brought to the prison for him by relatives and/or friends; and

(ii) the obvious problem of transporting a prisoner's property with him on transfer, particularly his personal and valuable property.

The Chairman subsequently wrote to me and said that he had decided to reconsider the question of compensation being paid to Jones and, in this regard, he had asked the Director of Establishments to urgently negotiate with the prisoner. The Chairman went on to say—

> ". . . I concede that the action taken by (the O.I.C., Reception Room) was wrong, and as a consequence I have arranged for this matter to be brought to the attention of the Superintendent Inspectorate Division, in order to prevent any further repetition of such incidents in future. Moreover, I have personally spoken to the officer who was responsible for the transfer of Mr (Jones') property from the Central Industrial Prison and indicated the unacceptability of his error. However the Reception Room is now under new management and a system of recording prisoners' property has been introduced which should minimize if not eliminate the problems which have occurred in this case."

Later still, the Chairman informed me that an approach was being made to the Treasury seeking $199.75 compensation for Jones, that is, the retail replacement cost of 25 pre-recorded cassettes.

The general issues I raised regarding adequate recording of property and its conveyance when prisoners are moved are, at time of writing, receiving attention within the Department and the Chairman has undertaken to keep me informed.

I considered that Jones' complaint to me had been sustained but, in view of the action taken by the Chairman, I took the matter no further.

APPENDIX A

DISCREPANCIES BETWEEN PROPERTY CARDS

Analysis of entries appearing on Cards C71543 (prepared at C.I.P.) and C47110 (prepared at Grafton) reveals the following apparent discrepancies:

(i) *Property received Grafton in excess of quantity recorded at C.I.P.*
- 1 Belt.
- 2 Trousers.
- 1 Jeans.
- 1 Coat/Jacket.
- 1 Level.

(ii) *Property received Grafton not recorded at all at C.I.P.*
- 1 Pullover.
- 1 Sandals.

(iii) *Property recorded C.I.P. not recorded Grafton*
- 1 Cardigan.
- 1 Clock.

DEPARTMENT OF CORRECTIVE SERVICES

Failure to Prevent Publication of Incorrect Material

During the course of investigating a complaint from a prisoner, it came to my notice that a Departmental Circular regarding the processing of prisoners' applications had been "reproduced" in "Inprint", an official Departmental publication circulated amongst prison inmates.

The terms of the Circular, as reproduced in "Inprint", read as follows:

"Introduction of procedures for the acknowledgment of prisoners application.

.....

> As a result of a recent discussion between the Ombudsman and officers of the Department, the following procedure covering acknowledgement and follow-up of prisoners' applications and statements had been introduced.
>
> If the application seems trivial to the Wing Officer or the Superintendent, then it should be torn up. Otherwise, the procedure below will be followed.
>
> The Secretariat Branch of the Department will forward an acknowledgment to the prisoner upon receipt of the application at Head Office. Should an answer not be sent within four weeks an interim reply will be forwarded by the Section concerned. Subsequently, follow-up replies will be sent at two-weekly intervals until a final answer is forwarded to the prisoner."

I was already aware that in the actual Circular issued by the Department, the second paragraph, as printed in "Inprint", did not appear. I was extremely concerned that incorrect and misleading information should be disseminated to prisoners by the Department itself and I decided, therefore, to investigate the matter of my own volition.

Initial inquiries resulted in my being provided with a copy of the "Circular" which had been forwarded to the Editor of "Inprint" and which had eventually been printed. That the "Circular" was a fake was clearly evident; the offending paragraph was of a completely different type form to the rest of the document.

I took up the matter with the Chairman of the Corrective Services Commission and in doing so, I said—

> "It seems that the matter may have been intended as a joke; but it is no joke that the many prisoners who might well believe and, indeed, expect the contents of Departmental circu' rs preproduced in 'Inprint' to be accurate and correct. The fact is that at least one prisoner (my correspondent) believes what he read in the magazine."

The Chairman subsequently provided me with comprehensive reports about the matter and, in his letter to me, he concluded by saying—

> "This matter highlights a severe malfunction in the editoring process associated with the production of 'Inprint'. I have requested the Director of Programmes to revise the present procedures to ensure that such an incident does not occur again."

I carefully considered whether I should pursue the matter but decided to let it rest. However, I wrote to the Chairman and said—

> "I am sure you agree with me that the dissemination of information to prison inmates requires the highest degree of care and accuracy and, when such dissemination is by way of a Departmental publication, that requirement becomes absolute. Oversight or inadvertence of the nature evident in this case, no matter how genuine the reasons, cannot be excused.
>
> Having carefully considered whether I should take the matter further in terms of section 24 and 26 of the Ombudsman Act, I have decided that I should not. In reaching my decision, I have kept in mind that you have already arranged for editorial procedures to be reviewed to ensure that a similar incident does not occur again.
>
> I find the complaint sustained but I now propose to discontinue my inquiries."

DEPARTMENT OF CORRECTIVE SERVICES

An Effective and Legally Doubtful Sanction

A prisoner, who was a regular correspondent, wrote to me again in February, 1980. This time his complaint concerned the method of punishment, which was in use at open institutions, for minor breaches of prison rules. My inquiries into this matter revealed that the only means of effecting the punishment for a prisoner charged with a breach of discipline, was to lock him away at a given time so that he could not receive the benefit of the amenities that are provided for the prisoners.

The early lock-in took place only on Sunday nights, to allow a prisoner the opportunity to put his case to the Superintendent, should he believe the punishment to be unfair. At first sight, it seemed to me to be a reasonable approach to the problem of taking a prisoner at a minimum security institution "off amenities", as depriving prisoners of privileges is authorized under section 23A of the Prisons Act, 1952. Further, Rules 5 (a) and 5 (b) made in accordance with the provisions of section 49 of the Prisons Act read as follows:

> *"Rule 5 (a)*
>
> An officer who sees, hears or otherwise becomes aware of an offence against prison discipline by a prisoner shall forthwith report the offence, on the form designed for the purpose, to the Superintendent of the prison. Such firstmentioned officer may lock the prisoner in a cell or otherwise restrain his communication with other prisoners prior to making such report.
>
> *Rule 5 (b)*
>
> Upon receipt of a report, the Superintendent of the prison shall carry out such investigations as he may desire as to the truth of the report and the gravity of the offence. If he is not satisfied that an offence was committed, he may return the prisoner to the ordinary routine of the prison. If he be satisfied that an offence was committed but that such offence is not of sufficient gravity to warrant charging the prisoner, he may deprive him of participation in the amenities of the prison for such period as the Superintendent seems appropriate, provided that such period shall not exceed one month without the Commissioner's concurrence."

It transpired, however, that no written report had been submitted and that a prison officer and not the governor had determined the guilt and the punishment. In the circumstances I had no alternative but to find the complaint sustained even although I was satisfied that the Superintendent had acted in good faith in allowing this system to operate.

Consequently, I took up that matter with Dr Vinson, Chairman of the Corrective Services Commission, who informed me that measures had been taken to eliminate this method of sanction.

When I informed my complainant accordingly he replied that he had discussed the question within the Prisoners' Action Group and that the conclusion had been arrived at that—

> ". . . the 'early night' summary procedure served the benefit of both sides in some circumstances and should be retained in some form. It is an effective punishment which prisoners pleading or accepting guilt can often feel themselves to be justifiable. Probably the fact that it survived so long without challenge was due to this.
>
> This voluntary acceptance of the procedure has served a purpose in the past and we believe it should be available in the future."

My complainant himself had thus indicated that the early lock-in was considered to be of benefit to both prisoners and officers in some circumstances and should be retained in some form.

I was therefore pleased to note that the overall question of effective sanctions available to Superintendents of open institutions has been referred for comment to the superintendents of such institutions as well as to the Corrective Services Commission.

DEPARTMENT OF CORRECTIVE SERVICES

Availability of Circulars

Although my function is the investigation of complaints, I am often able to give assistance by way of information or of referral to an appropriate authority. Such assistance is frequently required by prisoners whose activities are subject to a great deal of control. In order to minimize arbitrary and/or discriminatory treatment of prisoners, the Department of Corrective Services administers such controls in accordance with terms set out in the Prison Regulations, the Prison Rules and in numerous Circulars.

Recently I received a request from a prisoner for a copy of one of these Circulars which he wished to show to a Prison Officer who had made a decision contrary to the specific conditions contained in that Circular.

My supplying such a document, as I did in this case, presents no difficulty if it is confined to isolated instances. Such requests, however, could become a burden on my staff and, more importantly, are an indication of a defect in prison administration. Accordingly, I wrote to Dr Vinson asking him to confirm that all Superintendents have a complete set of Departmental Circulars and that Prison Officers have been instructed to refer to their Superintendent all questions from prisoners as to matters covered in these Circulars. Consequently, I was pleased to note that the next Circular issued was to that effect.

DEPARTMENT OF CORRECTIVE SERVICES

Problems of a Vegetarian

The investigation of specific complaints may result in a change in administrative procedure which should prevent similar complaints from arising in future. Sometimes, however, it may be necessary to repeatedly draw the Department's attention to a problem, which may each time be rectified, only to emerge anew at a later date. The matter of the provision of vegetarian diets for prisoners is a case in point.

On 13th August, 1979, I received a complaint from a prisoner at Cessnock Corrective Centre who had been unable to obtain a vegetarian diet at that institution since he had, a year earlier, embraced the faith which prohibits the killing and eating of animals. My inquiries revealed that the servery officers had been instructed that any inmate could be served with vegetables only and that my complainant had received "a full plate of vegetables for lunch and dinner", but that no protein supplement had been provided.

Before the matter could be finalized my complainant was transferred to Glen Innes Afforestation Camp, from where he wrote to me that—

> "The present situation is that I receive the normal meal minus the meat portion."

Two days later, however, he wrote as follows:

> "The situation has now changed and as of lunch-time Wednesday, 12th December, 1979, I have been receiving a raw vegetarian diet . . . I find this to be a totally adequate diet . . . I wish to thank you for your assistance in this matter as it is very important to me."

In view of this information I advised my complainant that I did not propose to take any further action unless I heard from him again.

I did hear from him again. In a letter dated 24th December, he informed me that he had been transferred to Grafton Gaol where he was unable to obtain a vegetarian diet. On receipt of this letter one of my officers telephoned the Acting Superintendent at Grafton and obtained from him approval for a vegetarian diet for my complainant. Further, I was advised on 20th February, 1980, by Dr Vinson that—

> "It is the policy of this department to make full vegetarian diets available in all institutions and departmental catering officers have supplied each institution with sample menus and recipes."

I was confident that this problem had been satisfactorily resolved, until I received a complaint from another prisoner at Glen Innes Afforestation Camp about his difficulties in obtaining the vegetarian diet ordered for him by a prison medical officer at Grafton Gaol.

DEPARTMENT OF EDUCATION

Unfair proposal to sell land by private treaty

My complainant owned land which was dissected at one point by the site of a school which had been long since closed. The school site, in fact, had been originally resumed from the very property that he now owned. He had discovered, however, that the Department planned to sell the site privately to an Investment Company whose land adjoined the site on one side.

My complainant expressed his views in the following terms:

> "I have common boundaries totalling 312 metres with the school site compared with a common boundary of less than 80 metres between land owned by the Company.
>
> I currently own 114 hectares of land adjoining the school site of which portion has been used by the Company because my livestock have no direct access to water which is a dam on the opposite side of the school site.
>
> The Company currently owns only 16 hectares of land adjoining the school site although it enjoys the free use of the school site and some of my land.
>
> I consider that it is totally unjust for the Education Department to sell the property without giving notice to the adjoining landholders or trying to determine which party it was resumed from.
>
> It was obviously resumed from the property which I own as I feel confident that my detached property could only have eventuated as a result of the resumption.
>
> In addition to my 114 hectares I hold lease on 6.9 hectares of roads within and around my property including the section of road immediately north of the school site.
>
> My contacts at the Department of Education . . . told me that nothing could be done to stop the sale at this stage."

I refered the matter to the Director-General of Education and, after receiving his reply, I was able to write to my complainant as follows:

> "I have now completed my inquiries in this matter and am able to summarize the position as follows:
>
> (a) The Minister for Education gave his approval to the sale of this surplus Government property to the Company, mainly on the basis of information submitted by the Company's representative to the effect that substantial common land boundaries were shared with the school site.
>
> (b) However, following reference of your complaint to the Department and further investigation by the Department's officers, it has been found that the Company is the registered proprietor of land on only one side of the school site and, as such, is not the main adjoining property owner.
>
> (c) In the circumstances, the Minister has rescinded his decision to sell the land by private treaty, and disposal of the site by Public Auction will now be arranged through the Government Real Estate Branch of the Housing Commission of New South Wales.

(d) That Authority will be asked to note your interest in the acquisition of the site so that you may be advised of the auction date at the appropriate time.

In all the circumstances, whilst I consider your complaint to have been sustained, I propose taking no further action in terms of the Ombudsman Act in view of the action taken by the Department to cancel the previous arrangements for the sale of the property.

Consequently, I will now discontinue my inquiries."

DEPARTMENT OF EDUCATION

Unreasonable request to undergo further medical examination and X-ray

My complainant, a teacher, had been refused entry to the Superannuation Fund because, it was claimed, she had not had an X-ray within the six months preceding her appointment to the permanent teaching staff. She claimed that she had undergone satisfactory medical examinations and X-rays on the following occasions:

- 1973—prior to entering University on a Teaching Scholarship.
- 1976—when in 4th year at University and just prior to finishing her Diploma of Education.
- 1977—when commencing an Honours course.

The complainant started teaching in August, 1977, but it was not until October, 1978, when a list of new teachers accepted as contributors for superannuation was published that she discovered that her name was not on the list. As a result of inquiries she initiated through the Department, she was eventually placed on the list of contributors in May, 1979.

In July, 1979, she was asked to attend yet another medical examination and X-ray. She had the medical but refused to have the X-ray as she strongly objected to unnecessary exposure to X-rays. The Superannuation Board then refused to accept her as a contributor because of the lack of an up-to-date X-ray and it appeared that some of her previous medical reports had not been forwarded to the Board by the Department.

I made inquiries with the Director-General of Education and the President of the State Superannuation Board. As a result, it was quickly established that, even though the complainant had entered the permanent teaching service in August, 1977, it was not until early 1979 that the Department informed the Board of her permanent appointment and, in fact, gave the date of such appointment as 18th January, 1979. So far as the Board was concerned, then, the most recent X-ray available was eighteen months old and unacceptable.

The Director-General told me that he regretted that the complainant's appointment to the permanent teaching staff had not been notified to the Board until February, 1979. He went on to say—

> "The medical examination which was arranged in the middle of last year, followed advice from the State Superannuation Board that the previous Medical Certificate was not acceptable for superannuation purposes, having been conducted more than nine months prior to the date of commencement of contributions. Her concern about the need for the chest X-ray associated with this examination is appreciated. I regret the inconvenience which has been caused."

The President of the Board informed me that, since the complainant had satisfactorily passed a medical examination for entry to the Fund in July, 1977, she was, at the time of her permanent appointment in August, 1977, a member of the Fund and there was no need for her to undergo any further examination or X-ray.

I decided that the complaint made to me was wholly sustained in the light of the administrative error in the Department. However, as the matter had been satisfactorily resolved, I took no further action.

HEALTH COMMISSION OF NEW SOUTH WALES

Failure to give access to patient's medical records

Access to confidential information is always topical and there is greatly increased concern at the present time with the secrecy of administrative procedures and growing demands by citizens for access to government files.

I was interested, therefore when I received a complaint in March, 1980, from a complainant who had approached the Health Commission and asked for a report on an injury she sustained whilst a hospital patient.

My complainant underwent an operation at the hospital in June, 1979. Five days after the operation, she buzzed the staff for assistance in going to the bathroom. There was no response from the staff, so she endeavoured to go by herself. She fainted, striking her head and arm. X-rays taken by the hospital after radiological treatment to the injured areas are purported to reveal no internal problems.

One week after her discharge on 5th July, 1979, she complained of pains in the affected areas and after many visits to various doctors and treatments including tablets, acupuncture and physiotherapy, she has now been told she is suffering from extensive damage to her neck and "frozen shoulder".

At this stage she sought legal advice and her solicitor wrote to the doctor who had treated her in hospital at the time. The hospital replied that it was not prepared to divulge the full details relating to her injury, and it was at this juncture that the complainant sought my help.

Since I took office, I have had discussions and correspondence with the Chairman of the Health Commission of New South Wales with regard to the production of medical records. I was therefore aware of the opinion of the Health Commission in regard to this matter.

In correspondence from the Commission in 1975 and 1976, I was informed—

> "It would be a serious breach of the conventions governing relationships between hospitals and their medical staff, if hospitals were to produce medical records to patients."

and

> "Other than when records were produced to a Court in answer to a subpoena, the record should remain within the hospital. Appropriate synopses, copies or reports based on the records are made available to other hospitals or medical practitioners who become involved in the treatment of the patient, or, with the patient's written authority, to solicitors, insurance companies or others who have to assess claims or advise on medico–legal matters."

The reasons given by the Commission for this policy were that medical records often contain important subjective observations of the patient and it would not be conducive to the maintenance of rapport between doctor and patient if such observations were shown to the patient. It would also have an undesirable inhibiting effect on the medical officer in his compilation of the records if he knew that the patient could have access.

On 27th February, 1980, Mr Akister, M.P., had raised the question of access to medical records in the New South Wales Parliament and was advised by the Minister for Health—

> "Where patients are taking action in cases alleging malpractice, their only access to the medical records held by public medical institutions is a request by the legal adviser for a report. This report must be supported by a written form of consent signed by the patient. It must be appreciated that such a report may well be edited.
>
> However, if legal proceedings are commenced, the documents must be produced for the court in response to a subpoena."

I advised my complainant generally in terms of the Minister's reply, also advising her and the decision as to whether to proceed with a neglect suit against the hospital would be a matter for her decision, and then on 28th March, 1980, I took the matter up with the Chairman of the Health Commission stating, in conclusion—

> "I would appreciate any comments that you may care to furnish on this procedure particularly insofar as you consider that it offers the patient an adequate opportunity of deciding whether in fact the allegations are reasonably based."

I was extremely pleased to receive a reply from the Chairman on 6th May, 1980, informing me that the Health Commission had recently reviewed this complete matter through its Medical Records Advisory Committee and in the course of the review, sought advice from the Privacy Committee, the Australian Medical Association and the Law Society, as well as the Commission's own legal and hospital administration advisers. As a result of this review, a circular has been issued dealing with the Confidentiality of Health Records in all Hospitals and Community Care Centres which states, in part—

> "8.2 The patient may request access to the information contained in his record. This may be granted unless, in the opinion of a health professional access would be prejudicial to the physical or mental health or well-being of the patient. Indirect access may be provided through a third party, if this is thought to be desirable."

Although I have full authority to obtain all the Hospital's records under sections 18 and 21 of the Ombudsman Act, whereunder public interest, privilege, duty of secrecy and other restrictions or disclosure by a public authority does not apply to me, I prefer the hospital to supply details of the patient's record direct to the patient as outlined above, as this does not then conflict with the hospital's moral obligation of confidentiality between the hospital and the patient.

HUNTER DISTRICT WATER BOARD

Unfair Increase in Water Rates

I received a complaint from the owner of commercial premises who received a rate notice for $447.74 from the Hunter District Water Board in May, 1978, for extra rates levied for the years 1975–6 and 1976–7.

In his letter, my complainant claimed that—

- he had paid a rate notice served for 1976–7 in the amount of $174.77 and also the rate notice for 1977–8 for $515.56.
- a further rate notice received in May, 1978, claimed an extra amount of $447.74 which upon inquiry he was informed was in relation to extra rates levied for the year 1975–6 and 1976–7.
- the explanation given was that the Board had received no valuation from the Valuer-General for the 1976 rating year and in those circumstances the Board has statutory powers to make its own valuation.

My investigation involved checking of the Board's file and discussions with the Board's officers as well as an examination of the Board's Act to determine whether there was any discretion as to the imposition of rates in all of the circumstances which applied in this case.

The difficulties appeared to arise from the following sequence of events:

(1) On 1st July, 1975, the Hunter District Water Board adopted, for rating purposes and in accordance with its Act, the series of Valuer-General's valuations dated 1st January, 1973.

(2) On 13th April, 1976, the Board's Auditor pointed out that a valuation in respect of my complainant's land had not been included in the Valuer-General's series of 1st January, 1973.

(3) The effect of this omission (2 above) was that rates for the year 1975–6 had been levied by the Board on the previous valuation (assessed annual value $1,000).

(4) The Board is empowered, under the Hunter District Water Sewerage and Drainage Act, 1938, to effect a valuation in such a situation, with effect from 1st July of the financial year of the discovery of the omission, i.e., 1st July, 1975.

(5) In this case, however, the Board's valuation was not carried out until 6th May, 1977. Notification of this valuation appears to have been overlooked at that time. The Board attributed the delay to the large volume of work which arose from the adoption of the 1973 valuations.

(6) The Valuer-General's valuation of assessed annual valuation of $2,950 was dated 19th September, 1975, and this superseded the Board's valuation.

(7) The notice of valuation issued on 10th November, 1978, gave my complainant the right of appeal and information regarding such was contained upon the form.

It appeared that the Board was not at fault in the initial delay, which was due to the non-inclusion of my complainant's land in valuations carried out by the Valuer-General.

It also appeared that the Board was responsible, however, for a subsequent delay from the time its Auditor detected the omission of an up-dated valuation until the Board effected its own valuation and subsequently notified my complainant.

I indicated to the Board that I found it understandable that the computerization of the large volume of work involved in the adoption of the 1973 valuations would tax the resources of staff and delay would inevitably occur in some part of the work. However, I questioned the fairness of the Board's decision to backdate rate levies on commercial premises when it is apparent that the owners of such premises would not have foreseen the need in advance to provide for such a contingency and would not have the opportunity at a later date to recoup their losses.

I had regard to section 101 (4) of the Hunter District Water, Sewerage and Drainage Act which, inter alia, outlines circumstances where the Board may cause a valuation or apportionment of the valuation to be made; and to clause 11 of the Third Schedule to the Board's Act which similarly indicates those times from which rates may be levied. I expressed the view that the Board had an option as to whether, in the circumstances which existed, backdated rates should be levied.

I felt that it was also pertinent to consider whether the Board would suffer any undue loss of revenue if it decided not to levy additional rates on an individual and whether, in such a situation, other ratepayers would carry an additional burden. It appeared that this was not the case.

At its meeting held on 16th November, 1979, the Board considered certain observations I had made in this matter along the lines of the above statements. As a result the Board approved that the rates subject to complaint would be waived and that the practice of effecting retrospective adjustments beyond the current rating year, in cases where delay in effecting their adjustment was attributable to the Board, would be discontinued.

I found that the complaint had been sustained in terms of the Ombudsman Act. However, in view of the Board's action in rectifying the matter and in amending its policy to ensure that similar situations do not occur in future, I did not take the matter further and discontinued my investigation.

DEPARTMENT OF INDUSTRIAL RELATIONS

Failure to Properly Investigate Complaint

The complainant (referred to hereafter as "Mr A") felt that his complaint to the Department had not been investigated properly.

The basis of Mr A's complaint was that—

(i) he had been employed by a large Real Estate company as a salesman. For reasons which are not important, he tendered his resignation, giving two weeks notice, on 26th March, 1979;

(ii) he had been summarily dismissed on 30th March, 1979, by the Sales Manager, allegedly because he had caused a scene in the office. Mr A denied that he had caused a scene or that he had been involved in any dispute with the Sales Manager;

(iii) he claimed that the employer owed him an extra weeks wages in lieu of notice, holiday pay and one weeks car allowance (which allowance was a condition of his employment), as well as commission on sales; and

(iv) he was not satisfied with the way in which his complaint to the Department had been investigated.

I sought from the Under Secretary of the Department his comments concerning Mr A's complaint to me. The terms of his reply of 30th August can be summarized as follows:

- Mr A had lodged his complaint with the Department on 2nd April, 1979, claiming one weeks wages in lieu of notice, that holiday pay was incorrectly calculated on termination and that no letter of appointment had been drawn up in his case even though this was a requirement of the Real Estate Salesmen's (State) Award.

- An Inspector had interviewed the Sales Manager of the company concerned and had examined time and wages records. The Sales Manager confirmed that Mr A had given two weeks notice on 26th March, 1979. However, the Sales Manager claimed that, on 30th March, Mr A had caused such a scene in the office that he was dismissed on the spot for misconduct and paid for the week that he had worked.
- Mr A was also paid holiday pay of one-twelfth of his gross earnings including commission which amounted to $8,300. The Sales Manager assured the Inspector that Mr A would be paid his holiday pay on commission when settlement was made on any of his outstanding incomplete sales (as per the terms of the Award). The amount in question was said to be around $24.
- The Sales Manager had admitted that no letter of appointment had been entered into with Mr A as the company was having a new one drawn up which changed the system of remuneration.

The Under Secretary went on to say—

"Mr A contacted the officer handling his file on 1st May, 1979, disputing the Company's comment that he was dismissed for misconduct. On 3rd May, 1979, he spoke to the Chief Prosecuting Officer stating that he was dissatisfied with the investigation. He advised the Chief Prosecuting Officer that the reason why he had given notice was that (the Company) had changed the system of commission which would mean that he would receive $16,000 per annum instead of $18,000. It was explained to him that he was receiving in excess of the award rate and had received his correct holiday pay on termination. He was questioned by the Chief Prosecuting Officer regarding his dismissal. When asked whether he had a new job to go to before the expiration of his notice he was evasive but admitted that he commenced with another real estate company on 9th April, 1979.

The Chief Prosecuting Officer discussed the file with the Inspector and the officer handling the file and was of the opinion that no breach of the industrial laws had occurred except for the failure of the parties to enter into a letter of appointment. Mr A was advised of the Department's decision on 3rd May, 1979.

On 7th May, 1979, Mr A telephoned the Senior Legal Officer complaining about the Chief Prosecuting Officer and the Department not taking prosecution action on his behalf. He advised that he had instructed a solicitor to institute legal proceedings against his employer for amongst other things, libel. The Senior Legal Officer in the course of an extensive conversation formed the legal opinion that it would be difficult to present Mr A as a witness of the truth as his views appeared totally subjective."

During the course of my investigation, Mr A corresponded with me regularly and at some length. Apart from a matter he raised which is set out later in this case history, the terms of his letters are not significant. However, early in September, 1979, Mr A informed me that his solicitors were pursuing with the company his claims in respect of moneys allegedly owing to him.

I wrote again to the Under Secretary and raised the following issues:

(a) As Mr A had been employed by the company for nine months, the altered system of remuneration (which arose shortly before and was the reason for his resignation) would not appear to explain why a letter of appointment had not been entered into at the commencement of his employment.

(b) I was unable to understand the significance of the statement made by the Chief Prosecuting Officer regarding Mr A having another job to go to. He had given his notice on 26th March and it was only natural that he would commence to seek alternative employment from that date. He was obviously free to engage in other employment after 30th March, the day of his dismissal.

(c) I went on to say—

"In order that I might conclude my investigation of this matter expeditiously, I would appreciate a copy of Mr A's complaint to your Department and of the report/s made out by the Department's investigating officer resulting from Mr A's complaint, as well as any additional reports and/or notations of action (including no action) to be taken as a result of that report.

Particular aspects I wish to clarify are probably covered in these reports; but if not I would appreciate separate advice on these, viz.:

(i) Did Mr A complain to your Department, either in writing or orally, that staff who lodge their resignations are forced into situations where a scene is caused by management and the staff member is then dismissed? If so,

(ii) Did the investigating officer discuss this aspect with other employees or former employees?

(iii) Were the circumstances of Mr A's dismissal checked with other members of the firm's staff than the Sales Manager?

(iv) On what specific grounds or statements made by Mr A did the Senior Legal Officer base his opinion that Mr A would be difficult to present 'as a witness of the truth as his views appeared totally subjective'?"

The Under Secretary, when he replied, provided copies of various reports, etc., from his file. I do not propose to deal at any length with those reports at this stage because, later in my investigation, I asked that the whole of the Department's file be produced to me. An analysis of the contents of the file is included later in those notes.

However, the Under Secretary reported in the following terms:

". . . I advise that the purpose of the Department's investigation of an industrial complaint is to determine whether breaches of the industrial legislation of New South Wales have occurred. If a breach has occurred then the Department takes appropriate action, which may include legal action. The Department, when it institutes legal action, is bound by the criminal standard of proof and therefore must prove its case beyond reasonable doubt.

In Mr A's complaint to the Department, he claimed one week's wages in lieu of notice, an underpayment of holiday pay, that no letter of appointment had been entered into and enquired as to whether a particular exchange of contracts had taken place and, if so, whether it had been taken into account in the holiday pay calculation.

The Department's investigation revealed that there was a conflict between the employer and employee as to the reasons for termination of the contract of employment. This was set out in my letter of 30th August, 1979. The company undertook to pay outstanding commission and holiday pay to Mr A for sales not completed. That undertaking would seem to acord with the acknowledgement from (the company's) Solicitors of outstanding commissions. Although Mr A demanded instant payment, this undertaking by the company was in accord with the Real Estate Salesmen's (State) Award and with a decision of the Industrial Commission of New South Wales in *Proud Projects Pty Limited* v. *Plotkin*, which was decided on 31st May, 1977.

The investigation disclosed that there was no letter of appointment and as this involved a breach by both parties of the award, it was decided that no further action would be taken in this regard, as the company was in the process of drawing up a new agreement as a result of the change in calculating remuneration.

In respect to your penultimate paragraph, I advise—

(i) No. Even if such a claim were to be made it would not be a matter upon which this Department could take any specific action.

(ii) This would appear to be not applicable.

(iii) No.

(iv) Mr A contradicted himself on several occasions in a lengthy conversation, became emotional and made a number of threats in order to induce the Senior Legal Officer to take unwarranted action on his behalf.

In regard to your fourth paragraph regarding commissions, I would advise that the Industrial Commission has ruled that the Department has no jurisdiction to recover commissions or over-award payments but is limited to ensuring that the prescribed payment under the award is made.

This is the second occasion on which an extensive re-examination of this file has occurred following demands by Mr A. In my view the Department's initial decision was correct. I would suggest that if Mr A wishes to pursue this matter, he should take advantage of his own alternative means of redress."

Of course Mr A had already taken action through his Solicitors or, to use the Under Secretary's terminology, had taken "advantage of his own alternative means of redress" and, it might be noted, eventually secured from the company payment of all of the amounts he had sought, including the additional week's pay in lieu of notice but excepting (at time of writing) the extra week's car allowance.

On the material then available to me, I informed both Mr A and the Under Secretary that I was unable to pursue the matter any further and that I proposed to discontinue my inquiries.

However, Mr A wrote to me again and produced what he considered to be clear evidence that his dismissal for misconduct on 30th March had been deliberately engineered. His evidence consisted of his termination cheque which was dated 29th March, the day *before* his dismissal. Mr A told me that he had informed the Department of his "new evidence" and had discussed the matter by telephone with the Chief Prosecuting Officer who had "agreed to re-open the matter" and to have another inspector allocated to the case.

Mr A later advised me that the Department had recovered $25.00 holiday pay that had been owing to him. He understood that the Department could not pursue his remaining claims on the company and he said he would take action in this regard through his Solicitors.

After reviewing the matter, I was concerned to establish what action the Department had taken in the second investigation. I was also concerned that Mr A's original complaint to the Department, in the light of the evidence he had presented, might not have been investigated as thoroughly as the complaint deserved. I, therefore, wrote to the Under Secretary and said—

> "Mr A has now sent me a copy of a cheque drawn in his favour by (the company) and dated 29th March, 1979, in the sum of $459.96. He states this is the salary he was paid on termination of his services, which is said to have resulted from a scene he caused on 30th March, i.e., the day following that on which the cheque was made out.
>
> Mr A claims that the signatory of this cheque was not present in the office on the day of his dismissal and claims that the cheque is conclusive proof of his claim that the firm's management forced him to leave earlier than his intended resignation and that the 'scene' was created by the management. I understand that Mr A had an interview with the Department's (Chief Prosecuting Officer) on 12th November and that . . . the matter (is to be) re-investigated by an officer other than the officer who carried out the first investigation.
>
> Whilst I have not, at this stage, decided to re-open my investigation of Mr A's initial complaint, I would appreciate your advice regarding the outcome of any investigation following Mr A's discussions with (the Chief Prosecuting Officer)."

On 7th December, 1979, I received a reply from the Under Secretary wherein, inter alia, he said—

> "I refer to your letter of 27th November, 1979, concerning Mr A.
>
> Since your letter of 8th November, 1979, Mr A has been in regular contact with the Department. Following his advice of 13th November, 1979, that he had not as yet received the $25.00 outstanding to him in holiday pay, a Departmental Inspector called at (the company) and collected a cheque for that amount.
>
> In regard to Mr A's claim that the signatory of his termination cheque was not present in the office on the date of his dismissal, the Company advised that as the Managing Director was frequently away from the office a number of blank cheques signed and dated were left with the office's Manager.
>
> I have attached herewith a copy of a letter forwarded to Mr A on 30th November, 1979, which is self-explanatory."

The letter to Mr A referred to by the Under Secretary said, inter alia—

> "Please find attached the Department's cheque for $25.00 and, as previously indicated, no further action will be taken by the Department in respect of your complaint.
>
> The matter raised by you concerning derogatory references from your former employer is a matter which you should raise with your Solicitor and is not a matter which falls within this Department's administration.
>
> The Department will enter into no further correspondence in respect of your complaint."

I wrote again to the Under Secretary and said that I had decided to re-open my investigation of Mr A's complaint to me. I went on to say—

> "I am concerned that the Department appears to have paid insufficient attention

to the nature of Mr A's complaint as distinct from the manner in which it was presented, and appears also to have accepted without question the assurances of the employer's representative on the question of wrongful dismissal without undertaking any detailed investigation.

Mr A has presented to me a photocopy of a cheque made out in his favour . . . by (the company) and dated 29th March, 1979; a copy is enclosed. The numerals in the date and the sum appear to be very similar if not identical. The inference to be drawn is that this cheque, which is said to represent final salary payment, was made out on the day *prior* to the supposed 'scene' which Mr A is said to have caused and which resulted in his dismissal.

Mr A complained that he had been wrongfully dismissed but the Department discussed his dismissal only with the person who was responsible for his dismissal and accepted that person's assurances.

The Department has since accepted the assurances of a representative of the firm that it is normal practice for a number of blank cheques to be signed and dated for use by the officer manager during the Managing Director's absence. This does not explain the date on the cheque in question.

I consider that adverse comment is warranted under section 24 of the Ombudsman Act relating to the points made above and I now give you the opportunity to make further submissions in accordance with the Act so that I may consider whether further action under section 26 of that Act is warranted."

The Under Secretary's reply of 15th January, 1980, said—

"I do not propose to accept with equanimity baseless allegations of the type levelled at this Department in your third paragraph. Whilst you apparently have been influenced by the manner in which Mr A's complaint was presented, let me assure you that my officers have not been, and they have dealt with the nature of the complaint quite impartially.

As I have pointed out on many occasions previously, to take prosecution proceedings successfully against an employer this Department is obligated to discharge the criminal onus of proof in respect of an alleged breach of the industrial law.

In this case Mr A has not brought to our attention any convincing corroborative evidence or facts which would support his version of the reason for his dismissal. (The cheque apparently pre-dating the actual day of his dismissal is not regarded as being in that category.) If the Department were to rely on the unprovable inference you say is to be drawn from a similarity in three instances where the numeral '9' appears on Mr A's final salary cheque, it would be regarded, I believe, as a vexatious and vindictive prosecutor.

Your threat that you might make a report on the case in terms of section 26 of your Act does not convince me that I should allow this Department's reputation for presenting properly prepared cases before the Chief Industrial Magistrate to be undermined by irresponsibly instituting legal proceedings on Mr A's complaint.

As you should be well aware by now, Mr A is quite at liberty to institute his own legal proceedings for recovery of any further moneys he considers are still owing to him; he would have to satisfy a much less exacting onus of proof and could claim costs against (the company)—if successful. In this regard it remains to be seen whether Mr A has the courage of his convictions. However, he is very keen—as you also appear to be—to induce this Department to conduct an unwarranted prosecution on this behalf against his former employers. As I have previously pointed out to you that is not this Department's function.

The Department's handling of this case has been strictly in accordance with ministerial policy. Moreover, the exorbitant amount of attention which has had to be given repetitively to it, because of Mr A's voluminous correspondence and your interventions, has been brought to my Minister's attention. Mr Hills has concurred in our maintaining the attitude indicated in our letter of 30th November, 1979, to Mr A viz. that no further correspondence will be entered into in respect of his complaint—unless, of course, additional relevant facts are put forward."

After Mr A had visited my Office to discuss his complaint, I asked the Under Secretary to produce the relevant file to me. This was done and it is important that I summarize the contents of the file—

(a) Mr A lodged his complaint with the Department on 2nd April, 1979. In his complaint, he claimed—

(i) payment for one week in lieu of notice (two weeks' notice having been given and accepted);

(ii) additional holiday pay on commission of $8,600 instead of $8,300 as paid;

(iii) additional holiday pay if particular sales mentioned by him finalized.

(b) (i) A Departmental Inspector visited the Company on 23rd April, 1979, and interviewed the Sales Manager (the Inspector did not speak to anyone else). The Sales Manager, *inter alia*, told the Inspector—

"He gave two weeks' notice on 26th March, 1979. However, on 30th March he caused such a scene here that he was dismissed on the spot and paid for the week."

(ii) The Sales Manager indicated that sales relating to extra holiday pay had not been finalized and, therefore, additional holiday pay could not be paid. The Inspector reported that he could not locate any underpayments in holiday pay and went on to say—

"Disregarding the dismissal for misconduct, I feel that, as the complainant had given notice and was paid for the week, he would not be entitled to a further week's pay."

(c) An officer of the Department who reviewed the Inspector's report, ordered a re-inspection and, in doing so, minuted the file as follows:

"E/ee alleges that he has received part payment for commission on the following on which he claims holiday pay was not calculated—

(Sale X) = $150.

(Sale Y) = $150.

Also claims that notice handed in on 26th was requested by E/ers to stay on the 27th, 4 hour conversation followed where upon E/ee said he would think about it. This point of time no animosity existed. Not in on 28th 29th entire day was spent in office 8.15–5.30. At 5.00 p.m. E/ee still advised of intention to resign as per the 26th, no scene caused still no animosity. Called at office on 30th as per usual and was requested for gear and was handed a cheque, E/ee & E/er shook hands and parted on best of company. E/ee most surprised at the terms of termination. If they still say that he was dismissed on the spot, E/ee advised he would institute his own legal action in this regard."

(d) On 3rd May, 1979, the Chief Prosecuting Officer recorded details of a telephone conversation with Mr A during which he explained to the latter the result of the Inspector's investigation of the matter. The Chief Prosecuting Officer went on to say—

". . . mentioned no (holiday pay) as yet re X and Y. Told him no settlement as yet and not entitled to payment to then. He said he was entitled to $24 odd H.P. now—explained when settled then entitled—asked him did he have a job to go to when gave notice—evasive but admitted he started in new job straight away—asked him did he start fight with (the Sales Manager). Said no but agreed he was very dissatisfied with new system of remuneration. Told him I would review file and decide in about a week's time. I felt that Mr A was evasive and that he was not telling me the complete story."

(e) On the same day, the Chief Prosecuting Officer minuted the file to the effect that he had discussed the matter with the Inspector and that he wished to discuss the case with the Officer to whom the file was allocated. On 7th May, he further minuted the file to the effect that Mr A had 'phoned and he went on to say:

". . . not prepared to listen—advised him to let his Solicitor look after his actions as no award breaches apparent."

(f) (i) In the meantime, on 3rd May, a letter had been sent to Mr A which, *inter alia*, said:

". . . your employer has advised that all holiday pay and outstanding commission will be paid direct to you when the sales have been settled.

With regard to your complaint regarding the circumstances surrounding your termination, I have to advise that the Department will be unable to take any action on your behalf unless you can supply the Department with some evidence to support your claim. I look forward to receiving any evidence you may have within fourteen days."

(ii) A letter was also sent to the company drawing attention to a breach of the Award in that the company had not completed a letter of appointment for Mr A. The letter went on to say:

"Your attention is now brought to this and I must ask that in future the letter of appointment should be completed, otherwise consideration will be given to legal proceedings."

(g) The company later informed the Department that letters of appointment had been completed and signed by all salesmen.

(h) The next item of significance on the file was a minute made by the Chief Prosecuting Officer on 12th November, 1979, following a telephone conversation with Mr A. The minute read as follows:

"On 12th November, 1979, spoke to Mr A at length—demanding service from Department and assistance with his civil case—advised him no further action—said he would go again to Ombudsman and see Mr Hills. Said new evidence to support his case, a cheque dated the day before he left. Told him only evidence that wrong date on cheque not necessarily support for his case. Told me he is suing (the company) for $15,000 for defamation. Says (the company) claim he is 'devious and a troublemaker and in need of psychiatric help' said he had it on tape. Said he had not received $24 yet. Told him Co. had agreed to pay. Said they would not until he withdrew his action. Advised him of role of Department and how best to let his solicitor handle it. Advised me that solicitor suggested we look at his new evidence. In a moment of weakness said if I send Inspector out to chase up holiday pay and confront them with cheque would he be happy. Said yes and would leave Department alone after that. Told him to drop his cheque in tomorrow, no lengthy letters . . . I would arrange for inspector to call on former e/er. Advised him employers comments not available to him only on subpoena to his case."

"Mr A phoned again—did I want letter with copy of cheque, said no."

(i) (i) On 13th November, Mr A wrote to the Department and enclosed a copy of the cheque to which he had referred in his telephone conversation of the previous day (and as referred to earlier in these notes).

(ii) The Chief Prosecuting Officer minuted the file as follows:

"Inspector to call on (company) collect $25 outstanding in holiday pay not paid on $300 commission on X and Y sales.

Also ask if why dismissed on 30 March '79 as stated by (Sales Manager) for misconduct why was terminated cheque dated 29th March, 1979.

Inspector to submit report to me."

(j) On 15th November, 1979, an Inspector visited the company, collected $25.00 holiday pay owing to Mr A and interviewed the Sales Manager about the manner of Mr A's dismissal. A copy of the Inspector's report is annexed to this case history and marked with the letter "A" (suitably edited to protect the identity of the participants).

(k) On 16th November, the Department wrote to Mr A and, *inter alia*, said:

"As advised I arranged for an Inspector to again visit your former employer concerning the $25.00 holiday pay outstanding to you. I am pleased to advise that the Department has collected the amount and a cheque will be sent to you shortly under separate cover.

In respect of your enquiry regarding the pre-dated cheque your former employer advised that a number of blank cheques signed and dated by Mr . . . . were left in the office as he is frequently away. The details on the cheque concerning payee and amount were filled in on the date of your dismissal, i.e. 30th March, 1979.

In view of the above no further action, as indicated in my telephone conversation of 12th November, 1979, will be taken by the Department in this matter."

Such advice was similar to that conveyed to me in the Under Secretary's letter on 7th December, 1979.

(l) Thereafter, the file consisted of a series of letters from Mr A to the Department, the contents of which do not merit reproduction. However, on 13th December, 1979, the Department wrote to Mr A and again informed him that ". . . no further correspondence will be entered into".

(m) (i) On 15th January, 1980, the Under Secretary prepared a submission to the Minister wherein he said, *inter alia*:

"Mr A originally complained to the Department on 2 April, 1979, against his former employer claiming that he was entitled to one week's pay in lieu of notice, that his holiday pay was incorrectly calculated and that no letter of appointment, as required by the Real Estate Salesmen's Award, was entered into. The matter was investigated according to accepted Departmental policy, and, as a result, the sum of $25.00 holiday pay to which he later became entitled was recovered for him. Appropriate action was taken by the Department in respect of the letter of appointment. In respect of his termination pay, there was a dispute concerning the reasons for Mr A's dismissal as the company claimed that he had been dismissed for misconduct. *There was insufficient evidence to justify the Department disputing the company's claim and, consequently, no action was taken to enforce payment of a week's pay in lieu of notice.*

Mr A was unhappy with the Department's decision and, as a result, he has continually written to the Department and to the Ombudsman requesting further action against this employer.

Mr A was advised on 16th November, 1979, that no further action will be taken by the Department on his complaint. He was also advised that should he wish to pursue his claim he should consult a solicitor, which I understand he has done.

However, lengthy letters by Mr A have continued to be received with the result that on 30th November, 1979, he was informed that the Department would enter into no further correspondence in respect to his complaint.

The Ombudsman carried out an investigation into the Department's action and advised on 8th November, 1979, that it had written to Mr A informing him that he was unable to find the actions of the Department to have been wrong in terms of the Ombudsman's Act. Since then and following further voluminous correspondence from Mr A the Ombudsman has re-opened his investigations and in this respect attention is invited to my separate minute of today's date hereunder.

In the circumstances, it is recommended—

(1) . . .

(2) that you concur in my despatching the letter hereunder to the Ombudsman."

(Emphasis is mine.)

(ii) The Minister approved the Under Secretary's recommendations.

(n) On 23rd January, 1980, the Chief Prosecuting Officer minuted the file and, *inter alia*, said—

"(The Sales Manager of the company) phoned at 3.10 p.m. re Mr A and enquiring as to whether the Department has completed his action.

I asked him who was present in the office when the scene occurred. *He said that the dismissal resulted from a culmination of several days of derogatory statements made to staff and clients within the office.*

Other employees will verify this but (the Sales Manager) said he would not advise me of names unless I could guarantee their safety from . . . harassment. On this undertaking being given he advised . . . and . . .

He said that the Company has always paid its agents correctly and is at present holding a cheque in its cheque account for Mr A for outstanding commission. He said that Mr A's solicitors had been advised of this but no one has collected it. He said the matter was in the hands of the Company's solicitor but the Company was trying not to get too involved with Mr A as it felt it could not really 'win' in the long run. He said that he was . . . concerned that the Department was still pursuing the matter. He assured me that if the Company could be of any assistance to finalise the matter, it would do so." (My emphasis.)

(o) On 5th February, 1980, the Chief Prosecuting Officer prepared a minute relating to the giving of notice in terms of the relevant Award. Such minute read—

> "I refer to your request for me to consider as to whether a breach of the Real Estate Salesmen's (State) Award had occurred in this matter by reason of the fact that Mr A, although he had given two weeks' notice, had in actual fact worked one week's notice as required by the Award. I advise that I have not been able to find a decision to support the proposition that the Award had been complied with by the fact that Mr A had worked a week after he had given notice.
>
> At common law an employee may give a longer period of notice than as prescribed in an Award. However, basic contract law gives the employer the right not to accept the notice. If the employer rejected the longer period of notice he could inform the employee that he would accept only a notice for the term prescribed by the Award. He could immediately give notice to the employee in accordance with the Award or he could terminate at once, paying the employee the amount of wages prescribed by the Award in lieu of notice.
>
> Likewise, the employer may agree to accept less than the prescribed notice should the employee wish to leave at an earlier date. Equally, an employee may waiver the requirement of notice when his services are terminated by the employer.
>
> There is nothing to prevent an employee from giving more than the notice required by an award. The actual giving of notice does not affect the rights of either party under the employment contract or the Award while such contract continues in operation (Storemen and Packers case: re Harris Scarf Limited 26 C.A.R. 392). Consequently, the fact that Mr A had given notice in this matter did not prevent the employer from summarily dismissing the employee for misconduct during the period covered by the notice.
>
> The action of the Company in dismissing Mr A during the period of notice was not wrong in law.
>
> I can find no authority for your proposition that the fact that Mr A had worked a week of his notice, that that satisfies the provisions of an Award where only one week's notice is required. *I feel that if an employer accepts a longer period of notice, then he is bound by that period of notice except in the situation outlined above where there is a breach of the contract of employment which allows him to summarily dismiss.*" (Emphasis is mine.)

As a result of my examination of the file, I felt that the situation could be summarized thus—

(1) It was important to remember that Mr A's complaint to me was that the Department had failed to properly investigate his complaint that he was not paid everything to which he was entitled, including an extra week's wages in lieu of notice, and holiday pay. Thus, it seemed to me, the matter of the *manner of his dismissal* appeared to have been an issue from the outset, particularly in light of the opinion expressed by the Chief Prosecuting Officer (see (o) above).

(2) (i) There were two separate "times" involved in Mr A's complaint to the Department:

(a) *before* the matter of his alleged misconduct was raised and before he presented his "evidence" (the copy of the cheque); and

(b) *after* he presented his "evidence" about the company's claim of alleged misconduct.

(ii) *In the first time period* (April to November, 1979), an inspection was made, which was apparently judged to be inadequate, for a re-inspection was ordered on 1st May, 1979. There was nothing on the file to show that such re-inspection was ever made, even though the minute ordering it drew attention to possible error in holiday pay calculation *and* the dispute regarding Mr A's alleged misconduct.

(iii) All that seemed to have happened was that a series of telephone conversations were had with Mr A and recorded and on 3rd May, he was asked by letter to produce evidence to support his claim (that he was not dismissed for misconduct) to enable the Department to take further action.

Consequently, it seemed to me, neither aspect (termination or holiday pay) had been seriously followed up in this first period. Certainly no attempt appeared to have been made to discover the "truth" about either matter (e.g., had the X and Y sales been settled or not?).

(iv) *In the second time period* (from November, 1979), Mr A had presented what he felt to be "evidence" to support his claims (the copy of his final pay cheque). He had first mentioned the existence of such "evidence" when he spoke to the Chief Prosecuting Officer, on 12th November, 1979. A further inspection was then carried out, even though it was ordered "in a moment of weakness", to obtain unpaid holiday pay and to confront the firm with the cheque "evidence".

(v) That inspection occurred on 15th November and involved a further interview with the Sales Manager, who had sacked Mr A in the first place. No attempt was made to speak to anybody else (e.g., the clerical officer who actually prepared the cheque; other members of staff) to establish whether the Sales Manager's story was correct or not. The conversation with the Sales Manager, as recorded by the Inspector, was of interest. In particular, it was noted that the Sales Manager made no mention of cheques being *pre-dated*, only of them being pre-signed. In addition, the firm apparently had readily admitted that further holiday pay was due, for a cheque was made out on the spot, without query.

(vi) The Department had then written to Mr A (16th November, 1979) and later, to this Office (7th December, 1979) and indicated that Mr A's former employer had advised "that a number of blank cheques signed *and dated* (my emphasis) by Mr . . . . were left in the office as he is frequently away". Not only was this informaton based on something that the Sales Manager had not said, but a quick perusal of the cheque copy would have satisfied any reasonable person that the signatory certainly had not written the date on it. (An edited copy of the cheque is annexed to this report and marked with the letter "B".)

(3) The Department, thereafter, obviously decided that no further action was warranted on Mr A's complaint.

(4) (a) I felt it necessary to consider just what aspect of the Department's conduct I was investigating, for, it seemed to me, neither Mr A nor the Under Secretary understood what this was. On the one hand, Mr A seemed pre-occupied with having the company prosecuted, come what may. On the other hand, the Under Secretary seemed to think that I was pressing the Department to launch a prosecution. A clear distinction needed to be drawn between "prosecution" and "investigation" so far as I was concerned.

(b) Perhaps the best way to illustrate this is for me to comment on the various "points" raised by the Under Secretary in his letter of 15th January, 1980. The major points he made appeared to be—

(i) He suggested that I and my officers were influenced by the way Mr A presented his complaint and, by inference, that I had not dealt with the matter impartially.

(ii) He repeated that the Department must satisfy the criminal standard of proof if it is to succeed in a prosecution.

(iii) He claimed that Mr A had not produced "convincing" evidence in support of his claim re dismissal and, if the Department prosecuted on that basis, it would be regarded "as a vexatious and vindictive prosecutor".

(iv) He did not intend to allow his Department's reputation in the area of prosecution to be "undermined" by my "threats", designed, he obviously believed, to force him to launch a prosecution.

(v) I was obviously keen, like Mr A, to induce the Department to "conduct an unwarranted prosecution".

(c) My comments in relation to each point are—

(i) I merely sought to recognize that Mr A was possibly a difficult man to satisfy and that he might be "hard to get on with" and even somewhat obsessed where the company was concerned. However, despite all of this, he remained entitled to have his complaint properly investigated by the Department.

(ii) This was the basic area of misunderstanding on the Under Secretary's part. I did not talk about *prosecution* but about *investigation* (i.e., that action which should precede any consideration of prosecution). I could not see how the Department could make any sensible judgement about standards of proof, or anything else, unless it investigated fully and properly.

(iii)–(iv) I did not suggest the cheque as a basis for prosecution, but as as a basis for further and proper investigation involving something more than a brief chat with the man who fired the complainant. As to whether Mr A's evidence was "convincing", I failed to see how the Department could form any real judgement about this when the Sales Manager's story was never, ever checked.

(d) (i) I was of the view that it all boiled down to whether the Department, in the light of its investigative efforts in this case, could honestly say that it has dealt with Mr A's complaint properly. In my view, it mattered not that, having *properly* investigated a matter, the Department honestly felt that it could not launch a prosecution. If the Department was of that view, having done everything it could to establish the facts, then the complainant could reasonably be expected to accept the decision, even if he did not particularly like it. He could still pursue the matter by civil action.

(ii) I felt, however, that the Department was *not* in that happy position in this case. Its investigations, it seemed to me, were quite perfunctionary and did nothing to try to establish where the truth lay. *No person, other than the man who dismissed the complainant, was ever spoken to.* Added to this, the question of whether Mr A really had created "such a scene" on 30th March, 1979, as to warrant his dismissal "on the spot" had not been put to the Sales Manager, let alone to any other person, *until 23rd January,* 1980 when the Chief Prosecuting Officer raised it during a telephone conversation—9 months after the event.

(5) (a) This led me to a consideration of the powers, duties and responsibilities devolving on an Inspector of the Department. I looked at old files involving previous complaints made to me about the Department and at the Industrial Arbitration Act and Regulations and the Annual Holidays Act in order to get some background on this. Neither source helped me very much.

(b) According to section 127 of the Industrial Arbitration Act, an Inspector may:

- inspect premises and any work being done therein;
- require the production of timesheets and pay sheets;
- examine any employee regarding prices for piece-work, the wages paid to him and his hours of work;
- institute proceedings (with the Minister's authority).

(c) In letters, etc., available on files relating to previous complaints, various statements had been made, as follows:

Form letter when complaint acknowledged—"Where investigation discloses an underpayment of wages, holiday pay or long service leave, the Department makes every effort to procure the payment to the employee of the amount of the underpayment, but it has no power to sue on the employee's behalf for the recovery of such amount. Therefore, any action which the Department may take will not necessarily result in payment being made to you."

Letter to me on 4/12/78—". . . the powers of Inspectors in conducting an investigation . . . are prescribed under Section 127 . . . Should the Inspector exceed his authority, he could well be the subject of a complaint to the Department, the Public Service Board or yourself. Accordingly, the Inspector must rely to a great extent on the accounts given by both the employer and the employee and the accuracy of the time and wage records."

Letter to me on 17/8/78—". . . the institution of prosecution action would be completely unjustified unless based upon the most complete inquiries possible."

(d) This gave me no clear picture of just what an Inspector can do when he investigates a complaint of the nature made by Mr A. In fact, the various excerpts were more than a little contradictory. *The first* appears to indicate that the Department will *firstly investigate to establish* whether there has been an underpayment and, secondly, try to get the employer to pay up if there has. *The second* seems to indicate that an Inspector can only do what section 127 says he can do and *the last* seems to indicate that "the most complete inquiries possible" should precede any consideration of prosecution.

(e) (i) Regulation 155 under the Industrial Act is not clearly worded but it does appear that an Inspector can do *two* basic things—

(1) enter a place and ask questions of the employer and the employees to ascertain whether a copy of the award is exhibited;

(2) ask questions of an employer or any employee to determine whether or not the requirements of the award respecting the maintenance, conditions or arrangement of the premises or *the conditions under which the work shall be carried on* are duly observed.

(ii) The question was, I felt, did the term "conditions" as used in the regulation mean conditions such as holiday pay, wages, pay in lieu of notice and so on, or did it merely refer to physical conditions (e.g., safety and hygiene) written into the specific award?

(f) So far as *holiday pay* was concerned, section 10 of the Annual Holidays Act appeared to clothe the Inspector with ample power to properly investigate a complaint about holiday pay. Section 10 (1) (c) enables an Inspector "to make such examination and inquiry as may be necessary to ascertain whether the provisions of this Act have been complied with".

On 25th March, 1980, therefore, I wrote, yet again, to the Under Secretary in the following terms:

"At the outset, I must say that I was surprised by the tone of your letter and more particularly by your obvious belief that, through my investigation, I am somehow pressuring you to conduct a prosecution against Mr A's former employers. Nothing could be further from the truth.

My concern in this matter is and always has been related to the question of whether Mr A's complaint to your Department was properly and adequately investigated—not whether the Department should or should not prosecute his former employers. I thought I had made this clear in the third paragraph of my letter of 9th January to which you have taken such strong exception.

My concern stemmed from the fact that, on the two occasions that an officer of the Department visited Mr A's former employer, only the Sales Manager (the person who actually dismissed Mr A) was spoken to and no attempt was made, apparently, to establish whose version of events was correct. In this regard, I note from perusal of your file that whereas the Sales Manager originally claimed that Mr A, on 30th March, 1979, 'caused such a scene here that he was dismissed on the spot . . .', he now claims (see Chief Prosecuting Officer's minute of 23rd January) that the dismissal resulted from a culmination of several days of derogatory statements made to staff and clients within the office.

There are several other aspects which, following my perusal of your file, call for comment by me—

(a) Whilst re-inspection was apparently ordered following the submission of the Inspector's report of 27th April, 1979, there is nothing on the file to indicate that such re-inspection was ever carried out. This appears particularly relevant, for the officer who ordered re-inspection clearly raised the issue of holiday pay in respect of the X and Y sales. The matter of the manner of Mr A's dismissal was also raised therein.

(b) No attempt appears to have been made on the occasion of either inspection (i.e., 23rd April and 15th November, 1979) to ascertain whether Mr A was entitled to the holiday pay he was claiming. It seems to me that in order to ascertain this, inquiry would need to have been made as to whether the X and Y sales had or had not been finalized but this was not done.

(c) When interviewed by the Inspector on 15th November, 1979, . . . the Sales Manager, in response to a question from the Inspector, is reported to have said—

'No. The cheque was signed the day before but it was made out to Mr A and the amount filled in on the day he was dismissed. It is not uncommon for Mr . . . to *sign* (my emphasis) several cheques which may be used for different purposes in his absence. His business takes him away from the Office quite often.'

However, in its letters of 16th November, 1979, and 7th December, 1979, to Mr A and me respectively, the Department claims that '. . . the Company advised that as the Managing Director was frequently away from the office a number of blank cheques *signed and dated* (my emphasis) were left with the office's Manager.'

Such advice was misleading in light of the fact that the Sales Manager made no mention whatsoever that cheques had been pre-dated.

(d) The question of whether Mr A really did create 'such a scene' on 30th March, 1979, as to warrant his instant dismissal 'on the spot' was not inquired into nor even put to the Sales Manager until 23rd January, 1980, when the Chief Prosecuting Officer raised it during a telephone conversation with the Sales Manager.

These aspects confirm my previous view that the manner in which Mr A's complaint was investigated by your Department might warrant adverse comment.

Following receipt of your letter of 15th January, however, I have directed my attention to the question of whether an Inspector appointed in terms of the Industrial Arbitration Act has the power to conduct the type of inquiries that I believe were necessary if Mr A's complaint was to be properly investigated. In this regard, I have examined previous correspondence between us in respect of complaints made to me about the Department as well as the Industrial Arbitration Act and Regulations and the Annual Holidays Act. The question, as I see it, needs to be considered separately in terms of the two Acts mentioned—

(a) *Annual Holidays Act*

(i) Section 10 (1) (c) appears to me to clothe the Inspector with ample power to make the type of inquiries that were necessary, and to which I have earlier averted, in this case.

(ii) The apparent failure to make such inquiries, therefore, cannot be subscribed to any legislative restriction upon the Inspector and, prima facie, must be viewed as a failure to properly investigate.

(b) *Industrial Arbitration Act*

(i) Section 127 is quite restrictive in respect of what an Inspector may do. Regulation 155 is not an easy regulation to interpret and it seems to me that whether or not an Inspector can make inquiries of the nature envisaged would depend on the meaning to be given to the phrase '. . . the conditions under which the work shall be carried on . . .' The question appears to be whether this phrase relates to the conditions laid down in an award (e.g., wages, notice, pay in lieu of notice, and so on) or merely to physical conditions (e.g., safety, hygiene, etc.) written into the award. I would appreciate your comments in this regard.

My examination of our previous correspondence in other matters has not been terribly helpful. However, I note that the standard letter of acknowledgement of a complaint says, *inter alia*—

'Where investigation discloses an underpayment of wages, holiday pay or long service leave, the Department makes every effort to procure the payment to the employee of the amount of the underpayment, but it has no power to sue on the employee's behalf for the recovery of such amount.'

In a letter to me on 17th August, 1978 (your papers L77/3938), you said, *inter alia*—

'. . . the institution of prosecution action would be completely unjustified unless based upon the most complete inquiries possible.'

In much of our correspondence, and certainly in Mr A's case, you have emphasized that any prosecution launched must satisfy the criminal standard of proof. I appreciate that fact but find it most difficult to understand how the Department can assess whether the required standard of proof can be satisfied, or how the question of possible prosecution can even be considered, in the absence of a proper investigation of a complaint.

You will, no doubt, wish to comment further about the views I have expressed and, in doing so, I would be pleased to receive your advice regarding the following questions:

(a) What procedure does an Inspector follow when investigating a complaint?

(b) Are there any written guidelines or instructions available to Inspectors in this regard? If there are, might I be provided with a copy please?

(c) Is it accepted and/or permissible practice for an Inspector to make inquiries sufficient to establish, as far as is possible, the truth when the stories told by the employee and the employer are in conflict (e.g., interview other employees, etc.)?

(d) So far as Mr A's case is concerned, if the Department's investigations had shown that his story regarding his dismissal and the pre-dated cheque was true, would Mr A have been entitled to a further week's pay in lieu of notice?"

On 22nd April, the Under Secretary replied and said—

"I note that you were surprised by the tone of my earlier letter and that you state that your concern is whether Mr A's complaint was properly and adequately investigated. However, it appears from your letter, that in assessing whether the complaint was properly and adequately investigated the criteria is whether prosecution action is subsequently taken by the Department. If the Department does not prosecute then there is a presumption of failure to carry out a proper investigation.

As previously indicated, the handling of this case has been strictly in accordance with Ministerial policy."

Regarding the issues and questions I had raised in my letter, I have summarized these, together with the Under Secretary's responses in each case, in the table hereunder to facilitate easier understanding—

Issue or Question Raised by me	Under Secretary's Response
1. Failure to re-inspect when same ordered.	1. The Chief Prosecuting Officer was of the opinion that further re-inspection was unnecessary in view of his lengthy conversation with Mr A on 3rd May, 1979, and his discussions with (the) Inspector, the investigating inspector, and the officer handling the file. The question of holiday pay was clearly covered in the inspector's report of 27th April, 1979.
2. Apparent failure to ascertain whether holiday pay due.	2. Your first statement is incorrect. I refer you to the reports. Such inquiries were made and the holiday pay outstanding was collected by the Department on 15th November, 1979, despite legal advice to the Company to hold the money pending settlement of the private matters between Mr A and the Company.
3. My contention that advice conveyed to Mr A and to me re pre-dating of cheque was misleading.	3. Agreed.
4. Failure to inquire about alleged "scene" created by Mr A.	4. The Sales Manager himself indicated this on 23rd April, 1979.
5. Question of whether difficulties presented by existing provisions of relevant legislation.	5. No difficulties have been experienced in making all necessary inquiries under this Act or other Acts administered by the Department.

6. Procedure followed when investigating complaint.	6. The inspector makes every endeavour to fully investigate a complaint to ascertain whether a breach of the laws administered by the Department has occurred.
7. Availability of written guidelines or instructions for Inspectors.	7. No. Initial on-the-job training under supervision and guidance by an experienced inspector is supplemented by careful examination of the adequacy and completeness of reports when submitted through supervising officers and legal staff.
8. Whether accepted/permissible practice for Inspector to make inquiries sufficient to establish truth in dispute situation.	8. Yes.
9. Whether, if Mr A's story was true, he would have been entitled to a further week's pay in lieu of notice.	9. Not necessarily so. It would depend on the ability of the party instituting any legal proceedings to satisfy the relevant standard of proof. In this case this Department would not, in my view, have been able to do so.

Bearing in mind the Under Secretary's assertion that Departmental Inspectors were able to make inquiries sufficient to, as far as possible, establish the truth when the accounts given by the employee and the employer are in conflict, and his statement that the legislation in its present form had not presented any difficulties in this regard (might I say that I remain doubtful that this, in fact, is the case), I decided that I should formally find the conduct of the Department to be wrong in terms of the Ombudsman Act in that the complaint made to the Department by Mr A was not properly investigated.

In reaching this view, I had in mind that—

(a) There was nothing in either of the reports submitted by the two Inspectors to indicate that the Inspector himself actually checked whether the particular sales mentioned by Mr A in his complaint had been finalized and, thus, whether additional holiday pay at the rate of 1/12th of commission on such sales was payable to Mr A.

(b) No effort had been made to resolve the question, central to the complaint, of whether Mr A was entitled to be paid an extra week's pay in lieu of notice. The resolution of this question required some investigation of whether Mr A had been dismissed for misconduct or not, and certainly required more than an interview with the company employee who, in fact, had actually dismissed him. This was particularly the case once Mr A had presented a copy of the termination cheque in support of his version of events.

(c) The Department, in its letters of 16th November and 7th December, 1979, to Mr A and this Office respectively, had conveyed incorrect and misleading advice about the pre-dated cheque.

(d) The Department was still unable to say with certainty that Mr A would *not* have been entitled to an extra week's pay in lieu of notice had investigation disclosed his version of his termination of services to be the truth.

(e) The Department was apparently still unable to grasp the distinction between "investigation" and "prosecution" and, apparently, could not see or would not recognize that proper and full investigation as a precedent to any consideration of prosecution—

  (i) is essential to enable any reasoned judgment about the likelihood of a successful prosecution (i.e., the "standard of proof" required); and

  (ii) may lead to a resolution of a matter without prosecution becoming an issue at all.

In summary, I took the view that the actual investigations of Mr A's complaint by the Department were perfunctory and did little to establish where the truth lay. No person, other than the Sales Manager (who had dismissed the complainant in the first place) was ever spoken to. The question of whether Mr A really did create "such a scene" as to warrant, on 30th March, 1979, his dismissal "on the spot" was not queried with any person until 23rd January, 1980, when the Sales Manager was asked to name witnesses to the alleged events.

When informing the Minister of my intention to publish a report, in terms of section 26 of the Ombudsman Act, as I am required by law to do, I recommended in the draft report I sent to him that the Department take action to formulate guidelines for use by Inspectors, clearly setting out—

(a) the powers, duties and responsibilities of an Inspector;

(b) the procedures to be followed when a complaint is investigated, including action to be taken where circumstances indicate that more intensive investigation is needed (e.g., interviews with other employees, etc.).

Subsequently, at the Minister's request, I consulted with him and I was made aware that training and procedure manuals for use by Inspectors were in the course of preparation, and had been so prior to my recommendation in this regard being made.

Therefore, in publishing my report, I made no formal recommendations, but merely expressed the view that the relevant legislation should be looked at closely to ensure that it contains the powers necessary to enable a complete investigation to be carried out. As required by law, I gave copies of my report to the Minister, the Under Secretary and the Public Service Board. In addition, I gave a copy of the report to Mr A.

ANNEXURE "A"

INDUSTRIAL ARBITRATION ACT

Inspector's Report

Nature of complaint—Alleged Underpayment of Holiday Pay.

Registration Number—L79/1914.

Name of Employer—(The Company).

Address of Employer—.....

Name of Complainant—Mr A.

Address of Complainant—.....

Industry or Award—Real Estate Salesmen (State).

Date of Visit—15 November, 1979.

On the above date I visited the above address and there met a person to whom I introduced myself and advised my visit to be a further query on Mr A's employment.

He said:

"My name is . . . I am the Sales Manager. I can speak on behalf of the Managing Director, Mr . . . in regard to this matter. Mr . . . is not here at the moment."

I said:

"Do you recall that you told Inspector . . . that you dismissed Mr A on the spot after he caused a scene in the office on Friday, 30 March?"

He said:

"Yes that's right."

I said:

"I have a photostat of the cheque you paid him on that day. It is dated the day before, the 29th. It would suggest you had intended to dismiss him and had his money made up the day before."

He said:

"No. The cheque was signed the day before but it was made out to Mr A and the amount filled in on the day he was dismissed. It is not uncommon for Mr . . . to sign several cheques which may be used for different purposes in his absence. His business takes him away from the Office quite often."

I said:

"It would appear there is still $25 in holiday pay outstanding which would be one-twelfth of the $300 commission he was paid."

He said:

"I will have a cheque made out to your Department immediately."

I collected the cheque and issued Receipt No. 22306. He said:

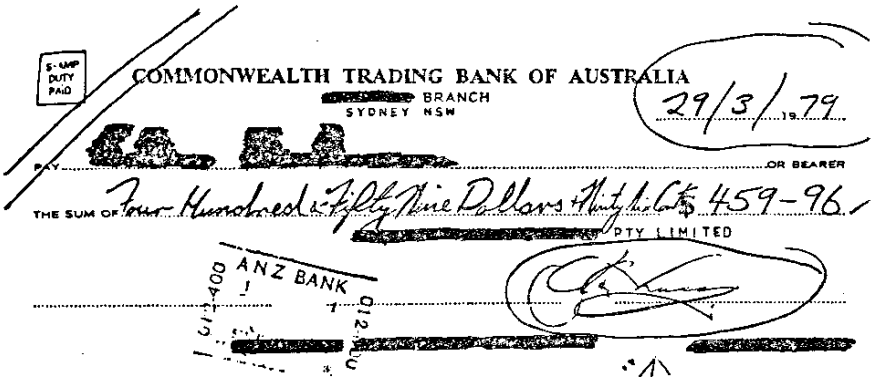
> "I certainly hope this ends the Mr A wage business at least as far as your Department is concerned. He has complained against the Company to every conceivable Government Department for all sorts of reasons. It has cost the Company hundreds of dollars in Solicitor's fees and many hours in time disproving his accusations. The unusual part about it is that he does not seem to be interested so much in obtaining money from the Company, he just wants the company prosecuted for some reason or other."

Submitted for Departmental consideration.

.....

Inspector.

16th November, 1979.



DEPARTMENT OF MAIN ROADS

Refusal to repair collapsed retaining wall

My complainant said that the Department, a number of years previously, in the process of widening the Princes Highway, had constructed a retaining wall. The wall had collapsed but the Department had refused to repair it.

My inquiries revealed that the retaining wall was constructed, to replace a similar wall on the old property alignment (i.e., the alignment before the highway was made wider) in 1930 and had partially collapsed in 1972. The wall was on the complainant's property and, in effect, the Department had relocated the original wall when the roadworks were carried out.

The Department felt that, in view of the time that had elapsed since the wall's construction and the fact that the Department had no control over factors (such as drainage, surface run-off, etc.) which could have contributed towards the wall's collapse, it should not be held responsible for repairs, particularly as it had never accepted any continuing obligation in regard to works relocated as a result of roadworks. The Department expressed the view that it would be quite unrealistic to expect the Department to maintain the wall in perpetuity.

After considering all of the material available, I took the view that the Department's attitude did not seem to be unreasonable. I agreed with the viewpoint that it would be completely unrealistic to expect the Department to be, forever, responsible for retaining walls, fences, and the like which, due to roadworks, have to be relocated.

The Department's responsibility, it seemed to me, would be to ensure that whatever it constructed in the process of relocation was constructed properly and to the satisfaction of the property owner concerned. Thereafter, the responsibility for maintenance must rest on the property owner.

In the case the subject of complaint, there was no evidence that the wall had not been properly constructed in 1930 and I could not accept that the fact that the wall collapsed in 1972, 42 years later, constituted such evidence.

I regarded the complaint to be not sustained and so informed the complainant.

DEPARTMENT OF MAIN ROADS

Delay in Carrying Out Works

I received a complaint from a lady upon whose property the Department of Main Roads had constructed a dam by agreement. She said that the Department was supposed to establish grass cover on the dam embankment but had failed to do so, despite repeated approaches by her, over a period of some two years. I determined the complaint to be that—

(a) there had been delay in establishing grass cover on the embankment of a dam; and

(b) the Department had failed to respond to repeated approaches made about the matter.

I obtained reports from the Department and in addition, I perused the Department's files. However, during my investigation, the complainant (to whom I shall refer as "Mrs X") relieved the Department of its responsibilities in relation to the establishment of grass cover.

My investigation revealed that Mrs X, by agreement, sold to the Department a portion of her property to enable construction of a road deviation. She was first approached formally about this in March, 1976, and, although the Department's files did not clearly show how it came about, it was obviously agreed, during acquisition negotiations, to construct a dam and a cattle grid on her property as part of the terms of settlement. The agreement about the dam was given formal expression in subsequent Departmental correspondence to Mrs X and it was also agreed that the dam would be constructed in accord with a design prepared by the Water Resources Commission. Part of that design specification stipulated that, after the embankment had been completed, the surfaces of the embankment and bywashes ". . . shall be protected against erosion by immediately planting and maintaining a good holding grass such as kikuyu. It is essential that this grass be established as quickly as possible, if necessary assisted by fertilizers and watering".

The contract for the sale of the land eventually entered into between Mrs X and the Department contained an appropriate clause relating to the dam and was signed in June, 1978. On 28th July, 1978, the Department informed the local Council that it now owned the land concerned.

The Department's files did not disclose when the dam was actually completed and the only evidence available in this respect was a statement made in a letter written by Mrs X on 25th October, 1979, to the Department wherein she said—

"It is approximately 15 months since the dam was built."

This placed completion at around July, 1978, and, according to the Department in its report to me, paspalum and couch grass was planted over the face of the embankment of the dam at around that time (i.e. ". . . immediately construction of the dam was completed", to use the Department's words).

On 25th October, 1979, Mrs X wrote to the Department complaining about the Department's failure to establish grass cover on the dam embankment and mentioned her desire to have safety rails placed on each end of the cattle grid (even though there had been no specific mention of these in the conditions attached to the contract of sale). In her letter, Mrs X referred to ". . . many trips to the Department's office in . . . and a number of phone calls . . ." without achieving satisfaction.

Her letter was received on 5th November, 1979, and was acknowledged on 7th November. The acknowledgement indicated that the matter had been referred to the Divisional Office for investigation and, in fact, on the same day, a copy of her letter was sent to the Divisional Office with a request that the Divisional Office reply direct to her after necessary inquiry had been made.

There was nothing on the Department's files to show that any action was taken at the Divisional Office after receipt of Mrs X's letter, on 12th November, until 27th November when Mr X inquired at the counter to find out what was happening. This spurred the Divisional Office into referring the matter to the relevant local Works Office for investigation on that same day (27th November, 1979). The file was re-submitted for one month (to 27th December, 1979) at the Divisional Office and, eventually, on 17th January, 1980, a reminder was sent to the Works Office, as no report had been received. The file was then re-submitted for *a further two months.*

Finally, on 10th March, 1980, the Works Office Engineer reported and blamed the dry conditions during 1979 as the major factor in preventing establishment of grass cover on the dam embankment. An added factor, he said, was that stock had been allowed to graze in the paddock concerned. He expressed the view that the Department had fulfilled its obligations under the specifications drawn up by the Water Resources Commission but added that, to improve the situation, "a checker-board pattern of kikuyu turfs has been laid on the face of the embankment with a 3 metre spacing between turfs". Unfortunately, he did not say when this was done but indicated that the embankment would be watered daily until the turfs were established. In fact, my inquiries revealed that the grass was watered on 13th March, 1980, and 14th March, 1980, and then twice daily on 17th, 18th, 19th, 20th and 21st March, 1980.

In all of this time (from early November, 1979, to March, 1980), not a word had been sent to Mrs X to tell her what was happening. It was not surprising, then, that, on 11th March, 1980, she wrote to the Divisional Office pointing out that she had not "received any further advice" and offering to take over the matter herself if the Department paid the costs, which she estimated at $436.00.

Mrs X's letter was acknowledged on 18th March, 1980, and, on the same day, the Divisional Engineer recommended that her offer to take over the grassing of the embankment be accepted. He, correctly, said that the specification prepared by the Water Resources Commission and embraced in the terms of the contract of sale ". . . requires that the Department plant and maintain until cover is effected".

Subsequent action to pay Mrs X the $436.00 she had asked for and to obtain a release from the terms of the contract, was taken speedily enough, and the matter was finalized at the Divisional Office on 6th May, 1980.

On the material available, it seemed to me that there had been delay in properly establishing grass cover on the embankment of the dam, as required by the terms of the contract for sale, between approximately July, 1978, and March, 1980. In the absence of any evidence to indicate otherwise, it appeared reasonable to assume that the Department had planted grass when the dam was completed and then left it to "fend for itself" through the latter part of 1978 and most of 1979. It was not until early 1980 that serious efforts appeared to have been made to get the grass cover properly established.

There was nothing in the Department's files, nor in the reports made to me, to refute the complainant's allegation that she had made repeated approaches to the Works Office, without result. There was certainly delay in dealing with her letter of 25th October, 1979, once it reached the Divisional Office, a failure to follow-up with expedition the action required by the Works Engineer and a failure to advise the complainant of the action being taken.

Therefore, in my view, the complaint had been wholly sustained. However, in view of the complainant's actions in taking over the task of establishing grass cover, on terms agreeable to her, there appeared to be no need to take the matter further in terms of the Ombudsman Act, and I concluded my investigation on that basis.

DEPARTMENT OF MAIN ROADS

Refusal to Negotiate Regarding Acquisition of Property Affected by Road Proposals

I received a complaint from a man whose property was affected by future road improvement proposals. He said that, when he purchased the property, there was no indication that it would be affected by future road proposals, even though he had seen some Departmental Surveyors on his property. The Surveyors had told him they were surveying an "off set of 14 metres which would not affect the property".

He had since been informed by the Department that his property, including his home, would be affected. However, the Department had indicated that, as the work which would affect his home would not commence within fifteen years, the Department was not prepared to enter into negotiations for the purchase of the land. My complainant said in his letter to me—

> "This has forced me into the position of placing my home on the market, but to no avail."

I took up the complaint with the Commissioner for Main Roads and my inquiries revealed that my complainant's property was affected by two stages of a planned improvement scheme for the main road to which his property fronted. This road was subject to heavy and increasing use by heavy coal trucks.

An area of around 28 square metres of the complainant's property was required for the first stage of the work and the Department had already made approaches to him for the acquisition of this relatively small area. Obviously, it was the second stage of the work which was of most concern to the complainant.

The history of the matter was as follows:

(a) In May, 1974, the Department adopted a location which indicated that the complainant's property could be affected by future roadworks. Subsequently, in October, 1976, the Department fixed new road boundaries for the purpose of property acquisitions. The land required for the second stage of the proposed roadworks would not be required for roadworks for many years.

(b) Reference to property search documents disclosed that the property was transferred to my complainant on 4th February, 1976. He stated that he had been informed in 1975 that "the Department had no adopted proposal which would require any part of the property". Although records of property inquiries issued by the Department were no longer available, the Department said that it was probable that the complainant's statement was accurate, as that advice would have been appropriate at the time.

(c) The information given to the complainant by the Department's surveyors when they were working across his property was correct. It is common practice, when working on heavily trafficked roads for the reference line of an engineering survey to be offset from the centreline of the future road to reduce risk to survey personnel. In this case, the reference line of the engineering survey was offset 14 metres from the future road centreline which necessitated placing survey marks in the complainant's property. These marks were for the purpose of the engineering survey only and at the time had no direct relationship to the future road boundary.

The Department indicated to me that it was unlikely that the second stage work, which affected the complainant's residence, would be undertaken within 15 years. In normal circumstances, the Department said, it would not wish to enter into negotiations for the purchase of the property until the roadworks were imminent. However, as the complainant now wished to sell the property, and was unable to do so because of the road effect, the Department said it was prepared to consider the purchase of the property on the grounds of hardship being experienced by the complainant.

I informed the complainant of the Department's willingness to purchase his property and determined his complaint to be partly sustained. However, in view of the Department's offer, I considered that no further action was needed on my part and I discontinued my inquiries.

DEPARTMENT OF MOTOR TRANSPORT

Licence Plate Duplication

My complainant like 50 000 other individuals each year (I am surprised to be told) sought to have personalized number plates for his F100 utility. The plates he sought were MYF 100. He filled in the appropriate application, paid the appropriate fee and within a few weeks was able to proudly screw the new plates onto his utility. Two months later, he received a phone call, at his parents' home in another part of the State, from a person claiming to be an inspector from the Department and who claimed that the plates that he had been issued had in fact been issued to some other person some months previously and that he wanted the plates back and indeed that he had already made a trip from the registry office where he was some thirty miles to the complainant's house to find him not there and that he had with him the plates MYF 000 which he wished to exchange for the plates which he had and also the registration papers appropriate. The complainant checked with the Department and was told that the story was correct and he discussed with them the possibility of having instead the plate MIF 100. However, he thought it would be appropriate under the circumstances to await formal written confirmation. He was next contacted by telephone at 7.30 a.m. by a person claiming to be an inspector of the Department and that he had called to see new licence plates and demanded the return of the MYF 100 plates. The complainant said he was waiting for something in writing and the inspector said that he was not prepared to put anything in writing and demanded return of the plates. At this stage the complainant wrote to me.

In view of the refusal to put anything in writing I suggested to the Department that the complainant had some reason to be suspicious and that I would appreciate an explanation. The result of my inquiry was not an answer but a letter to the complainant from the Department followed by further pressure from the Department. I, therefore, suggested to the Department that it would be appropriate for the officers to cease trying to recover the plates until certain matters have been explained, that is to say,

the date on which the identity of the person to whom the plates had been issued, should be shown to me, and some explanation given of why an officer of the Department refused to give the complainant a written explanation and request for the plates; how it was that the Department had manufactured two sets of these plates; why the Department treated this matter with extreme urgency involving numerous personal visits to the complainant's home and phone calls at quite unusually early hours and some explanation of the system which is used to record issue of plates and explanation of how it had failed to function. In the end the Department did explain that a genuine error had been made an an inspection of the Department's records showed just how it happened. The urgency with which the Department acted was explained as follows:

> "The duplication of a number plate is considered most serious. Problems would arise if a vehicle they were attached to were stolen, involved in an accident, reported for a traffic infringement or any similar matter."

In the end all that one could say was the complaint against the Department for their action was sustained in so far as they had indeed made a mistake and proceeded in a way which could only lead to suspicion but the complainant ultimately had to do without the pleasure of plates saying MYF 100 on his F100.

DEPARTMENT OF MINERAL RESOURCES

(Mine Subsidence Board)

Excessive Delay in Settling Claims

I received a complaint from a farmer whose land had been affected by mine subsidence due to coal mining operations. Damage had occurred to land used for grazing of stock, a contour drain and a windmill which had moved out of alignment and could not be used.

From the complainant's letter, it was obvious that he believed that—

(i) the Board and its officers had been quite incompetent in investigating his claims and, in fact, that the officers sent to carry out investigations had little or no knowledge of the problems involved;

(ii) at his insistence expert advice was sought from the Water Resources Commission and the Soil Conservation Service; and

(iii) the Board had unfairly rejected his claim in respect of certain grazing land on the basis that such land was not an "improvement" within the terms of the Mine Subsidence Compensation Act.

It was clear, too, that the complainant had refused to allow certain works authorized by the Board (in respect of his remaining claims) to proceed on the basis that he wanted all of his claims accepted.

I took up the matter with the Under Secretary of the Department (who was also Chairman of the Mine Subsidence Board) and he provided me with a comprehensive report. In addition, I asked for and perused the Board's file relating to the matter.

In the light of my inquiries, the situation could be summarized as follows:

(a) The complainant's claim for compensation for damage caused by subsidence to his land and his windmill was made formally on 18th May, 1978, and was apparently handed to a Board Officer by the Manager of the local Colliery. The Officer had inspected the complainant's property the previous day, 17th May, 1978.

(b) The Officer submitted a report on 23rd May, 1978, the salient features thereof being—

- the surface of the land had been "severely affected" by mine subsidence;
- the complainant had told the Inspector that he had relied on a former Director of the Coal Mining Company for guidance and appeared to have believed that the colliery would rehabilitate the land in due course. He claimed that he had not even heard of the Board until a few weeks previously;

- the Inspector was of the view that the damage to the land would not come under the provisions of the Mine Subsidence Compensation Act and asked that the terms of a lease held by the Colliery be examined to see if the complainant was entitled to any relief thereunder;
- the Inspector felt that the matter of the windmill would need "more study" to determine why it had moved as the nearest mining was 20 metres away at a depth of 27 metres and there was a 2.7 metre igneous dyke in between.

(c) On 21st July, 1978, another and more senior Inspector reported regarding the issues raised in the first officer's report. Significant aspects raised were—

(i) The complainant, on 1st October, 1976, had entered into a private agreement with the Coal Company which gave the latter title to the use of parts of the surface of his land for mining purposes. The agreement contained conditions whereby the complainant released the company from all claims and demands in respect of, inter alia, damage to crops, damage to land, deterioration in value of property and subsidence caused by mining, but reserved to him the right to claim under the Mine Subsidence Compensation Act (hereafter called "the Act"). In consideration, the complainant had been paid $30,000 and given certain other things.

(ii) There was some doubt that the requirements of the Act and Regulations relating to the time within which claims must be made, had been complied with by the complainant, and his claimed ignorance of the Board's existence and role was disproved, both by the agreement referred to in (i) and by other papers on file going back to 1974.

(iii) It was not clear, whether land used for cropping or grazing could be classed as an "improvement" for the purpose of the Act and the Inspector recommended that the Board seek legal advice in this respect.

(iv) The Inspector concluded that the damage to the land was the result of subsidence and the damage to the windmill was "most likely" due to subsidence. He recommended the Board accept that subsidence had caused the windmill damage.

(v) In addition, he formally recommended as follows:

"Should the Board consider, either currently or subsequent to receipt of further advice, that the possible impediments to this claim by virtue of (the legislation) and/or the definition of "Improvements", are *not* such as to invalidate the claim in whole or part, then it is recommended that:

(1) The Board accept (the claim).

(2) Advice be sought from the Soil Conservation Service of N.S.W. regarding the work necessary to economically restore the subsidence affected land back to its previous potential usage for wheat and lucerne cropping. If practicable, the advice should include broad specifications and estimated cost of the work required.

(3) Advice be sought from the Water Resources Commission regarding:

(i) The possible repair and restoration of the windmill water bore into service. (A specification and costing of any repair works should be included if practicable.)

(ii) The feasibility and probable cost of providing a replacement bore and windmill installation."

(d) On 7th August, 1978, the Chairman reported that the Board, at its meeting on 3rd August, 1978, had "deferred consideration of this claim pending receipt of advice from the Legal Officer as to whether land used for the growing of crops, etc., and damaged by mine subsidence can be regarded as an improvement within the meaning of the Act. The Board had also decided to defer the possible acceptance of the claim pending "further investigation being undertaken by the Chief Inspector of Coal Mines". Advice of the Board's decisions was forwarded to the complainant on 16th August, 1978.

(e) On 15th September, 1978, the Chief Inspector of Coal Mines reported on the matter, having inspected the complainant's property on 23rd August, 1978. That report was considered at the Board meeting held on 5th October, 1978, when the Board decided—

"1. That the water Resources Commission be asked to examine, investigate and report on the state of the borehole and windmill to determine its alignment and its possible re-use. The Commission is also to be asked to provide a detailed estimate of the cost of restoration of the windmill and borehole.

2. That the damage to the contour drain be considered the result of mine subsidence.

3. That the Soil Conservation Service of N.S.W. be asked to advise the Board—

(a) as to what action can be taken to repair and/or restore the contour drain on the claimant's land and to provide a detailed estimate of the cost involved; and

(b) as to what action can be taken to restore the altered drainage pattern on the claimant's land and to provide a detailed estimate of the cost involved."

(f) On 23rd October, 1978, letters were sent to the Soil Conservation Service, and the Water Resources Commission pursuant to the Board's decision. Thereafter, procedural action was taken with the two public authorities.

(g) On 15th December, 1978, the Secretary minuted the file as follows:

"I have asked (the) Assistant Legal Officer today, to request Mr . . . of his Branch, to expedite the legal advice sought on (the complainant's) claims by the Board on 3rd August, 1978, and referred to the Legal Officer on 17th August, 1978."

(h) On 30th January, 1979, an advising for the Board on the question of whether land used for the growing of crops was an "improvement" in terms of the Act, was prepared; such advising was to the effect that land so used was not an "improvement".

(i) On 2nd February, 1979, the Soil Conservation Service submitted a comprehensive report regarding work required to reinstate lands affected by mine subsidence. On 19th February, 1979, the Board considered the report and accepted that part of the complainant's claim related to the contour drain as this drain was considered to be an improvement within the meaning of the Act, and as it had been determined that such contour drain had been damaged by mine subsidence. It authorized the Soil Conservation Service to carry out repairs to the contour drain at an estimated cost of $640.00. The Board refused that part of the claim which related to land used for the growing of crops, etc., in the light of the legal advice it had received.

(j) On 2nd March, 1979, letters were sent to the Soil Conservation Service and the complainant conveying the Board's decisions. The Service was asked to arrange with the complainant for the approved work to be carried out.

(k) (i) On 5th April, 1979, the complainant wrote to the Board and, *inter alia*, said—

"I challenge the right of your Department to authorize anyone to work on Private Property without prior consultation. I have advised the Soil Conservation Service to disregard your directive as I intend to have the matter investigated by Parliament after the Easter recess."

His letter was received on 9th April, 1979.

(ii) On 10th April, 1979, the Secretary wrote to the complainant explaining in considerable detail what had occurred and even providing him with copies of relevant, prior correspondence. The complainant, however did not reply.

(l) On 17th April, 1979, the Board received a report from the Water Resources Commission about the windmill.

(m) On 2nd May, 1979, the Soil Conservation Service confirmed that the complainant had asked them not to proceed with work on the contour drain. On 18th May, 1979, the Secretary wrote to the complainant again, referring to his earlier letters, and asked if the complainant was now prepared to consent to allow work on the contour drain to continue. On 21st May, the Secretary prepared a minute outlining the difficulties encountered for the Board's consideration.

(n) (i) On 15th June, 1979, the Board decided "That the Water Resources Commission, the Soil Conservation Service and the Claimants were to be advised that no further action was to be taken in respect to any of the aspects of this claim until the claimants have given their written consent to the Board for all works previously authorized by the Board to proceed". This decision was conveyed to the complainant on 26th June, 1979. Similar advice was sent to the Soil Conservation Service and Water Resources Commission.

(ii) Reminder letters were sent to the complainant on 26th October, 1979, and 20th December, 1979, and, finally, on 16th January, 1980, he wrote and, *inter alia*, said—

> "The reason I have failed to reply to your correspondence is that they contained nothing that had not been discussed before but merely were an effort on your part to have me accept something that to my mind is a gross injustice. When you decide to repair all damage caused by Mine Subsidence and submit a plan as to how this will be carried out we will then discuss the matter."

(o) On 14th February, 1980, the Board considered a report prepared by the Secretary and the complainant's letter of 16th January, 1980, and decided that—

> "Its various previous decisions relevant to the aspects of the subject claim that it has previously accepted be advised to the claimants in simple terms together with details of those works which the Board has authorized to be effected in respect thereto.
>
> The letter conveying the abovementioned information is also to give the claimants the final option to definitely state once and for all whether they accept or reject the Board's decisions in respect of their claim."

(p) On 6th March, 1980, the Chairman wrote to the complainant pursuant to the Board's decision.

It seemed perfectly clear to me that the complainant wanted the Board to accept that part of his claim relating to grazing land (or land which he claimed he was going to use for crops) and was not prepared to agree to restoration work being carried out until the Board did so.

The Board has indicated to him, on many occasions, that it has rejected his claim in respect of the grazing land because, in the light of legal advice available to the Board, such land was not an "improvement" in terms of the Act.

In this regard, I noted that Section 4 of the Act defined "improvement", but not exhaustively in pure statute terms. *Section* 12 *of the Act* seemed, quite clearly, to restrict the payment of compensation to "damage to improvements". *Section* 13 provided the Board with a discretion, in lieu of making payments to claimants, to do certain things, including:

> "execute or cause to be executed such works as may be necessary to restore the damaged improvements to a condition as nearly as practicable equivalent to that in which such improvements were before the damage to such improvements arose."

In this case the Board has clearly and quite properly chosen to act in accordance with section 13 (1) (b) of the Act.

The whole matter, from the complainant's point of view, appeared to hinge on whether subsidence on land used for grazing or cropping is or is not "damage to improvements" in terms of the Act. The complainant obviously felt it was; the Board, in the light of the advice available to it, obviously thought it was not.

I took the view that it was not my function to determine whether the Board's view in this regard was right or wrong. That question involved legal considerations of statute interpretation quite outside my role and capacity to undertake. The matter, if the complainant wished to test it, would need to be determined elsewhere (possibly in the Supreme Court or by civil action) and, for this purpose, I advised him to seek legal advice if he wished to pursue the matter.

The basic complaint to me was that there had been excessive delay on the Board's part in settling the complainant's claim. I took the view that the complaint could not be sustained; one of the major causes of delay (apart from the inescapable need to seek expert advice from the Soil Conservation Service and Water Resources Commission) was the complainant's refusal to reply to the Board's letters between 10th April, 1979, and 20th December, 1979.

In my view, there was no evidence to support the complainant's claims as set out in his original letter to me. The issues raised by the various officers of the Board which led to further investigations being carried out were quite legitimate issues and it was proper for them to have been raised.

I, therefore, informed the complainant that I could not find the Board's conduct to be wrong in terms of the Ombudsman Act.

NATIONAL PARKS AND WILDLIFE SERVICE AND PLANNING AND ENVIRONMENT COMMISSION

Decision to acquire property in terms of Coastal Land Protection Scheme for inclusion in National Park.

I received a complaint from a family who owned a 40 acre block on a fairly remote part of the South Coast. They contended that their property was unreasonably being acquired by the Crown when the objectives of the Coastal Land Protection Scheme could just as effectively be achieved if the property was re-zoned to prevent development and, therefore, protect its natural state.

The property fronted on to a picturesque beach, one of only two real beaches on an extensive length of coast.

During the course of my investigation of the complaint, I made extensive inquiries with both the National Parks and Wildlife Service and the Planning and Environment Commission, as both authorities were very much involved in the matter. In addition, I had an opportunity to peruse the Commission file relating to the complainants' property and one of my officers made an inspection of the property and surrounding areas.

In taking up the complaint, it was necessary for me to determine the administrative conduct of both public authorities which would form the basis of my investigation. Obviously such conduct would necessarily relate to my complainants' contention that their land was unreasonably being required for acquisition. My perusal of the relevant Planning and Environment Commission file, however, confirmed that the decision to acquire the property had been taken, on more than one occasion, at Ministerial level. In this regard, it was clear that, in November, 1974, the Minister for Planning and Environment and the Minister for Lands jointly approved of the property being acquired for public ownership. The Minister for Planning and Environment confirmed that decision in a letter to the family on 28th April, 1975. In October, 1978, following a review of land designated for acquisition but not then acquired, both Ministers again approved of the acquisition of the property and of resumption action being taken if negotiations to purchase continued to be unsuccessful.

In terms of the Ombudsman Act, I am expressly precluded from investigating the conduct of a Minister of the Crown and, as a result, I was quite unable to inquire into the decisions taken by the Ministers. However, I am able to investigate the conduct of a public authority relating to a recommendation made to a Minister of the Crown. In this context, then, my investigation of the complaint was concerned with the question of whether the National Parks and Wildlife Service and/or the Planning and Environment Commission (through the Coastal Lands Protection Committee), acted wrongly in recommending to the Ministers that the property be acquired for public ownership.

I felt it important, therefore, to consider the concepts embraced by the Coastal Lands Protection Scheme and my research on this subject indicated that these could be briefly stated as—

(a) the need to ensure that the coastline, as the major recreation and scenic resource of the State, be protected against development that could be detrimental to the visual character of the landscape;

(b) the acquisition of key lands to cater for the many requirements of passive and active recreation and for access to the foreshores; and

(c) to ensure the preservation, in the public interest, of important scenic areas, with controlled public access under management planning.

The major issues advanced by the complainants in support of their complaint were related to the following considerations:

(i) whether, in fact, acquisition of their property would provide better access to the beach than that available on adjacent publicly owned land;

(ii) whether there were satisfactory public facility areas, or areas capable of development in this respect, on adjacent publicly owned land to the north as compared to such areas available on their property;

(iii) whether, in fact, their property would constitute an "intrusion" into the National Park is allowed to remain in private ownership;

(iv) possible despoliation of the area if thrown open for public use;

(v) whether restricted development zoning, rather than acquisition, would meet the needs of the Scheme; and

(vi) whether they were being unfairly treated in comparison to landowners to the south, whose properties had not been zoned for acquisition.

I accepted the complainants' claim that they were dedicated conservationists and wished to preserve the property in its present state. However, the real issue that I had to consider was whether, in the light of governmental policy concerning the protection of coastal land and the creation and management of National Parks, the public interest would best be served by retention of the property in private ownership or by its acquisition for public ownership and use.

My inquiries revealed that, in July, 1973, Cabinet decided to introduce the Coastal Lands Protection Scheme whereby designated lands were to be acquired or made subject to more stringent planning controls. In August, 1973, details of the Scheme, showing properties marked for acquisition, were placed on public exhibition for a period of six months.

In February, 1974, the complainants lodged an objection to the effect of the Scheme on their property and, in August that year, the Inter-Departmental Committee appointed to implement the Scheme considered the objection and recommended it to be disallowed. In November, 1974, the complainants made personal representations to the then Minister for Lands and Services but, later that month, as already mentioned, both he and the Minister for Planning and Environment approved of the land being retained under the Scheme for acquisition on the basis that it would be prejudicial to the establishment of the National Park for the property to remain in private ownership.

I do not propose to recount the events that thereafter occurred. Suffice to say that there were protracted negotiations, from March, 1976, between the complainants and the Commission concerning the acquisition of the property. At one stage the possibility of a leaseback of the property after purchase by the Commission was being favourably considered.

As a result of my investigation, it seemed to me that, so far as each of the major issues raised by the complainants were concerned, the position could be summarized as follows:

(i) *Access to Beach*

(a) I was of the view that their property provided the best and easiest access to the beach. For the most, the rest of the frontage to the beach provided no real access. The only other point of public access was near a camping area on parkland immediately to the North; that access, at best, was difficult and appeared to be down naturally eroded scours in the cliff face for a distance of some 30 or 40 feet.

(b) My complainants claimed, and it was true, that the public had access to another beach in the area and it was suggested that people could wend their way from there around to the sandy beach in front of the property. The other beach was a boulder strewn beach and, certainly from a public recreation viewpoint, did not compare, with the beach fronting the complainants' land. In my opinion, access to the sandy beach from the other beach, or anywhere in its vicinity, would be most difficult due to the rocky, boulder strewn terrain.

(c) The remainder of the land fronting the beach north and south of the property consisted of fairly high sandy cliffs covered in scrub, rendering access to the beach extremely difficult if not impossible.

(d) Therefore, whilst it was true that other access to the beach existed, such access was restricted and much more difficult than the access available on the complainants' property.

(ii) *Suitability for Public Use of Parkland to North*

(a) The public camping area to the north of the property was, in itself, a satisfactory area. What made it unsuitable (or not as suitable as it might be) was the lack of easy access to the beach, as already mentioned. In addition, the area was relatively small and could not be further developed without destruction of natural flora in the park.

(b) Another aspect that had to be considered was that, according to the National Parks and Wildlife Service, the flat areas above the beach outside the complainants' property were also the site of an Aboriginal campground midden which, in terms of the National Parks and Wildlife Act, required protection.

(c) There already existed on the complainants' property two cleared and level areas which could be easily developed for camping, etc., without damaging the natural habitat. One was a plateau area on which a cottage was situated and the other was a cleared grassy "amphitheatre" area running down towards the beach.

(d) Therefore, in my view, the most logical place to provide improved camping, etc., facilities for the public with minimum damage to the natural environment was on the complainants' property.

(iii) *Location of Property in Relation to Park Boundary*

(a) I noted the complainants' claims that the property was not an "intrusion" into the National Park and that its area, compared to the total Park area, was insignificant. I must say, in my view, that the latter claim had to be regarded as largely irrelevant.

(b) There seems little doubt that, for all practical purposes, the property was an intrusion into the Park. The fact that, at two spots, for very short distances, the Park boundary was common to the property boundary did not, in my view, alter that. I noted that, in November, 1974, the complainants themselves considered that the property was "within the confines" of the Park, for they said this in a letter to the then Minister for Lands.

(iv) *Despoliation if Available to Public*

(a) Whilst I could appreciate the complainants' desire to keep the area as they had made it and enjoyed it (in keeping with their genuine interests in protecting this piece of natural bushland) the real question was whether the land should be in public or private ownership. The argument of probable despoliation that the complainants advanced, it seemed to me, was difficult to support in the light of the expertise available through the National Parks and Wildlife Service in respect of controlled management and public use of such area.

(b) In any case, even if this was not so, I doubted that there would be a massive influx of people to the area. The property was quite isolated and difficult to reach; it seemed likely that only the dedicated nature lover, of similar philosophy to the complainants, would make the effort to go there and it is improbable that such visitors would do anything to damage or destroy the natural habitat.

(v) *Restriction Rather Than Acquisition*

(a) I could appreciate the complainants' feeling that there was no need for the property to be acquired and that the government's aims could be achieved by restricting the development that they would be permitted to carry out.

(b) Whilst this would have *protected* the land so far as future development was concerned, it would have left it in private ownership. Even if the land was proclaimed a Wildlife Refuge, such a proclamation could be revoked by the owner of the land at any time in accordance with provisions of the National Parks and Wildlife Act.

(c) The solution suggested by the complainants, in the light of the other factors involved, in my view would not serve the public interest in that public *use* would be prevented.

The situation, then, seemed to be that the National Parks and Wildlife Service claimed that the land was essential for National Park purposes and that the Service was perfectly able to manage the land so as to prevent damage to the flora and fauna and, at the same time, provide for limited and appropriate public use. The material available to me did not refute either of these claims.

The Coastal Lands Protection Committee and the responsible Ministers believed that the property should be acquired and revert to public ownership. The Committee had maintained close liaison with the Service in this regard, and did not accept the view that the real public interest would best be served by leaving the land in private ownership, particularly in the light of the principles of the government's Coastal Lands Protection Scheme. Again, on the material available to me, I could find no reason to disagree with the Committee.

This brought me to the question of whether the complainants were being unfairly treated in comparison to their neighbours to the south. My inquiries revealed that, in fact, all the properties to the south which were involved, had subsequently been reclassified for acquisition under the Scheme.

Notwithstanding this, I was of the view that, even if it was not intended to recommend acquisition of such properties, it could not be held that the complainants were being unfairly treated in comparison. The physical features of the properties were completely different. More importantly, the complainants' property fronted onto and enabled easy access to one of any two real beaches in a long stretch of coast at high water.

In summary, then, the decision to acquire the property had been made and confirmed at Ministerial level and, on the material available to me and bearing in mind the government's policies in relation to the establishment and management of National Parks, the protection of coastal land and its availability to the public for recreation, I could not see that either the National Parks and Wildlife Service or the Planning and Environment Commission (through the Inter-Departmental Committee for the Protection of Coastal Lands) had acted wrongly in terms of the Ombudsman Act in recommending that the property be acquired, or in maintaining that view. In addition, there was no evidence to suggest to me that the complainants were being treated unfairly or discriminatorily in comparison to property owners to the south.

Consequently I took the view that I should determine the complaint to be not sustained.

PUBLIC TRANSPORT COMMISSION

Failure to refund portion of cost of weekly transport ticket unable to be used due to disruptions to transport services by industrial disputes

Following a series of disruptions to transport services brought about by industrial disputes, I received a number of complaints from persons who claimed they were not able to obtain a refund on weekly rail tickets they had purchased and were unable to use due to the disruptions mentioned.

I was concerned that there seemed to be some inconsistencies occurring in cases where partial services were said to have been available, where a person did or did not purchase a weekly ticket the following week, and where different destinations or types of service were involved.

Although I was aware of the existence of the By-Laws applicable to operation of the transport services, I felt that these were not generally known to the travelling public and that the Public Transport Commission (as it then was known) was able to quote them without any real opportunities having been given to members of the public to know what they were at the times tickets were purchased, freight despatched, etc.

I was not aware at the time whether the legality of the endorsement on the weekly tickets as to the conditions applicable to their use had ever been tested.

Accordingly, I took these matters up with the Deputy Commissioner of the then Commission and, following receipt of his advice in the matter and other inquiries I made on the subject, I was able to inform my complainants of the outcome.

It was indicated to me that there had not been a provision in the By-Laws for a refund to be allowed by the Transport Authorities in respect of weekly tickets which could not be used when transport services were not provided in circumstances beyond the control of the authority. Instead a proportionate discount of the respective weekly fare was allowed to passengers who purchased weekly tickets when services resumed.

I ascertained that a copy of the By-Law which stated the circumstances under which rebates were allowed on weekly tickets was contained in the "Passenger Fares and Coaching Rates Book" which was available for inspection by the general public upon application to the Station Master. This publication was able to be purchased at all stations for a nominal amount of $1.00 and this information was advertised in both the official Country and Suburban Train Timetables.

Paragraph 119 (c) set out the conditions under which a rebate was allowed and, as only a partial stoppage had occurred on one of the dates referred to by some of my complainants when the inter-urban trains were affected but the suburban services were operating, the authority said that a discount had not been allowed for that day.

However, although the By-Law provided for a rebate only to be allowed to customers who purchased weekly tickets for the week immediately following a strike, the authority said that it had since decided to allow the rebate as a refund, provided the applicant produced evidence that he/she held a weekly ticket for the week in which the strike occurred and for certain reasons could not take advantage of the discounted fare.

It was indicated to me that the rebate had been allowed initially on rail weekly periodical and Eastern Suburbs Rail Bus/Rail periodical tickets only for the week referred to earlier because alternative bus travel had been available to holders of South/West Bus/Rail and other intermodal weekly tickets.

I was informed that, following my approach in the matter, applications for refund from customers who held intermodal weekly tickets and who claimed they were disadvantaged by not being able to use the alternative bus services available, were fully examined and refunds were then granted upon conjunction of presented evidence and the authority's findings.

As an explanation of some of the inconsistencies to which I had drawn attention, it was pointed out that a rebate was allowed for a strike day which had occurred during Christmas week so that it was impracticable for a large number of passengers to purchase weekly tickets and this was the reason for the decision to grant a refund.

At a later strike, four days' usage of the weekly ticket was lost and I was told that a delayed decision was then made by the authority that a refund should be allowed in lieu of the rebate under similar circumstances.

Accordingly, those persons who supplied evidence satisfactory to the Commission that they were not in a position to take advantage of the rebated fare were informed that the rebate would be allowed as a refund.

As a result of the situation disclosed, I was informed by the authority that the By-Laws relating to the allowance of a rebate on weekly tickets was the subject of a review and it was proposed that a rebate would be allowed as a refund on production of a weekly periodical ticket for the week in which a strike occurred.

In the circumstances, I found the complaints made to me in the matter to be sustained to the extent that rebates were at one time declined and then subsequently granted. However, in view of the steps which were taken to rectify the position, I did not take the question any further and concluded my inquiries in this respect.

PUBLIC TRANSPORT COMMISSION

Alleged Use of Misleading Advertising

Amid much publicity in the press by way of a well-mounted advertising campaign, the Public Transport Commission introduced, midway through 1979, yearly tickets enabling travel on more than one form of public transport. The advertisements appearing in the press were certainly eye catching and, among other things, claimed that a yearly ticket would give the purchaser 52 weeks travel for the price of 40 weeks, a saving, it claimed, of "around 23 per cent on the cost of a weekly ticket". Provision was also made to enable the ticket to be paid for in nine instalments by paying a ten per cent deposit and arranging for the payments to be made from the purchaser's cheque account. Tickets paid for in this way were designated "Easy Pay" tickets.

I received a complaint from an Eastern Suburbs commuter that the Commission's advertising had been misleading. When he purchased his weekly ticket, he found that the price had increased from $140 to $147. When he inquired, he was told that a five per cent handling charge was levied when payment was made by instalments. The complainant considered this to be wrong because no mention had been made of the handling charge in any of the Commission's advertisements, nor on the ticket application form. He kindly forwarded me one of the advertisements which appeared in "The Sun" on 9th July, 1979, and this appeared to support his claim.

My inquiries with the Commission revealed that, indeed, no mention had been made in the original advertisements nor on the application form of the five per cent charge. The commission said that the advertisement appearing in the press on 9th July was "of a general nature to promote the introduction of yearly tickets". However, brochures which were issued and available at the time clearly stated that there was "a small management charge of 5 per cent" payable in respect of "Easy Pay" tickets.

The Commission provided me with copies of later press advertisements used. In the first of these, in respect of "Easy Pay" tickets, it was stated that "a five per cent administrative charge is included in the cost of the ticket". In the later advertisements, the matter was put beyond doubt as these said that the 5 per cent charge "is added to the cost of the ticket".

In addition, the Commission had arranged to overprint the yearly ticket application form to include mention of the 5 per cent.

To the extent that the 5 per cent surcharge was not originally mentioned in the Commission's general press advertisements nor on the application form, I regarded the complaint to be partly sustained.

In informing the complainant of this, I pointed out that details of the surcharge had been given in the brochure available at the time and that the Commission had since taken action to remedy the deficiencies previously existing in its advertising and on the application form.

In the light of that, I decided to pursue the matter no further.

ROYAL PRINCE ALFRED HOSPITAL

Misplaced wedding rings belonging to deceased patient

My complainant in this case approached me about the failure of the hospital to return the wedding rings of his wife who died whilst a patient at the hospital.

In response to my initial inquiry the hospital authorities reported that my complainant had first approached the hospital about the whereabouts of the rings some four and a half months after the death of his wife.

After a thorough search and inquiry the hospital reported that no evidence could be found that the rings were missing whilst the patient was in hospital.

My complainant subsequently informed me that in company with the undertaker he visited the hospital's mortuary where he examined the book which funeral directors sign when taking delivery of deceased patients. Against the entry referring to his late wife was the notation that nil valuations were upon the remains when signed for by the undertaker.

Following my further approach to the hospital I was informed that the entry in the Mortuary book was made by the funeral director's staff as the body was removed from the Mortuary after hours when no member of the hospital staff was present.

Because the complaint came to the hospital's attention four and a half months after the event investigations had to rely on people's memories and some of the staff had left the hospital which made the investigations more difficult.

In the period between the loss of the rings and the investigation of the inquiry the site for storing patients belongings had changed. Previously, a safe kept for this purpose had to be removed from the Front Hall after several hold-ups.

After further searches the rings were finally located in a cupboard. It appeared that the member of the staff who had received the rings originally had long since left the hospital.

After further correspondence with the hospital I was subsequently able to advise the complainant that the hospital had reviewed its procedures for the safe custody of valuables belonging to patients thereby reducing the likelihood of anyone else having an experience similar to his.

In this case, I found the complaint to be partly sustained. However, as the matter had been rectified by the hospital, I decided to take no further action in terms of the Ombudsman Act.

STAMP DUTIES OFFICE

Refusal to Grant Exemption from Stamp Duty

The Honorary Treasurer of a Society engaged in the dissemination of information about certain Australian animals complained that the Stamp Duties Office had rejected the Society's application for exemption from duty on cheques, apparently on the grounds that the exemption provisions of the Stamp Duties Act did not apply to the Society. The complainant disagreed.

With this letter to me, the Treasurer enclosed a copy of a letter he had received from the Stamp Duties Office and which outlined the exemption provisions. Those provisions, inter alia, are:—

"Exemption (g)—cheque drawn or given by or on behalf of—

Any charity which is registered or which is exempted from registration under the provisions of the Charitable Collections Act:

Any society or institution for the time being approved by the Commissioner for the purpose of this paragraph whose resources are in accordance with its rules or objects used wholly or predominantly for—

(a) the relief of poverty; or

(b) the promotion of education; or

(c) any purpose directly or indirectly connected with defence or amelioration of the condition of past or present members of the naval, military, or air forces of the Commonwealth of Australia or their dependants or for the promotion of any other patriotic object; or

(d) such other purposes which in the opinion of the Commissioner warrants such society or institution being deemed to be a charitable society or institution."

The letter, concluded by saying—

"Please note that provision (b) is applied specifically to institutions of learning i.e. schools, colleges, universities, etc."

As a result of my inquiries, the Commissioner of Stamp Duties reviewed the matter and he commented that in his view there was insufficient evidence to clearly establish that the Society was an institution whose resources were used predominantly for the promotion of education. At the same time, he conceded that there were some elements present which could be properly classified as educational. The difficulty of course, was to determine the extent of the use of the Society's resources for the promotion of education.

As the matter was not free from doubt, the Commissioner had sought from the Society further information regarding the allocation of the Society's resources during the last financial year.

The Commissioner subsequently informed me that, following his review of the information provided, the concession in respect of cheques drawn by or on behalf of the Society had been granted.

I considered that the complaint to me had been sustained on the basis that—

- the information that had been sought by the Stamp Duties Office in order to resolve the doubt that existed, should have been sought before the application had been refused in the first place; and
- the advice contained in the letter referred to above was clearly incorrect.

However, in view of the action that the Commissioner had already taken to remedy the matter, I took no further action.

STAMP DUTIES OFFICE

Failure to grant relief from Duty

A firm of Solicitors complained to me on behalf of their client who, with her late husband, had contracted to purchase a property. Stamp Duty was paid under the First Home Purchase Deferred Payment Scheme but, shortly after the contract was entered into, their client's husband had died. The contract to purchase was rescinded by mutual agreement.

The Solicitors wrote to Stamp Duties Office in May, 1979, outlining the circumstances and indicating that they had been unable to contact their client, the widow, to complete necessary documents. Whilst it might have been considered that the Solicitors' letter did not constitute an application for a refund of Stamp Duty, the Stamp Duties Office nonetheless accepted the letter as such an application. On 6th June, 1979, the Office wrote to the Solicitors requesting the production of certain documents to finalize the matter and that letter clearly quoted the Stamp Duties Office reference number.

Almost a year later, in May, 1980, the Solicitors forwarded the documents requested. However, their letter did not quote the applicable reference number; nor did it refer to the fact that previous correspondence existed. On 29th May, the Stamp Duties Office wrote (showing a completely different reference number to that shown on the letter of 6th June, 1979) refusing a refund of duty on the grounds that the application was not made within the time prescribed under the Stamp Duties Act (12 months).

The Solicitors complained that this decision was "somewhat callous".

It seemed fairly evident that there had been a communication problem and I made inquiries with the Commissioner for Stamp Duties.

His prompt reply confirmed that the failure of the Solicitors to quote the appropriate reference number or to mention the existence of previous correspondence had resulted in their letter of May, 1980, being treated as a first application. The Commissioner said that the two files had been connected and arrangements were in hand for a refund to be made.

This complaint well illustrates that it is not always the fault of a public authority when problems arise. Had the Solicitors followed reasonable and normal business practice in their correspondence, there would have been no problem at all.

I regarded the complaint as being not sustained.

STATE RAIL AUTHORITY

(Formerly Public Transport Commission)

A Rather Nasty Fall

The complainant, on 4th September, 1979, was travelling on a train consisting of only three carriages. She said that, when she tried to open the door to leave the train at her station (in suburban Newcastle) it was stuck. Two men, she said, also tried to open the door, but unsuccesfully. She had to run through to the next carriage to get off the train but, by that time, the train had started to leave. The complainant jumped to the platform and, of course, fell, sustaining relatively minor injuries which nevertheless involved her in some time off work and some medical expense.

Her Solicitor had approached the Authority about a "claim", for what, exactly, he did not say but I presume that he was seeking reimbursement of medical expenses incurred and, possibly, some compensation for the time the complainant was off work. The Authority had denied liability and the Solicitor then wrote to me.

I obtained a report from the Authority about the matter and it was therein claimed that the matter had been investigated as fully as possible and, further, that all doors on the three carriages involved had been checked and found to be operating normally.

I called for and examined the Authority's files and my perusal of them revealed the following:

1. The Station Assistant on duty at the time of the incident had reported in the following terms

   "When the 4.00 p.m. train . . . pulled in I was standing near the seat on the up side of the platform to collect tickets. The train was stationary for a couple of minutes and no-one got out and the guard turned to me and said "quiet station" or "quiet afternoon" or something like that. I said "yes it is", and he said "right?" and I said "right" and he waved the green flag to the driver and the train started off. It went a few yards and suddenly a woman jumped out and fell over, she rolled towards the moving train and nearly fell between the train and platform, she kicked out with her feet and kept kicking to keep herself from going down. I

ran down to help her as soon as I saw her fall and the guard stopped the train. I helped her to her feet and asked how she was. She said she was alright. I helped her into the office and sat her down and attended to her cuts. She had a cut on her left elbow that was bleeding a lot and abrasions to her right leg from her knee to her ankle. Her stockings had big holes torn in them. She said the train didn't stay very long here" and I said "the guard and I looked down the train and couldn't see anyone getting out so it went", she said she tried to open one door and couldn't open it and a man tried to and couldn't open it either so she walked down to the next door and then the train started to go and she jumped out."

2. The Authority had arranged for the three carriages involved to be checked after the incident. The guard on the train did not check the doors at the time, because, to use his words—

"... I had no reason to, as people had used this door all the way to ... and also on the return trip to ... people were using that door and appeared to have (no) trouble with it at all."

His report had been written some 13 days after the incident and it seemed clear that he would not have been aware of the alleged stuck door on the day in question.

3. The three carriages in use at the time had been checked sometime between 14th September, 1979, and 28th September, 1979. All doors on all three carriages were found to be in good working order. Repairs carried out in the interim, details of which were available, had not been related to sticking doors.

4. The Authority had attempted, between October, 1979, and January, 1980, to obtain more precise and, in my view, reasonably pertinent information from the Solicitor about which carriage the complainant had been travelling in (there were only three all told) and whereabouts in that carriage the defective door was located. The Solicitor's replies had been somewhat evasive and culminated in a claim that his client could not remember. I found that quite difficult to believe.

It seemed to me that the Authority, indeed, had investigated the claim as far as it was possible to do so, and on the material available, it did not appear to me unreasonable that liability should have been declined.

I so informed my complainant and discontinued my inquiries.

STATE RAIL AUTHORITY

A Torn Pair of Slacks

I have mentioned in previous reports some of the difficulties I face when investigating complaints about denial of liability by a public authority. I am unable to determine liability; nor am I able to force an authority to make payment, even when I think the authority has acted wrongly. What I can do is look to see whether the authority has properly considered and dealt with a claim and, where appropriate, attempt to persuade an authority to have another look at a claim.

This case involved a lady who ventured onto the Eastern Suburbs Railway the day it was officially opened. She told the story as follows:

"Whilst descending on the escalator from the concourse to the trains at the Kings Cross Station on 23rd June, 1979, the right leg of a pair of black velvet slacks became caught in the escalator about three steps above the platform. As I raised my right foot to be ready to step off the escalator I realized this was impossible as the right leg of the slacks had become caught in the moving steps. I did not panic, but quietly asked a gentleman standing on the platform if he could help me. Fortunately for me, he had the presence of mind to quickly see what had happened and ripped the right leg of the slacks from the escalator. Three Police Officers then came forward and escorted me to a seat, and inquired if I had been injured in any way and if I needed medical attention. Although I really was very badly shaken I informed them I did not require medical attention.

I was then escorted up to the Stationmaster, clutching the piece of torn black velvet, by a railway attendant. The Stationmaster inquired if I required medical attention, etc., then proceeded to detail particulars of the accident on an official form. He advised me I would be reimbursed for the damaged slacks, and to write to him officially enclosing the docket for the replacement of the slacks. Incidentally, the original slacks cost $38.00—the replacement ones $35.00.

As the Public Transport Commission of New South Wales has refused to accept liability for the replacement of the slacks—a mere $35.00—I am appealing to you for help in an effort to have my claim accepted. The slacks, damaged beyond repair, are in my possession and if required for inspection I shall be only too happy to bring them to your office.

I am attaching relevant correspondence, and should be most grateful if you would take this matter up with the Transport Commission on my behalf. In conclusion, I must say I shall always be grateful to the gentleman who so quickly ripped the slacks from the escalator—I shudder to think my right foot could so easily have been crushed by the moving steps as I would not have been able to get it out of the slacks."

From the correspondence provided, it was clear that the State Rail Authority had declined liability on the grounds that—

(a) all escalators on the Eastern Suburbs Railway had been inspected and tested, immediately prior to the opening, and had been found to comply with all regulations applying to escalators; and

(b) the escalator concerned had been inspected following the incident and no defect or malfunction was found.

I took up the matter with the Authority and received a reply which simply reaffirmed the advice already given to the complainant. I then called for the relevant files.

Having examined the files relating to the matter and having interviewed the complainant about her claim, there were several aspects that I felt I should raise with the Authority, namely—

(1) (a) The complainant had consistently maintained, right from the outset of her dealings with the Authority, that the Stationmaster, Kings Cross, had told her that she would be reimbursed the cost of a replacement pair of slacks. For this reason, he asked her to submit the docket covering the purchase of the replacement slacks and to deliver the damaged slacks to him in case his superiors wished to inspect them, both of which she did.

(b) I noted that, on the Stationmaster's report ("Casualty Report") in answer to the question, "Was the injury due to want of care on the part of the injured person?", he had written "No".

(c) The complainant claimed that the Stationmaster (whom she identified by name without access to the information held by me) had been quite solicitous in his concern for her after she had been escorted to his office following the incident. He had asked her if she needed medical attention and had made a remark to the effect that she had the dubious honour of being the first casualty on the Eastern Suburbs Railway. She claimed that he instructed her to replace the slacks and submit the docket with a letter claiming reimbursement and that he had quite clearly indicated that she would be reimbursed or compensated.

(d) The whole tone of a letter she wrote to the Stationmaster when submitting the docket was consistent with her expecting there to be no problem about reimbursement.

(2) (a) I noted from a minute of 20th December, 1979, from the General Manager, Electrical Branch to the Operations Manager (Rail) that the Electrical Branch had declined to accept liability on the presumption that the complainant's slacks "were of such a length to be draping on the step surfaces and thus be jammed in the gap between the steps as they moved to the flat landing position just prior to entry into the combplate". Such presumption had been made as a result of consideration of "the nature of the incident".

The minute went on to say—

"It is fundamental that persons wearing clothing of ground length such as evening frocks and in this case presumably long slacks, should take reasonable precautions which apparently were not taken by (the complainant) at the time".

(b) I took the view that the General Manager was not entitled to make such a presumption. Presumption is no substitute for proper investigation.

(c) I had arranged for the complainant to come to my office and there had photographs taken showing her in the damaged slacks and wearing the shoes she wore on the day in question (I only had her word that these were the shoes she wore, but as nobody had suggested, and as I did not believe, that she was untruthful, I accepted her word). The photographs clearly showed that the slacks were not "of such a length to be draping on the step surfaces". In fact, they were a good 8 to 10 centimetres clear of the floor. I wondered, therefore, what "reasonable precautions" the complainant should have taken. In addition, the slacks were caught when the complainant had been about three steps from the bottom, not when the step on which she was standing entered the combplate.

(3) The complainant's claim, in my view, had been rejected without proper investigation being made. No Commission officer, other than the Stationmaster on the day of the accident, had ever spoken to her about the matter. It seemed to me quite inconceivable that the complainant would "stage" such an elaborate performance for the sake of $35.00.

In addition, I noted that, following my referral of the complaint to the Authority, the Electrical Branch had been asked if it was "now prepared to accept liability". An officer there directed that a "similar reply again" be prepared.

(4) It seemed clear that there had been no physical check made of the escalator concerned at the time of or immediately after the incident. The complainant said that not even the Stationmaster had bothered to do this. I was intrigued, therefore, to know how it could be presumed with certainty that the escalator was functioning normally when the accident actually occurred.

I took up these aspects with the Authority and I concluded my letter by saying—

"In the circumstances, I consider that the Authority should seriously review its decision in respect of (the complainant's) claim, particularly in view of the quite erroneous nature of the presumption made by the General Manager, Electrical Branch, regarding the length of the slacks concerned and the fact that I am satisfied that she was told by the Stationmaster that she would be reimbursed.

I suggest that this is the type of case in which considerations of legal liability should be afforded a lesser place than considerations of moral responsibility, reasonable conduct and good public relations."

The Authority replied, denying that the Stationmaster had told the complainant that she would be reimbursed in any way, and went on to say—

"Staff from the escalator manufacturers, Otis Elevator Company Pty Ltd, were on standby at Kings Cross Station and were advised by the Stationmaster shortly after the incident happened.

A complete check was made of the escalator throughout its whole length, but no defect was found and it was then returned to normal service.

In view of the findings of the staff from Otis Elevator Company Pty Ltd, the assumed cause of the complainant's slacks being caught was based on similar happenings that have occurred on escalators at various city railway stations over a number of years where clothing draping on steps has become caught in escalator combplates.

It is respectfully suggested, taking into consideration the trauma experienced by (the complainant) that a misunderstanding may have arisen as to the then Commission meeting the cost of replacement of the slacks.

Though the State Rail Authority has not found that any act or omission to act by any of its employees contributed to the unfortunate incident occurring, it is prepared to pay, without prejudice, the amount claimed as compensation."

I was pleased to be able to tell my complainant that, after some fourteen months and the expenditure of countless public dollars, her claim for $35.00 would be met, as an act of grace. I remained convinced, however, that her claim had not been properly investigated in the first place and I, therefore, determined the complaint to be sustained.

STATE SUPERANNUATION BOARD

Absence of information in literature

During my investigation of a complaint about the Superannuation Board and, specifically, the conditions under which a contributor can seek exemption from contributions, a matter arose regarding information about exemptions contained in literature distributed by the Board. My inquiries revealed that the Board's literature contained no mention of the exemption provisions or the nature of the refund a contributor granted exemption could expect.

I took up the matter with the Board and the President subsequently wrote to me in the following terms:

> ". . . it is true that the nature of the payment available on exemption is not mentioned in the Board's literature prepared for Fund members. The literature must be concise, if it is to be read, and the selection of material proceeds on the basis of the information most relevant to Fund membership. As you would appreciate, exemption obtained at the point at which eligibility to contribute arises results in no payment being due as no contributions would then have been made. I might mention that the Board has not previously received a complaint regarding the lack of information provided at entry to the Fund on the subject of entitlement on the granting of exemption."

I wrote to the President and said—

> ". . . I agree that such literature should be concise. However, I cannot see that the insertion of brief information about exemption from contributing in such literature would destroy its concise nature. Whilst the literature mentions the availability of further advice and information from the Advisory Service, many contributors might not be aware of the exemption provisions of a scheme which you rightly describe as complex.
>
> Consequently, I would appreciate your further consideration of and advice about the possibility of making some mention of the exemption provisions, and of the fact that the grant of exemption attracts only a refund of contributions, in the literature, perhaps when it is next being reprinted."

The President replied that he would ensure that my request was satisfied when reprinting of the information pamphlets was next being arranged.

TENTERFIELD PASTURES PROTECTION BOARD

Refusal to Refund Deterrent Fees following Impounding of Stock

The complainant, while driving a herd of cattle from one property to another, had had them impounded and had to pay $455.50 to an officer of the Board before he could get his stock back. The complainant, through his Solicitors, has asked the Board to refund the fees paid and, in support of his request, contended—

(i) his stock had not been lawfully impounded;

(ii) he, therefore, should not have had to pay the fees;

(ii) the Board should have taken action against him by way of normal legal process.

In a letter sent to the Board, the Solicitors had this to say—

> "The stock owned by our client which was being taken across the T.S.R. consisted of approximately 125 cows and 44 calves. A number of these calves had been born in the preceding two to three weeks and one or two of them had been born in the preceding ten days. The total distance from the commencement point (of the journey) to the property belonging to our client is approximately 25 miles. Cattle, as you would be aware, can only travel as fast as the weakest members of the mob and our client instructs us that the distance from the Reserve to the final destination, a distance of some 12 or 13 miles is almost all uphill. In addition, we are instructed that from the Reserve, there are no other holding paddocks till the final destination. Given both the geographical location of the course, the extreme heat which was existent on the days when the stock was on the run, and the fact that a number of the stock were extremely young, it was not possible for our client to drive the stock harder than he did in fact drive them.

Again, because of the conditions, the heat, the distance to be travelled and the fact that a number of cattle were very young calves, our client thought it advisable to rest the stock adequately before preparing for the last long run up the hill to his property.

On the day on which the stock were apparently impounded by Officers of the Board, we are instructed that our client had been with the stock in the morning and had proceeded back to the starting point in order to locate a number of cattle which appeared to have been missing in the original muster. The stock, at the time, were left in a secure, fenced, holding paddock and at the time there was no danger that they would mingle with stock belonging to any other owners. Our client was only away from the Reserve paddock for a short number of hours and he returned to the paddock to be informed that his stock was to be impounded unless a deterrent fee was paid by our client. At the time he had no alternative but to pay the amount as he had been informed that the cattle would otherwise have been impounded and that he would be liable to pay for the transportation costs of the cattle.

In relation to the question of abandonment, at no time did our client abandon his stock whilst they were on the travelling stock reserve. To leave cattle for a short period is certainly not to abandon them and we are sure you would agree to this.

We hope that, upon your review of this incident, you will give consideration to amending the decision of the Board to invoke such fees from our client, and to attend to the refund of the money to him as soon as possible. We would also be interested to know under what authority deterrent fees may be imposed on site by members of the Board or Officers of the Board, on persons travelling under permit across a travelling stock reserve."

The Board's Solicitors replied and refused the request for the refund of the fees and the complainant's Solicitors then wrote to me.

My inquiries revealed that the complainant (hereafter referred to as "Mr A"), on 12th February, 1979, obtained a permit to travel his stock a distance of approximately 25 miles. He commenced the journey on the same day. The stock arrived at a Travelling Stock Reserve, the site of the impounding, at approximately 5.30 p.m. on 16th February, 1979, and were still there when impounded at about 1.00 p.m. on 19th February, 1979. Something like 12 miles remained to be travelled before Mr A's stock reached their destination.

In terms of section 58 (1) of the Pastures Protection Act (hereafter referred to as "the Act"), Mr A was required to cause his stock to travel towards their destination a distance of 10 miles each twenty-four hours (calculated from 6.00 a.m. to 6 p.m.). In a period of approximately seven (7) days, Mr A in fact had caused his stock to travel towards their destination a total distance of about 13 miles—an average of less than 2 miles per day.

On the morning of 19th February, Mr A left his stock unattended on the reserve. At the time the stock were impounded, they had been unattended for about five (5) hours. Mr A's contention that the stock were not lawfully impounded by the Board's officer appeared to be based on the fact that Mr A had a permit to travel stock and that such permit had not been cancelled.

Section 48 (5) of the Act sets out the circumstances in which a permit shall cease to be in force and it seemed quite clear that the required circumstances did not exist so far as Mr A's stock were concerned. I considered, therefore, that Mr A's permit existed and remained in force, even though he had not complied with the distance requirements of section 58 (1). However, in my view, it was necessary to go to other provisions of the Act to determine whether the stock had been lawfully impounded and, in particular to decide whether the stock had been "trespassing stock" in terms of the Act. In this regard, section 66 (1) provides that any stock found on any travelling stock reserve, which are not travelling on a permit *and* which do not have some person then in charge of them shall be deemed to be trespassing stock. Section 66A clearly provides that—

- any stock deemed to be trespassing stock in terms of section 66 may be impounded;
- impounding may be affected by a ranger or other officer of the Board; and
- impounding stock can be released, before placement in a pound, upon the payment of deterrent fees.

It seemed to me that Mr A's stock were, in fact, "trespassing stock", in terms of section 66. In order to escape being deemed to be trespassing stock, two conditions must be fulfilled in respect of stock found on a reserve—

(i) they must be travelling on a permit; *and*

(ii) there must be some person in charge of them when they are found.

There was no question, in my view, that condition (i) had been fulfilled in Mr A's case; equally, there was no question that condition (ii) had not been fulfilled. Mr A admitted that he left his stock unattended for about five (5) hours prior to the actual impounding being effected. When the Board's officer found the stock on the reserve (at about 10.00 a.m.) there was no person in charge of them. The stock therefore were "trespassing stock".

This being the case the provisions of section 66A came into force and it seemed to me that there was no doubt at all that—

(i) the stock had been lawfully impounded by duly authorized officers; and

(ii) the imposition of deterrent and damage fees was perfectly in order and was not arbitrarily done as the complainant claimed.

I agreed that the Board could have taken other action against Mr A, had it wished to do so, in addition to requiring the payment of deterrent and damage fees. Prosecutions could well have been launched in respect of breaches of section 56, 58 and 66 of the Act and, if convicted, Mr A could have been fined up to $100 on each count. I did not agree, however, that the Board should have initiated legal proceedings against Mr A *instead* of using the specific provisions of section 66A. It seemed to me, in fact, that Mr A "escaped" fairly lightly, in that—

(i) the Board's officer detained the stock until Mr A arrived at the reserve, paid the fees and secured release of his stock. The officer could have simply driven the stock to the pound had he wished to do so and Mr A would then have had to pay even more.

(ii) Mr A was not prosecuted, as well, for breaches of the Act.

The contention that the stock could not be travelled any faster than they were was not supported by the material available to me.

To summarize the views I formed, then, I was of the opinion that the complaint could not be sustained because—

(i) the stock, as "trespassing stock", were lawfully impounded;

(ii) deterrent and damage fees were quite properly imposed by an officer authorized in terms of the Act to do so; and

(iii) the Board's failure to prosecute Mr A for breaches of the Act operated in his favour.

It followed that I should not find the conduct of the Board in refusing to refund the fees paid by Mr A to be wrong in terms of the Ombudsman Act. I informed the complainant's solicitors accordingly, but extended to them an opportunity to make further comments to me. Such comments were not forthcoming and, therefore, I discontinued my inquiries.

ASHFIELD MUNICIPAL COUNCIL

Failure to erect protective fence adjacent to practice cricket pitch

I received a complaint from a resident about the failure of the Ashfield Municipal Council to erect a wire screen along the rear fence of his property at the rear of a practice cricket wicket in the adjoining park.

On the 15th September, 1977, my complainant wrote to Council indicating excessive disturbance caused by children playing in the corner of the park adjacent to his property and the adverse effect on his elderly and ill mother, as well as trespassing and damage caused to his property; and seeking from Council the planting of protective shrubs or a hedge similar to that provided by Council to protect homes around other parts of the same park. In addition, the complainant sought a wire screen along the length of his rear fence of a similar type to wire surrounding an adjacent tennis court.

Council's reply of 19th December, 1977, did not deal with the special circumstances of the greater attraction of this corner of the park when compared to other sections bordering private property and also the fact that the complainant's property had been afforded less protection by Council than other properties through the planting of shrubs. Council in that letter also informed the complainant that "a fence of significant height to prevent the occasional cricket ball entering private property around the perimeter of the Park would not be warranted".

On 16th November, 1977, the Department of Sport and Recreation advised Council that approval had been given to a Government grant under the Special Employment Scheme "to assist with the construction of 5 all-weather cricket practice wickets and erection of practice nets" at five parks including the park alongside my complainant's property.

Council subsequently not only sited the cricket pitch within a few feet of the complainant's rear fence; but also failed to consider either

(a) the increased attraction which this new amenity created for both children and adults to play ball games in close proximity to his property; or

(b) his request made only two months earlier that protective shrubs and fence be provided to his property.

On 16th November, 1978, in reply to representations made on my complainant's behalf by his local Member of Parliament, Council *inter alia* indicated that—

- "the situation . . . was similar to that existing at a number of other parks in the municipality . . . While cricket balls and soccer balls do periodically enter into adjacent residential properties, this situation has existed for many years." (This did not take into account the special circumstances affecting my complainant and in particular the construction by Council of the practice cricket pitch.)
- my complainant had "acquired the property in March, 1977, and it could therefore be reasonably assumed that he would have been aware of the fact that the Park was used for active ball sports".
- an estimation of the cost of erecting wire fencing to all properties adjoining the Park and running into thousands of dollars. (However there was no suggestion that such protection would be sought or wanted by the majority of adjoining owners who were already afforded substantial protection by well established shrubs within the park and adjacent to property boundaries.)

In January, 1979, and resulting from continuing complaints by my complainant and after the commencement of my investigation, Council considered the question of providing protection to his and the immediately adjacent properties by the erection of additional wire mesh to the cricket pitch enclosure.

In doing so, however, Council, instead of discussing the problem with those residents affected by it, held discussions with the firm which originally erected the wire enclosure. As a result, the previous wire enclosure was extended at some cost to Council and the problem to the property owner continued.

The basic problem, as explained by my complainant in numerous correspondence to the Council, had been—

- prior to the erection of the practice cricket pitch, the layout of the park was such that a protected corner adjoining his rear fence provided a natural attraction to children to play close by, placing his property at greater disadvantage and danger than other properties adjoining the park; and, in addition, his property was not protected by shrubs preventing such play as was the case with the majority of other property owners;

and

- since the erection of the practice cricket pitch, the natural attraction of the area had been enhanced, and since the cricket pitch enclosure was a small one, both children and adults played in the area outside the enclosure because that enclosure was capable of accommodating only one batsman at any one time. Balls continued entering his property from outside the enclosure as well as some which bounced over the top of the enclosure.
- Council had not apparently taken into account the complaints which were made on the basis of evidence, viz., visible damage to property and the number of balls confiscated by my complainant for the purpose of providing evidence.

- Council consistently had not commented on the danger to persons, and in particular, to a sick and elderly woman, and dealt only in terms of cost of preventing damage to property and possible claims for damage to property.
- Council appeared to have concentrated on the aesthetic and visual desirability of any protective screening to a greater extent than the loss of privacy, safety, and use of the full facilities of their property by the complainant and his mother.
- There appeared to be no good reason why the protective cricket pitch was located in such close proximity to the complainant's boundary when there had been previous complaints to Council regarding play in this section of the park.

Following a site inspection by one of my officers and examination of the Council's relevant files, I approached the Council pointing out that there appeared to be grounds for adverse comment in respect of the following considerations:

- Council did not appear to give sufficient attention over a period of approximately 1½ years to requests made by my complainant for protective fencing and shrubs especially in relation to the special circumstances which were the basis of his requests, and apparently failed to take into account the evidence provided to substantiate the problem.
- Council did not appear to afford the same measure of protection (by shrubs) to the complainant as it had done to the majority of other property owners/occupants adjoining the park.
- In erecting a cricket practice pitch in the park, Council apparently failed to take into account the additional problems and dangers the location of this facility would present to my complainant.
- In reply to representations made by my complainant's Member of Parliament, Council seemed to have failed to deal with the subject matter, viz., the special circumstances affecting any complainant and his immediate neighbours which gave need for protection on the boundary fence by wire extensions and also by planting of shrubs close to the boundary.
- The siting of the pitch and enclosure in such close proximity to an unprotected property appeared to be unwarranted.
- Council did not appear to have paid regard to the aspect of personal danger; had seemed to regard property damage as a matter for insurance claims; and had also appeared to be more concerned with the visual effects of wire screening than the loss of privacy and safety by the property owners.

In reply the Town Clerk informed me that Council had resolved that in the special circumstances—

- the Council would construct, subject to my complainant's written approval, a suitable protective wire fence adjacent to properties at the rear of the practice cricket wicket;
- that shrubs would be planted at this location;
- that the Town Clerk would interview and convey the above information to my complainant;
- that the Council would place a synthetic surface on the practice cricket wicket with a view to lessening the alleged noise nuisance associated therewith and determining the synthetic's suitability for use.

Following his discussions with the Town Clerk the matter was resolved to the satisfaction of my complainant. I therefore decided to take the matter no further and concluded my investigation on the basis that the complaint had been sustained.

COROWA SHIRE COUNCIL

Refusal to terminate lease without payment of consideration

My complainant had purchased some land, on 1st September, 1978, over which Corowa Shire Council held a lease for the purpose of providing car parking facilities for the public. He claimed that when he purchased the land at auction, he was led to believe, by statements made by the Auctioneer, that Council would relinquish its lease without difficulty but, in fact, Council refused to do so unless he paid some compensation.

The land had originally been owned by the local County Council and, while it was so owned, the Shire Council had secured the lease which did not expire until 1983. One of the terms of the sale of the land was that the lease would remain force.

My complainant felt that the Council was being unreasonable in requiring the payment of money before it would give up its lease over his land. In this regard, he claimed that—

- Council no longer needed the land for the purpose stipulated in the lease (a car park);
- Council had not paid to him the rental stipulated in the lease;
- Council (in fact, the Shire President) had previously allowed him to use the land anyway; and
- Council was victimizing him.

The complainant provided me with a great deal of information relating to his claim of victimization most of it quite historical in nature.

At the outset, I explained to my complainant that my jurisdiction so far as the conduct of local government authorities is concerned, is restricted to conduct which occurred on or after 1st December, 1976. Therefore, whilst I found interesting the information he had provided, much of this information had to be disregarded for the purpose of my investigation.

I made inquiries about the matter and I subsequently received two comprehensive reports and copies of Council files from the Shire President, as well as a report from the Chairman of the local County Council, the former owner of the land involved.

My inquiries revealed the following situation:

- My complainant had first approached the County Council expressing interest in lease or purchase of the property, in October, 1971. On 4th November, 1971, the County Council wrote to him and, *inter alia,* said—

  "It has now been decided to subdivide a small section at the rear of the block for retention as a possible future sub-station site, and sell the balance of the property . . . Local Government regulations require us to advertise and invite tenders with respect to any real estate, and you will be invited to submit a tender when this occurs."

- However, on 19th November, 1971, the Shire Council expressed an interest in acquiring the property as an off-street parking area. After receiving advice from the Department of Local Government that the sale of the property need not be advertised and bearing in mind that the Shire had actually owned the property prior to the establishment of the County, the County Council resolved to give the Shire preference in respect of the acquistion of the property. The County Council wrote to my complainant on 9th December, 1971, informing him of this decision.

- In the event, the Shire decided to accept the County's offer of a long-term lease, at a nominal rental, over the land in question. Such lease, current for a period of 21 days, commenced on 1st August, 1972, with the consent of the Minister for Local Government.

- On 1st April, 1978, my complainant wrote to the County Council expressing his interest in purchasing the land and his disappointment that the County had leased the area to the Shire in 1972. He suggested that the fairest way to dispose of the property would be by public auction.

- On 15th May, 1978, the County Clerk wrote to him in the following terms:

  "The Council has decided that there is no good reason to retain ownership of its . . . block, but is considering the matter of how best to sell the property in view of the existing lease to the Shire arrangements.

  It is pointed out that in 1971, when the Council originally discussed the matter of the future use of the . . . block, and you submitted an offer dated 8th October to purchase the property including the existing building, the Council considered your offer at that time, and decided to give preference to the local Shire as it indicated it was interested in the use of the property. It is noted that my letter dated 9th December, 1971, advised you that the County wished to give the Shire Council preference in this matter, and it continued to do so in connection with the lease for parking purposes granted on 1st August, 1972.

The County Council has no wish to rush this matter, but will be giving it further consideration in due course."

- On 25th May, 1978, the complainant replied to that letter and concluded his letter by saying—

  "We consider that auction is the best and fairest way to sell this block and we would be interested to purchase same, even with a lease on it to Council."

- On 14th June, 1978, the County Clerk wrote to him and said—

  "Further to previous correspondence, I now wish to advise that the County Council has decided to place the property with Messrs . . . for sale by public auction. Should a third party purchase the property the Contract will be contingent on the continuation of the existing lease to the Shire Council for car parking purposes. I thank you for your interest in the particular block, and look forward to your continued interest in the proposed auction sale."

- Prior to this, on 5th May, 1978, the Shire Clerk had written to the complainant concerning his lease of portion of the property and ended his letter as follows:

  "For your information, the . . . County Council have inquired of Council as to whether they wish to purchase the area and negotiations are currently in hand."

- The County Clerk reported to me that he and a Councillor attended the auction sale. He went on to say:

  "The Auctioneer made it quite clear that there was an existing lease on the land for car parking purposes and that it had 15 years to go."

So far as the various claims made by my complaint were concerned, my inquiries revealed the following:

Council need for leased property and Permitted use of portion of land

Council at a meeting on 15th May, 1979, resolved that the subject block be retained as a car park in view of the fact that two hour parallel parking was about to be introduced into Sanger Street, Corowa, the main sheet and shopping centre. Parallel parking, in lieu of 45 degree angle parking, in fact, was introduced on 8th June, 1979.

The change to parallel parking reduced the number of practical parking bays in Sanger Street by approximately 85 and, therefore, Council was of the view that alternate parking adjacent to the business section was needed.

Following Council being the losing bidder on the complainant's block, Council negotiated and purchased alternate land for off street car parking. The complainant's block would park some 32 cars whilst the alternate area in a nearby street would park 38 cars. This land was purchased from four owners at a cost of $23,172.00 plus legal and subdivision costs. In addition, Council had expended approximately $4,500 on preparation of the area and sealing had still to be carried out. The decision to purchase the alternate land was taken prior to any discussion and meetings concerning the introduction of parallel parking.

Council argued that to permit the orderly parking of vehicles of employees and shoppers, it needed to provide additional off street parking in both locations and the Shire Clerk had already approached a landholder in a third location regarding Council acquiring his land as well.

Regarding my complainant's block, on one end of it there was a raised section, originally the foundation of a building, approximately 30 feet by 17 feet which was not suitable for parking of cars as there was a sharp drop on three sides. This was the section which Council permitted the complainant to use. This area did, in fact, reduce the number of cars which could currently use the block; however, by levelling this area, parking for approximately 32 cars could be provided.

Failure to Pay Rent

As the lease commenced on 1st August, it had been usual on or about that time each year for Council to pay the annual rent and reimburse rates to the previous owner, the County Council. This had been done in 1978 prior to the land being sold to the complainant.

Council intended that the 1979 rent to be paid prior to 1st August. I also ascertained that the complaintant had elected to pay his 1979 rates on his Corowa Shire properties by instalments, in accordance with section 160DA of the Local Government Act, and, in paying the first instalment, included rates for the property involved. This payment was reimbursed on 17th May, in accordance with the terms of Council's lease.

Alleged Victimization

Suffice to say that I found no evidence to support the complainant's contention that he was being victimized.

The Shire Council denied that they had authorized the Auctioneer, on the day of the auction, to take any statement regarding termination of the lease and the Auctioneer had not been employed by Corowa Shire, as the complainant had inferred.

The complainant had offered to meet all legal expenses in terminating the lease but, as Council pointed out, this offer amounted to NIL unless some surrender value was offered.

My inquiries revealed that, in encouraging public use of the land, Council had demolished an old building, levelled a large section, provided an all weather surface and sign-posted with a sign on the Sanger Street end of an access lane and on another street frontage. In actual fact, according to Council, people had been discouraged from parking on the area by the presence, from time to time, of large farming machinery belonging to the complainant.

The Shire President had granted permission to the complainant to use a section of the land and Council had endorsed such action. It was claimed, however, that, on many occasions, farm machinery occupied the larger portion of the block.

On the material available to me, I reached the following conclusions:

(1) There was no doubt that the complainant was well aware of the lease over the land at the time he purchased it. Continuation of the lease, in fact, was a condition of the auction contract.

(2) Even if the Auctioneer had made the statement that the complainant claimed he made, such a statement, in my view, meant nothing more than the eventual purchaser would have been able to negotiate with the lessee (the Shire) regarding termination of the lease. However, only the Shire would have been in a position to advise interested bidders of the conditions or terms on which the lease might be terminated; it was clear that no approach had been made to the Shire, prior to the auction, to clarify this aspect.

(3) It was obvious that the Council refuted my complainant's contention that the land as no longer needed for off-street parking. In fact, according to the Council, his land, as well as other land, was needed for this purpose following the introduction of parallel parking in Sanger Street.

(4) The rent on the lease, in terms of the lease agreement, was payable on 1st August "in each and every year". Rental for 1978 was paid to the County Council (then the owners). Rental for 1979 was paid to the complainant in June, well before the stipulated date.

(5) On the material available to me, there was nothing to indicate that the Shire Council, or any officer of Council, was victimizing the complainant.

It seemed to me that the basic question that I must consider was whether Council was acting wrongly (i.e., unfairly, unreasonably, or improperly) in requiring the payment of consideration in return for terminating its lease over the land in question. I took the view that Council was not acting wrongly in this respect. It is well accepted practice that a lessee is entitled to require some form of consideration in return for abandoning his rights and interests as a lessee and Council, in my view, was doing nothing more than this and was acting in the interests of ratepayers generally.

Council had stated (and I saw no reason not to accept such statement, that, if it relinquished its lease on the complainant's land, it would have to acquire other land elsewhere at a cost to ratepayers. It did not appear to me unreasonable that Council should seek to minimize the cost involved by requiring the payment of compensation for giving up its lease.

Consequently, I informed the complainant that I was of the view that his complaint should not be sustained. I added that, as I understood the situation (and my understanding appeared to be supported by comments made to me by the Shire President), there might still be room for negotiations in the matter and I shared the Shire President's hope, as expressed to me, that an amicable solution would be reached, and thus avoid any possibility of involving the ratepayers of Corowa Shire and the complainant in unnecessary and costly litigation.

I did afford the complainant an opportunity to provide me with further comments which might persuade me to adopt a different view. Whilst he informed me of his disappointment at the result of my investigation and indicated that he would make further submissions to me, he did not do so and, after a time, I concluded my investigation.

EUROBODALLA SHIRE COUNCIL

A number of provisions in the Local Government Act and Ordinances relate to the question of a Council's public officials undertaking private work.

This is to avoid posisble conflicts between a Council Officer's public and private interests, or gaining some advantage and in this regard the Act protects not only the public but also the individual officer.

Section 96 of the Local Government Act, in particular, states that, even though an officer may have a right of private practice, that officer may not prepare any plans, specifications and the like for any other employer than his Council.

A permitted exception relates to the preparation of such plans that have been undertaken with the employer Council's approval. However, the Act appeared to me to say little about giving an intending private client an opportunity to note that a private and not a Council planning service was being provided.

My complainant, a Victorian, had bought a residential block of land in a country town in this State, and, admitting to me that there was no favourable market there for resale of vacant land, had approached Council's town planning section initially about the type of development that would be advisable.

A Council Officer had subsequently offered to meet my complainant on site after normal business hours and then to draught plans for appropriate development.

About a month later, these plans were submitted for discussion and at that stage the project obviously no longer appeared viable, particularly as my complainant then appreciated that a charge of up to $400 would be incurred in preparing the detailed plans.

The project had clearly lapsed in my complainant's mind until she received a bill for $185 for the work on the draught plans that had actually been completed on the still unfinished project.

At that stage, the complainant took the matter up with both myself and the council direct since, she informed me, no mention of a charge had been made as regards the site inspection and draught plans and it was assumed that these were part of Council's services, some at least of the necessary information having to come from Council's resources.

After taking the matter up with the Council, I learned that the Shire Clerk had already promptly replied to the direct representations received by pointing out to my complainant that Council permitted certain staff members including the officer, the subject of the complaint, to undertake private work as a service to the public but subject to a number of conditions. It was also mentioned that Council did not provide a free plan drawing service for home builders due to costs and staff requirements.

Finally Council had provided my complainant with full details of its conditions under which any of the staff were permitted to undertake private work. As well as the usual conditions that I might have expected to find restricting the time that Council officers might spend on work for others than their normal employer, it appeared that payment had to be made at the usual rates charged to the public for Council resources that might be needed. In addition, a declaration had to be lodged with a superior in a prescribed form in respect to each piece of private work undertaken.

Council was therefore in a position to take any necessary action to regulate the private work of concern to my complainant, and I had to conclude that in the light of the information then available to me it would not have appeared that there would have been any basis upon which the administrative conduct on the part of the Council or its officer involved in the case could have been found unreasonable, as required under the terms of the Ombudsman Act.

I did, however, invite my complainant to comment on the matters raised in the above regard. Regrettably this was not done, but one of my senior officers interviewed the Council officer involved. As some months had elapsed since the time my complainant had been first interviewed, the officer was unsure that, before commencing his private work, that he had discussed the possibility with my complainant that a charge could be involved for completed work even if the whole project did not proceed.

Additional information made available by Council in response to my specific inquiries negatived any suggestion that the Council officer could have taken an unfair advantage of my complainant.

In the result, I informed the Shire President that while I regarded it as unfortunate that it had been necessary for me to have raised this matter with him, nevertheless, it appeared that the Council's system was open to misunderstandings that could negate the intention that permitting willing employees to undertake additional private work should be seen as a service to the public.

Therefore, to overcome future complaints of a similar nature, I suggested that members of the public should receive adequate prior notice that any relevant work performed for them by a Council officer was so performed on a strictly private basis.

In this regard, I also suggested that Council might consider adding to its list of conditions applying to private work by Council staff members, as forwarded to my complainant, requirements for the staff member to furnish a written notice to an intending client showing that—

- no Council work was involved, but a private service was proposed in terms of Council's permission;
- if it were intended that a charge be made for private work, there would be a specified cost which would be a matter between the staff member and the client concerned on a personal basis;
- if the private work did not proceed to its anticipated completion, there would still be a cost negotiable on a personal basis between the staff member and the client concerned.

I was subsequently gratified to hear from the Shire Clerk that Council had agreed to add the conditions I had suggested to those applying to Council staff carrying out private work with Council's approval. Council had also reduced the number of staff who had been granted approval to carry out such work.

HORNSBY SHIRE COUNCIL

Introduction of a twice weekly garbage service by the Council, despite a survey having been conducted which resulted in a majority of those who replied being in favour of only a single service

A total of 76 complaints were made to me that the Hornsby Shire Council had approved the introduction of a twice weekly garbage service despite a survey having been conducted which resulted in a majority of those who replied being in favour of only a single service.

Various grounds of objection were raised by the complainants but particularly they were directed towards—

(a) Council, having called for a survey, was not abiding by the outcome.

(b) The survey was not in favour of a twice weekly service.

(c) Pensioners and low income earners did not need the service and would be adversely affected.

(d) Council did not consider the objections lodged.

(e) Council was favouring the garbage contractor.

Inquiries were instituted which also involved examination of Council's voluminous files, reports by Council and by Investigation Officers of the Ombudsman's Office. As a result, the following sequence of events emerged as having taken place:

(a) In 1977, Council considered the question of an elective form of excess garbage removal being provided. This was to be distinct from a twice weekly mandatory service system. A system involving the use of yellow-coloured bags was examined but the point was raised that there was a definite danger to collectors from sharp objects, such as broken glass, protruding through the bags.

The purpose in using the yellow bags was as a means of identifying the additional service to be charged for, but it was really a refinement of Council's then existing system of charging for an additional garbage bin, on request for the extra service. (The residents thus had the option of one or two bins being collected at the once weekly service.)

(b) Problems relating to a once a week collection were examined and these involved mainly the health hazard between services arising from flies on rotting refuse; danger of disease; and putrid bins where they were crammed with garbage, particularly in the summer. Householders who were affected by this situation were said to be then depositing their garbage in litter bins in Council parks, ovals and reserves and shopping centres. At the same time the Metropolitan Waste Disposal Authority had indicated that it was about to charge for rubbish disposal at its Depot, so that it was strongly expected that some people would be even more inclined to deposit surplus garbage in bushland and public places. Rubbish and garbage were already being placed in Council's "Dempster Dumpster" containers which were not intended for this purpose, but for the disposal of non-putrescible garbage only.

(c) The Council Health Surveyor favoured a twice weekly service to overcome these problems and recommended such a service to Council on 16th January, 1978.

(d) To obtain additional information, the views of contractors were sought and letters supporting the twice weekly service were received which pointed out the dangers of plastic bags and that their use would not achieve any economy as the second garbage collection service could be provided at the same cost.

(e) On 2nd February, 1978, Council deferred a decision on the introduction of a twice weekly service until a plebiscite had been taken.

(f) On 13th February, 1978, the Health Surveyor reported to Council on the proposed survey; the plastic bag collection scheme; and an optional single or twice weekly service. It was pointed out in the report that the plastic bag system could result in a loss of revenue and that there were problems in the control of those who would be receiving an optional single or twice weekly collection.

(g) Although there was no obligation to do so, Council conducted the proposed plebiscite in 1978 being aware that the result could be in favour or against the proposal, but that the current views of the residents would be available.

(h) 33 000 forms were sent out to the population of the Council's scavenging area. Of these, 15 003 were returned; 4 631 voted for a twice weekly service but 10 372 were against the proposal. About 55 per cent did not express an opinion.

(i) On 14th August, 1978, the Health Surveyor reported the result of the survey to Council in a comprehensive report which included mention of the type of comments made by objectors.

(j) All of the objections lodged were, therefore, fully considered by Council.

(k) In the exercise of their discretion as the elected representatives of the ratepayers, Council decided on 14th August, 1978, to adopt the twice weekly service by inviting tenders when the next contract was called.

(l) Council had reports available to the effect that—

(i) 55 per cent of the ratepayers were not concerned with the decision to be made by Council as they did not express a view;

(ii) records showed that most of the objectors were pensioners and the contractors had indicated that a double service, if implemented, should be provided to pensioners at the current single service rate;

(iii) the result of the plebiscite was not overwhelmingly in favour of a single service;

(iv) Hornsby was the last Council north of the harbour to have a twice weekly service;

(v) a voluntary second service would be a problem to control as people who had not paid the charge could obtain a second service merely by putting out their bins.

(m) Accordingly, on 11th October, 1979, when the next contract was about to be arranged and after tenders had been called, Council accepted six contractors in zoned scavenging areas so that the twice weekly service was not given to any one specific contractor and no particular contractor gained a benefit.

(n) On 5th November, 1979, Council considered a detailed report by the Shire Clerk on a number of pertinent points, including the effect on the position of pensioners. (Council resolved that any aged pensioner or otherwise financially disadvantaged retired person would be able to opt for a single service only. Pensioners already receiving a rates rebate will automatically receive one garbage service per week only unless they request otherwise. Other pensioners and financially disadvantaged retired persons will be required to apply to Council.)

(o) The contracts were formally sealed by Council on 14th February, 1980.

In summary the investigation indicated that the Council fully considered the objections lodged; there was no obligation on Council to conduct a survey; its attitude to the survey was not unreasonable; council had real and cogent reasons for introducing a twice weekly service; other alternatives were investigated by Council but could not be implemented for sound reasons; and the contract was fairly distributed to six contractors after tenders were called.

In the light of what was disclosed by my inquiries, I came to the opinion that Council, in deciding to introduce the twice weekly garbage service had had regard to the relevant factors. Accordingly, I decided that I would not be able to find its conduct wrong and that my inquiries into the subject should, therefore, be concluded.

I wrote to all of my complainants enclosing a statement of my findings and closed my investigation.

It was somewhat heartening to receive from a few of those who had originally complained to me a message of appreciation for the explanation I had been able to provide to them.

KIAMA MUNICIPAL COUNCIL

Failure to Support Application for Suspension of Planning Scheme

During a visit to the Wollongong area, I received a complaint from the owner of five separate blocks of land (hereafter identified as Lots 1 to 5) on an estate situated some 1½ miles from Kiama. In 1973, he had been granted permission to build one dwelling on the combined lots 1 to 5 as the land was zoned non-urban. He now wished to erect a dwelling on each of the lots but, he said, Council had refused to support his application.

I made inquiries with Council and the Mayor told me that Council had decided not to support suspension of the Planning Scheme to permit the erection of single dwellings on each lot because—

- no water supply was available to the lots;
- the lots were well outside the town boundaries;
- approval of the suspension application would result in and encourage ribbon development;
- the area was outside the area serviced by Council's garbage contractor but a garbage service would undoubtedly be required;
- the intersection of the two roads bounding the property was an extremely dangerous one and could not be rectified without major reconstruction.

I also made inquiries with the Planning and Environment Commission and as a result was able to summarize the situatioin as follows:

(1) The Estate in which lots 1 to 5 were located was subdivided into 38 residential lots in January, 1960, prior to the introduction of planning control in October, 1960. Between October, 1960, and March, 1969, when the Kiama Planning Scheme was prescribed, the land was subject to interim development control and was zoned non-urban, requiring a minimum area of 50 acres for the erection of a dwelling. This zoning was maintained in the prescribed Scheme.

(2) The Estate was then in the ownership of a company which sold off many of the lots both before and after the introduction of planning control in October, 1960.

(3) It was not until December, 1964, when interim development appeals against Council's refusal to permit dwellings on the other lots were lodged, that the matter first came to the attention of the Planning and Environment Commission. During the hearing of those appeals, it became known that no essential services were available, the land was 1½ miles (2.4 kms) from the town of Kiama and part of the site was extremely steep and subject to erosion. Because the owners of the two lots had purchased the land in good faith, would suffer financial hardship, and were committed to build, the Commission reluctantly allowed the appeals in July, 1965.

(4) From that time, numerous conferences between Council, the Commission and the major landholders in the area took place with a view to overcoming the obvious problems of permitting residential development in an isolated area devoid of essential services. Exchange of lots, purchase back by the company, and purchases of additional lots by the various owners were all examined with a view to achieving blocks of not less than 3 acres nor more than 5 acres.

(5) During the latter part of 1970, the complainant purchased the unsold lots from the original owners, the Company. It seemed that he was fully aware of the zoning and the proposals for consolidation of various lots.

(6) Further efforts were made to resolve the problem but were not successful. Finally, in March, 1973, it was agreed that dwellings would be permitted on lots purchased in good faith from the Company and that the balance would be consolidated into areas of not less than 1 acre nor more than 3 acres.

(7) Accordingly, action was taken to suspend the provisions of the Kiama Planning Scheme and make an Interim Development Order providing for the erection of one dwelling on, among others, the combined lots 1 to 5.

(8) So far as the complainant's suspension application was concerned, I ascertained that Kiama Municipal Council had forwarded the application to the Commission with the advice that any easing of the original provisions would not be supported.

(9) A report on the application was prepared but, before the matter could be submitted to the Minister for determination, Kiama Council indicated that it did not support the application and that no further action should be taken. However, the complainant subsequently asked that the application proceed notwithstanding that Council did not support it. Accordingly, the matter was submitted to the Minister for Planning and Environment.

(10) The Minister declined to take suspension action on the grounds that essential services were not available, the development would have a negative visual impact and be likely to cause erosion, would be a traffic hazard, and the solution reached in 1973 allowing one dwelling to be erected on the combined area of lots 1 to 5 was a reasonable one.

As the matter of suspension had been determined by the Minister, I was unable to pursue the matter further.

So far as Council's actions were concerned, I told the complainant that on the material available to me I could not see that I would be able to find Council's conduct to have been wrong in terms of the Ombudsman Act. Consequently, I regarded his complaint to be not sustained and I discontinued my inquiries.

KOGARAH MUNICIPAL COUNCIL

Refusal to allow inspection of plans of neighbours' Building Application

The complainant had used a local solicitor to write to Council on his behalf concerning the erection by a neighbour of a double car-port and garage and the sighting of the approved plans. Council had replied to the solicitor that the plans could only be viewed at Council Chambers if the permission of the applicant was obtained.

At that stage the complainant was brought to my office and I approached Council concerning the Building Application and regarding the sighting of the approved plans by the complainant.

Following receipt of a lengthy reply from Council, it appeared that the main concern of the complainant was that the double car-port and garage would be used as a workshop for the maintenance of the commercial vehicles owned by his neighbour. However, Council had an assurance from the neighbour that the structures would only be used for parking of his vehicles. The report also went on to say that the Council's Deputy Building Surveyor had interviewed the complainant at his home and given him verbal details of the proposed structures including height, size and site location, but he was not prepared to show him the approved plans. Subsequently following his solicitor's representations, Council did arrange for the complainant to sight the plans but only after he produced a letter of authority from the applicant.

In my reply to Council I advised that while I did not intend to pursue the matter of the approval of the Building Application, I was concerned at Council's rationale in refusing to allow the complainant the opportunity to inspect the plans. My letter also stated that while I realized that Councils were not obliged to advertise all building and development proposals, that it was obvious that members of the public should be made aware of any such proposals which could adversely affect them.

My letter went on to say:

"However, if a *genuinely interested* person such as a neighbour becomes aware of a proposal and requests the Council to peruse a building or development plan he should be permitted to do so in order that he may lodge an objection for Council's consideration before a decision is made by the Council (to be able to object properly he would need to see the plan of the proposals). This should be to the advantage of the Council as it enables it to be in possession of the full facts. Section 312 (2) of the Local Government Act would not prevent such action as it would be consistent with giving effect to the provisions of the Act. Such a document would not be confidential in respect to such a genuinely interested person.

Even more so, such an interested person should be permitted to inspect a building or development plan after it has been approved by the Council, as such a document would have already been discussed at an open Council meeting which approved the plan. If an approval was given by delegated authority to a Council officer under section 530A of the Local Government Act this should not materially alter this principle. It could be argued that the conduct of one officer acting alone should be more open to public scrutiny.

In relation to such an interested person being permitted to have access to the conditions of approval imposed by the Council it is apparent that he should be able to do so for the following reasons:

(a) Planning schemes contain a provision that Council shall keep a Consents Register of development application approvals (including approvals for the erection of buildings and use of land) which is available to the public for inspection. There is no reason why building approvals under Part XI of the Local Government Act could not be similarly inspected.

(b) Ordinance 1 paragraph 38 (e), made under the Local Government Act, provides that a person is entitled to inspect the Council minutes. Such minutes would contain Council's building and development approvals and any conditions imposed. If the approval was given under delegated authority, the specific approval would be reported to a later Council meeting, even if in a Schedule listing such approvals over a given period, and obviously the conditions of approval even if not listed in the Schedule would not be confidential and would be available to an interested person.

(c) The Council officer's report to the Council on the building and development approval would appear in the agenda of a Council meeting and thus be available to the public at that time. The agenda would show the recommended conditions of approval which then become the conditions of approval if accepted by the Council at that meeting. If approved under delegated authority the same principle applies and it is even more desirable that the information be available to the public.

Allowing an *interested* person to inspect building or development applications or take a copy of conditions of approval would not be a breach of the Local Government Act and a failure to do so could be unreasonable and therefore wrong conduct of the Local Government authority in terms of section 5 (2) (b) of the Ombudsman Act. Ordinance 1 paragraph 56 (b) does not prevent such access as it specifically excludes occasions as otherwise provided by law. Of course, in addition, the Ordinance permits the Council to give leave to produce such records."

I requested that Council reconsider the matter and let me have its further comments.

I then wrote to the complainant passing on the relevant information, advising him that I intended to pursue Council's initial refusal to allow him to inspect the plans and requesting his comments on my report. However, the complainant did not reply and I assumed that the matter had been concluded as far as he was concerned and that he was no longer interested in the matter.

Council subsequently replied enclosing a copy of a legal opinion which in effect confirmed its original policy of refusing to disclose details of Building Applications made to it other than applications for the erection of residential flat buildings. The advice went on to suggest that if I considered the present situation so unsatisfactory, I should approach the Government to have existing legislation altered!

I then wrote back to Council advising as follows:

"Recently another metropolitan council sought the advice of the Department of Local Government on my opinion in this matter as stated in a letter to them in similar terms to my letter to you dated 23rd October, 1978. In expressing general agreement with my opinion the Department stated—

> 'While it is true that under clause 56 of Ordinance No. 1 under the Local Government Act there are constraints upon servants and members of the Council from making available records of the Council to other persons, these constraints are subject to the exercise by the Council of its discretion to allow such records to be made available.
>
> It would seem the Ombudsman is of the view that the exercise of such discretion so as to prevent availability of building and development applications except with the consent of the applicant is 'wrong' within the terms of the Ombudsman Act. It is not, of course, a question of the Council acting outside its powers but whether, in appropriate circumstances the rules adopted by the Council tend to deny information to persons whose interests may be adversely affected thus affecting their ability to put forward their views on the subject at an appropriate time in the decision-making process.
>
> While appreciative of the fact that under existing law the Council is deemed to be the arbiter of the public interest in issues where it is not statutorily obliged to make public details of building and/or development applications, it must be recognized there are increasing calls for more open government and a greater degree of 'third party' participation in the decision-making process. That councils, not infrequently, actively canvass public opinion and base decisions partly on representations received and use them in responding to appeals to the Local Government Appeals Tribunal lends point to these calls.
>
> *Accordingly, the Department is inclined to the view that unless councils are prepared to make details of such matters available to properly interested persons when requested to do so they will expose themselves to criticism for withholding information from persons who have a valid interest in the matter to be determined and reasonable steps should be taken to avoid such situations.*
>
> Determination of guidelines as to who may be regarded as properly interested persons to whom information should be made available on request is one of some difficulty. While it is obviously not possible to express any conclusive view as to the appropriate attitude in all cases the Council might consider adapting the provisions of section 342ZA (1) (a) as a guide in determining whether in response to the Ombudsman servants are to be authorized to make details of development and building applications available.'

It should also be noted that in the course of my dealings with local authorities in New South Wales I have found that it is the usual practice of many councils to act in accordance with the above stated advice of the Department of Local Government and my own previously stated view."

My letter went on to say that:

"I did not imply that there was any *obligation* upon Council under the provisions of the Local Government Act to make building plans available for inspection to genuinely interested persons, but that that Act did not prevent Council from exercising a discretion to provide access to such persons and that Council's failure to do so could be unreasonable and therefore wrong conduct in terms of section 5 (2) (b) of the Ombudsman Act."

Council subsequently replied requesting time in which to further consider the matter and in which to also consult with the Department of Local Government.

Following that consultation Council forwarded a copy of the Department's advice for my information and stated that a report on the matter would be put to Council recommending a firm policy for its adoption.

Several months later Council replied enclosing the text of a resolution adopted as follows:

> "THAT the Building Surveyor and Town Planner be authorised to allow persons who own land adjoining property which is the subject of a building or development application, to peruse the plans submitted with the application.
>
> Further, where, in the opinion of the Building Surveyor, or Town Planner, special circumstances attached to a site are of such a nature that other properties apart from those adjoining may be affected by a proposed building or development application, the Building Surveyor and Town Planner be authorised, on application, to display the plans to the owners of such other properties as may be affected."

As this matter finally appeared to be resolved, I then closed my file.

LIVERPOOL PLAINS SHIRE COUNCIL

Flooding of Wheat Fields

This complaint was from a wheat farmer concerned at the Council's actions in constructing earth-banks in the table-drain, beside several causeways in the public road adjacent to his and his neighbour's properties. The earth-banks diverted the natural flow of flood waters into the causeways and then to the opposite side of the road, thereby flooding the lower land. Before the earth-banks had been constructed by the Council, the flood waters had proceeded along the edges of the roadway in the table-drain and had not caused any excessive damage to the land in question.

The result of some previous flooding had been the loss to the farmer of approximately 180 acres of wheat due to the land being too soft to get harvesting equipment on to it.

The farmer had complained to Council several times but to no avail. After I took the matter up with it, Council in a report claimed that the Crown road had become a water channel due to:

(a) the farming techniques used by the local farmers;

(b) the boundary fencing catching debris and diverting the water flow;

(c) the forming of deep tractor ruts caused by the movement of machinery and implements owned by the various farmers who used the road for access to their property.

The Council was concerned that the surface water previously had been directed across the surface of the road causing the loss of surface gravel and other road failures. Council also assured me that it was on sound engineering principles that it had constructed the earth-banks and causeways.

Following considerable correspondence with the Council and the complainant and after examining aerial photographs and plans provided by the Council, I arranged for two of my Officers to inspect the site and to hold discussions with the complainant and with the Council Officers.

Following that inspection a further series of meetings were arranged with the Officers of the Water Resources Commission who visited the area and who also had discussions with the Council officers.

During the course of my investigation the original complainant sold his farm but continued to keep an interest in the result of my investigations.

The officers of the Water Resources Commission following their inspection and meetings with Council advised that an equitable solution to the problem appeared to lie somewhere between the opposing views of the Shire and the landholders, and after considerable discussion a voluntary agreement along the following lines had been achieved:

(1) the Shire would limit the existing drainage banks to a distance of 40 metres (or less) from the road;

(2) any new banks proposed by the Shire would extend at a "flatter" angle to the road than those existing, to enable a greater distribution area for floodwaters before reaching the landholders property. Any banks should not extend beyond 40 metres from the road;

(3) landholders would not construct levees along the common boundary with the road reserve and keep this fence line as free from grass and debris as possible.

The Water Resources Commission also advised that it did not possess the statutory powers to control earth works in such locations and could only advise and suggest solutions to problems that might be voluntarily accepted and implemented by the Council. My subsequent inquiry at the Council revealed that it proposed to modify one of the banks in question, and that Council had no plans to construct any additional banks in the future in that area.

As a workable solution had appeared to have been reached I advised the complainant and the Council that in view of the Water Resources Commission's involvement and the Council's co-operation that I was not going to pursue the matter further and had concluded my inquiries. I thanked the Water Resources Commission for its involvement in the matter.

MANLY MUNICIPAL COUNCIL

Encroaching Pipes

A matter of interest in the Local Government area was a complaint which practically amounted to a violation of air space. It also illustrates the so often referred to principles of lack of communication and the growth of molehills into somewhat larger structures where neighbours are concerned.

The nub of the complaint was that after a dividing wall had been built between two adjoining properties, plumbing had been installed and the resultant pipes, through small, were on the complainant's side of the wall and therefore intruded on to her property.

Whilst the pipes were indeed small they were rather unsightly and the complainant took the view, with which I agreed, that a betterment to the adjoining property should not be achieved to the detriment of the complainant's home.

When I raised the matter with Council, I was advised that many complaints arising from the building activities had been lodged and investigated and on most occasions, as on this, had been found to be of a private nature. However the offending neighbour had agreed to some amelioration of the problem (by cement rendered bagging) if an approach was made to him by the complainant.

I was not of the opinion however that the complainant should be obliged to approach cap in hand, nor did I agree that the intruding piping was of a private nature in which Council was not concerned. I then wrote to Council asking what I considered to be rather pertinent questions relating to the building application for the wall; the possible issue of a section 317A Certificate of compliance; whether the pipes in question were regarded as part of the building application; and the matter of a survey certificate.

In due course the required answers arrived from Council and included, I was pleased to note, the advice that a verbal assurance had been received from the neighbour that the pipes were to be relocated on the other side of the wall.

Council later advised that when permission was sought to install an outside shower utilizing the offending pipes, the relocation became a condition of the approval.

As I stated, this was a rather small matter but I fail to see why one person should ever be disadvantaged by the actions of a neighbour where it is possible that any disadvantage could more justly be borne by the neighbour who stands to gain as a result of his building activities. I am pleased the complainant brought the matter to my notice.

NAMOI VALLEY COUNCIL

Excess Electricity Accounts

I received a complaint from the Manager of a Timber company about excessive electricity accounts received from the Namoi County Council for periods ended 1st November, 1977, 1st January, 1978, 1st March, 1978, and 1st May, 1978.

The Council had a block tariff for Sawmills which was applicable if the mills' operation was confined to prescribed hours which were from 10.00 p.m. to 4.15 p.m. the following day.

If a mill operated outside these hours it automatically reverted to the higher Industrial Tariff C of the Council's tariffs.

The dispute hinged around the fact that my complainant claimed that the mill did not operate outside hours but the Council's metering and control equipment clearly indicated that within the months under dispute demands were created outside the hours permitted.

My complainant claimed that there was no occasion for the mill to operate outside normal hours because it was standard practice to stock pile timber either at the mill or its Sydney outlet. The two stock piles were sufficient to meet all orders and no rush orders were ever necessary. As he was also responsible for payment of all accounts, salaries and wages, etc., he would have been aware if any outside hours' operations occurred because overtime or penalty rate payments would have been involved.

In addition, statutory declarations were provided by the mill manager and a number of mill operators that no out of hours operation of mill took place during the period in which the electricity consumption was disputed.

On my further approach to the Council on the basis of the above claims further checks were carried out by the Council's engineering staff on the operation of the Council's metering and control equipment.

The principle of operation of the Council's frequency injection system was described to me as follows:

A three hundred and ninety Hertz (390 Hz) audio frequency signal is injected into Council's power supply system at varying rhythms. Galvanometer relays are installed at consumers' premises and are tuned to operate upon receiving the signal frequency generated at a specific rhythm. When a particular consumer load group is required to be connected to the supply, or alternatively, be connected to a different tariff, a signal is injected into the system which will operate the specific switching device (relay) tuned to respond to the rhythm generated. A different rhythm is injected to control other load groups or to return the relay and the installation to the original status.

The frequency injection plant is fitted with "check back" relays which, in the event of a plant malfunction and a programmed signal not being injected, causes a follow-up signal to be injected into the system. Should this signal also fail to be injected, a visual alarm is recorded at the plant control panel; furthermore, this alarm panel is checked daily—other than at weekends. As a further check, frequency injection relays with operation counters are connected to the system and should a signal fail to be injected, this malfunction is registered by a lower count on the counter. The counters are read and recorded daily—again except on weekends.

Variations in system or consumer classload patterns should not affect the effectiveness of the injection system as the plant is commissioned to inject a satisfactory signal level at the time of peak load. Furthermore, failure of the plant to inject a signal should be registered by each of the two check systems.

The installation at my complainant's premises was continuously metered by the Council for the period 31st January, 1979, to 19th June, 1979, and during this time it was found that malfunctions occurred. The nature of the malfunctions were such that accounts would have been incorrectely charged at the Industrial Tariff.

As the problem was not of a recent origin, the Council concluded that it was therefore possible that my complainant's claim that the mill had not operated outside the prescribed hours could be valid and accordingly, a credit of $722.48 representing the difference between the charges levied on Industrial Tariff and the correct charge on the Sawmill Tariff for the readings taken on 1st November, 1977, 1st January, 1978, 1st March, 1978, and 1st May, 1978, was passed to my complainant's account.

In the circumstances, I was able to inform my complainant that I had found the complaint to be sustained. However, in view of the Council action in rectifying the matter, I did not take the matter further and concluded my investigation.

RANDWICK MUNICIPAL COUNCIL

Council Decision Altered by Alderman

My complainants requested my assistance to investigate their complaint that an Alderman had overruled a decision made by the full Council concerning the proposed height of a retaining wall on the boundary of their property.

The next-door neighbour purchased the land in 1978 and then proceeded to bring fill onto it to elevate it before commencing to build his home on it.

Council had approved of him building a retaining wall on the boundary 2.6 metres in height and within 1.6 metres of the complainant's home.

They then lodged an objection with Council on 23rd March, 1979, and a month later had an on site meeting with members of the Council's Building Committee. Following their second letter of objection on 15th May, 1979, they were granted a second site inspection and subsequently received a letter from Council in early July, 1979, advising that at the June Council meeting approval had been granted for the erection of the concrete block retaining wall for a distance of 6 500 mm along the northern boundary and 3 000 mm along the eastern boundary to a maximum height of 1 700 mm above the existing ground level at the north eastern corner of the site.

Following a rumour they heard that the neighbour proposed increasing the wall height above 1.7 m they interviewed the Chief Health and Building Surveyor who assured them that before the height could be increased the owner would need to submit a fresh building application to Council.

On 5th October, 1979, the builder laid concrete blocks to a height of 2 m instead of the 1.7 m approved by Council along the eastern boundary.

The complainant telephoned the local building inspector who inspected the wall and directed the removal of the blocks above the approved height. However, later on the same day the blocks were relaid and the builder informed my complainant that he had been given permission to do this.

Later again that same day, an Alderman telephoned to say that he had arranged a further site meeting for 9th October. At that meeting the Alderman admitted that he had authorized the increased height of the wall and left the meeting leaving the complainants with the impression that the additional blocks could stay and that he would do nothing further about the matter.

The next day they brought their complaint to my office. I then wrote to Council seeking an explanation.

In the meantime the matter received some coverage in the local paper where it was reported that the Alderman in question had been rebuked by the Mayor for his actions.

Council's reply arrived a few days later advising that a resolution had been adopted that its original approval be adhered to regarding the dimensions of the wall and that an order be issued giving seven (7) days for the removal of the offending blocks.

The report from Council went on to say that it had been made clear to the Alderman involved that "an individual Alderman unless specifically authorized under section 530A of the Local Government Act, had no power to make any decision or to give any direction on behalf of the Council. In the second place, it was also made clear that a decision having been made by the Council, any reversal or amendment of that decision, must be made by the Council itself".

Council also advised that the Alderman concerned in expressing regret that he had exceeded his authority also said that he had acted in an honest endeavour to resolve the situation in an amicable manner!

I passed this information on to the complainants and advised them that as the matter had been satisfactorily resolved I was concluding my enquiries.

They subsequently telephoned to advise that the offending blocks had been removed and to thank me for my efforts.

SYDNEY COUNTY COUNCIL

Service Fee Charging System

I received a complaint about a service fee of $10.00 included in the quarterly electricity account received by my complainant's elderly, widowed, pensioner mother.

My complainant claimed that—

- her mother had received an electricity account which had risen from $12.00 to $22.00, the reason for the sharp increase being a service fee of $10.00;
- a telephone call to the Sydney County Council resulted in being connected to a recording which explained that the service fee had originally been included in the total account, but was now being shown as a separate item;
- if this were the case, her mother's account should read $2.00 for electricity and $10.00 for the service fee; instead of which her usage has inexplicably risen by $10.00 for the quarter;
- the Council had advertised an 8 per cent rise in electricity charges but on the basis of her mother's experience this amounted to an 83.3 per cent rise and even with a $5.00 pension rebate the account was still 41.7 per cent higher.

Following my approach to the Council I was advised that at its budget meeting in December, 1979, the Council decided that it was necessary to increase its tariffs as from 1st January, 1980, to return a net increase in revenue to 8 per cent in order to avoid a loss in 1980. At the same time it was also decided to change the method of calculating electricity supply accounts.

Prior to 1st January, 1980, the domestic tariff structure comprised four kilowatt-hour blocks, the first three of which were charged at higher prices to cover the basic fixed costs associated with providing and maintaining the electricity supply.

In order to distribute equitably the contribution towards the recovery of these fixed costs among all customers, it was decided to eliminate the block tariff structure and to replace the three higher priced kilowatt-hour blocks with a Service Charge of $10.00 per account and to charge a flat 3.13 cents per kilowatt-hour for all electricity consumed.

It was pointed out that the disputed account had not risen from $12.00 to $22.00 as claimed. Consumption of 400 kWh for the period ended 2nd January, 1980, amounted to $22.52 less the pensioner rebate of $5.00, leaving an amount payable of $17.52.

The consumption for the same period in 1979 was also 400 kWh which amounted to $17.60; however, a comparison of these two accounts did not reveal a true picture due to the fact that the Council's 1979 tariffs did not become applicable until 1st March, 1979. Therefore, the January, 1979, account was calculated at the 1978 tariffs which applied at that time.

A true comparison showed that the 400 kWh calculated at the 1979 tariffs would have cost $18.64 compared with $22.52 at the 1980 tariffs.

This represented an increase of $3.88 or 20.8 per cent. However, as the pensioner rebate applied, the 1980 account had been reduced to $17.52 resulting in a reduction of $1.12 or 6 per cent.

It was stated that the service charge had always existed in the Council's domestic tariff structure, but was previously contained in the three higher priced blocks of the tariff which had now been eliminated.

The new method of charging could be likened to that of Telecom's method of charging telephone rental and a flat rate for all local telephone calls.

In relation to the claim that the Council advertised an 8 per cent increase in electricity charges it was stated that advertisements were inserted in the Metropolitan newspapers on 6th December, 1979, setting out the new schedule of charges. Any reference to an 8 per cent rise would have been contained in journalists' reports; however, as previously explained the tariffs were increased to return an 8 per cent increase in revenue.

The effect of the tariff increase and the change in the method of calculating accounts had resulted in a fairly high percentage increase to users of relatively small amounts of electricity. However, in monetary terms the additional cost average between 30 and 40 cents per week and in similar cases where the pensioner rebate applied, a reduction would occur.

In advising my complainant of the explanation provided by the Council in regard to the new procedures for calculating electricity supply accounts, I pointed out that it did not appear from the information available that I could take the matter further in terms of the Ombudsman Act.

In the absence of any further submission from my complainant, I subsequently concluded my inquiries on the basis that the complaint was not sustained.

SHELLHARBOUR MUNICIPAL COUNCIL

Axeman, spare that tree

The complainant, a farmer, said that there was a stand of paper bark Ti-trees on his property which he wanted to thin out. He had approached Council for permission to cut down some of the trees but permission was refused, even though no tree preservation order was in existence at the time.

My inquiries revealed that Council had not refused the complainant's application to fell the trees but had deferred it while further information was sought. Following advice from the Catchment Areas Protection Board, Council had made a tree preservation order over the Municipality some three months previously. However, the complainant's application was to be further considered at the next meeting of Council.

Following that meeting, the Town Clerk informed me that Council considered the stand of Ti-trees on the complainant's property to be of real value to the community as it was one of the largest plantations of Ti-trees in the coastal area. Council had refused the application to remove some of the trees but had offered to purchase the land on which the trees were growing at a price per acre equivalent to that paid by the complainant when he purchased the farm. Council was also prepared to meet the costs of survey, subdivision and legal fees.

I considered Council's offer to be a reasonable solution to the complainant's problem and so I informed him and asked for his views. As I heard nothing further from the complainant, I discontinued my inquiries.

WARRINGAH SHIRE COUNCIL

Delay in decision about piping watercourse

The complainant was building a home on a steeply sloping block of land along one side of which there was a natural watercourse into which Council had directed street drainage. The complainant had approached Council, some considerable time before complaining to me, about the unsatisfactory state of the watercourse and the damage being caused to his property by run-off during periods of wet weather.

From all the complainant had to say to me, there appeared to be doubt about whether the watercourse, at some stage previously, had been piped and whether Council would be prepared to contribute towards the cost of piping or the complainant would have to pay for this to be done. Council was apparently considering as a policy issue the general question of piping watercourses but, according to the complainant, a decision had been deferred on several occasions and he was concerned at the delay.

I took up the matter with Council and the Shire President told me that—

- a complete review of the Council's policy regarding the piping of natural watercourses and drains had been under consideration for some months;
- Council had recently sought guidance in the matter from the Department of Local Government; and
- he anticipated that the policy would soon be determined.

I decided to pursue my investigation and one of my officers carried out an inspection of the complainant's property. As a result of his report to me, I wrote again to the Shire President and, *inter alia,* he said—

> "So far as the complainant is concerned, Council does not appear to dispute that a natural watercourse exists on his property. An inspection of the property reveals that Council has carried out certain works designed to discharge water from road drainage into the watercourse and this Council is entitled to do only if the watercourse is a watercourse. My understanding is that, if no watercourse exists, then Council must make other arrangements for the disposal of water from the roadway. In any case, the existence of the natural watercourse is apparently mentioned on the Certificate of Title.
>
> It seems clear from all that the complainant had to say in his letter to me that there is some dispute as to whether the watercourse had ever been piped. Documents in his possession (engineering reports, etc.) mention the existence of a pipe the exact location of which is unknown. It is claimed by the complainant that this information was given by Council when his engineer made inquiries and by Council's Engineer when the complainant spoke to him about the matter earlier this year.
>
> One of my officers who carried out an inspection of the complainant's property reported to me in the following terms:
>
> > 'It seems apparent that Council has carried out some work to divert surface run-off water from the street and surrounding terrain down the watercourse. Inlet sumps have been constructed in Wallumatta Road at locations approximately opposite the natural watercourse. There is a pipe from the inlet sump on the complainant's side of the street which runs under the grassy embankment and empties onto a shallow cement dish drain that runs about 15 feet before it stops in mid air over the watercourse depression.
> >
> > Unfortunately, the dish drain is broken across its width about half-way or a little more along its length; the lower section is upraised with the result that water flows under the dish drain and not in it for the lower part of its length.'
>
> The complainant claims that water from the inlet sump on the opposite side of the street is piped under the road to the inlet sump on his side and, thus, into the watercourse.
>
> He claims that Council carried out this work some time in 1976. On 30th December, 1976, he was invoiced by Council (Invoice No. 305636) for 4 metres of kerbing and guttering which stops at the end of the inlet sump on his side of the street.
>
> A plastic pipe running from the next-door property to drain excess water into the watercourse was, according to the complainant, installed by Council. There is evidence in the watercourse of old cement pipes. The complainant claims that Council must have installed these in 1976 also as the previous owner has told him that Council did not pipe the watercourse while he owned the land (the complainant bought it in 1973).
>
> If the watercourse was piped some time in the past, it would seem (judging from the present location of one piece of pipe up near the street) that the piping followed a different route to the present watercourse. This could mean that either the watercourse has gouged itself a new route or the original pipes have been displaced by scouring and erosion.
>
> Down at the rear of the house in an area where the septic tank has been installed, there is bad scouring and erosion. Broken cement pipe is also in evidence there but whether this was due to excessive water discharge or excavation work is impossible to say.
>
> Survey plans, etc., in the complainant's possession show 'watercourse believed to be piped—exact location of pipe unknown'.
>
> In all the circumstances, I would appreciate your further comments about this matter. Understandably, the complainant is reluctant to proceed with the construction of his home while ever the present unsatisfactory situation exists.

In particular, you might let me have answers to the following questions:

(a) Was the natural watercourse ever piped by Council? If so, when was this done and does Council recognize any responsibility to maintain the pipe?

(b) To what extent has Council diverted water from the road and surrounding houses into the watercourse? Can Council provide a plan of the drainage scheme serving the area?

Has Council considered whether, by its own actions and through permitting development in the area, the watercourse might have been surcharged to the extent that it now causes damage to and interferes with the use and enjoyment of the complainant's land. In this regard, the decisions taken in *Rudd* v. *Hornsby Shire Council* (31 L.G.R.A. 120) and *Carmichael* v. *Sutherland Shire Council* (25 L.G.R.A. 435) appear relevant."

In his reply, the Shire President said that Council did not dispute the fact that a natural watercourse existed on the complainant's property and that the stormwater from sections of his street and two others, as well as adjoining privately owned land, discharged into this watercourse. In 1976 Council had carried out kerb and guttering works in front of the property; this work included the construction of inlet pits which connected to the existing 525 mm diameter pipe culvert which crossed the street at this point.

The Shire President went on to say—

"As foreshadowed in my previous letter of the 8th November, 1979, Council has adopted a new policy on natural watercourses which reads as follows:

(1) That in respect of all future road and other drainage works undertaken by Council, or by developers, special attention be given to the assessment of requirements for the piping or other appropriate treatment of watercourses, depressions and all manner of other low lying lands proposed to be used for the conveyance, ponding or disposal of stormwater and other discharges from the Council's drainage system to ensure that where necessary, works authorized by section 241 of the Local Government Act, 1919, are designed and constructed to adequately cope with peak flows and minimize the likelihood of damage or nuisance to private property or other property not owned or controlled by the Council.

(2) That all costs associated with and involved in the design and construction of such works be met by the:

(a) Council in respect of works of the Council.

(b) Developers in respect of works required in connection with new development proposals.

(3) That easements be obtained at Council's cost in all instances where works are proposed to be constructed pursuant to section 241 of the Local Government Act, 1919, upon or through private land or other land not owned or controlled by Council.

(4) That provisions be made from year to year in the Council's estimates for the adequate maintenance of works constructed or watercourses serving as works pursuant to or within the meaning of section 241 of the Local Government Act, 1919.

(5) That in all instances where it is proposed to enter private land or other land not owned or controlled by the Council for any purpose in connection with the construction, reconstruction or otherwise the works and the like referred to herein, prior notice be given and the owner's and occupier's consent be obtained wherever practicable.

(6) That the Shire Engineer report in detail, bearing in mind the principles set out in the foregoing report and the recommendations on all outstanding requests for the piping or other treatment or watercourses on private lands.

The estimated cost of piping the natural watercourse through the complainant's property is $5,000 and a report recommending the voting of the necessary funds will be submitted to the next Works Committee which will be held on Monday, 18th February, 1980. Recommendations from this meeting will be considered by full Council at its Ordinary Meeting on the 25th February, 1980.

The following answers are submitted in response to the questions listed in your letter:

(a) The natural watercourse within the complainant's property has not been piped or partially piped by Council.

(b) As far as can be ascertained the catchment area feeding the subject watercourse remains unchanged and Council has not diverted storm-water into it. A copy of a plan showing the catchment area together with a copy of Plan No. A/3/3357 showing the road design for this section of . . . Road is attached for your information.

Council is aware of the decisions taken in the Court cases quoted in your letter and has taken them in consideration when adopting its new policy on natural watercourses."

I subsequently ascertained that Council, on 25th February, 1980, had adopted Works Committee recommendations that the watercourse on the complainant's property be piped and that, when completed, a 3 metre wide drainage easement over the centre line of the pipeline be acquired.

Whilst I considered the complaint made to me to have been partly sustained, I was of the view that the action taken by Council would satisfactorily resolve the problem and I concluded my investigation.

WARRINGAH SHIRE COUNCIL

Failure to Prevent Drainage Nuisance

In May, 1979, I received a complaint that Council had failed to take sufficient action to prevent my complainant's neighbour discharging sullage from a septic tank onto my complainant's property.

My inquiries, which included examination of Council's file and an inspection of the complainant's property, revealed that my complainant had first brought the matter to Council's attention in January when, following complaint by her, Council's Ordinance Inspector visited the property and saw her property flooded and the source of the sullage. He prepared a report regarding his observations, after having left a message for the offending neighbour (who was out when the Inspector called) asking that he cease pumping out the sullage, and the matter was immediately referred to the District Health Inspector.

The Health Inspector carried out an inspection and observed that a hose and pump had been fitted to the neighbour's septic tank. In mid-February Council issued a notice to the neighbour drawing his attention to the provisions of Local Government Ordinance 44 which, *inter alia,* states—

> "A septic tank or septic closet or sewers or drains or fittings in connection therewith shall not be altered with permission of the Council."

Unfortunately, the terms of the notice issued by Council were defective in that words necessary to give it any real meaning, so far as the recipient was concerned, were omitted. In short, the notice failed to specify just what it was that the recipient had done without obtaining Council's permission. The relevant portion of the notice, in fact, said—

"The septic tank at the above premises without the approval of this Council constitutes a breach . . ."

The defective nature of the notice was not observed by any of Council's officers either at the time of its issue or when the matter was subsequently followed up. In fact, it was not until mid-July, when Council's solicitors drew attention to the wording of the notice, that any Council officer became aware of its defective nature.

In the meantime, however, a number of follow-up inspections were carried out between March and May and led to the Health Inspector recommending that Council take legal action against my complainant's neighbour for failure to comply with the notice. Council eventually referred its papers to Council's solicitors on 6th July. However, I was most concerned to see that Council on 20th and 25th June, and 4th July, had written to the Regional Director of Health and my complainant respectively, stating that ". . . the matter has been forwarded to Council's solicitors to implement legal proceedings . . . ". Such advice was clearly incorrect and misleading.

Without detailing the events which occurred after the papers were returned to Council by its solicitors, action was eventually taken to serve my complainant's neighbour with a notice in terms of the Public Health Act requiring him to abate the nuisance being caused by the discharge of effluent from his septic tank. This notice issued on 31st July, but was not complied with. On 21st August, Council's Solicitors were again asked to institute legal proceedings. Such proceedings had not been finalized as at mid November.

I was concerned that it had taken Council so long to effectively deal with the problem brought to notice by my complainant and which must have caused her some distress. I called for Council's comments in this respect and, in writing to the Shire President, I said that—

(i) there appeared to have been considerable delay on the part of Council's officers in coming to grips with the problem;

(ii) no real effort appeared to have been made by Council's officers to make personal contact with the offending neighbour in an effort to have the nuisance to my complainant abated;

(iii) the terms of the notice issued in February were inappropriate;

(iv) Council's advice in its letters of 20th and 25th June and 4th July was misleading and incorrect.

The Shire President commented in respect of each matter, as follows:

(i) "The District Inspector served notice in February following an inspection of the site which established that the septic tank had been altered without approval. This was the appropriate notice at the time as effluent was not observed surfacing nor could the pump be activated to establish that the effluent did in fact surface."

(ii) "Council's officers have visited the offending neighbour on a number of occasions; however, as he was not at home, business cards were left requesting that he contact the Inspector. In addition, a letter was sent requesting him to make representations to Council. These approaches yielded no response."

(iii) "The format of the notice served in respect of the defective septic tank was prepared on the advice of Council's solicitors."

(iv) "Council's advice on the 20th and 25th June, and the 4th July, perhaps was incorrect in stating that the matter had been referred to the solicitor whereas more correctly it was in the process of being referred to the solicitor. Nevertheless the Shire Clerk's authority to instruct the solicitor to act in the matter was sought on the 25th June, and upon receipt of this authorization from him Council's solicitors were instructed to act in the matter on the 7th July."

Consequently, I informed the Shire President in the following terms:

"I am not convinced that Council's officers did all they could have, as quickly as they could have, to overcome the problem brought to notice by my complainant.

Having again reviewed the events that occurred and the action taken by Council, I am satisfied that there was excessive delay in dealing with the matter. Following the issue of the notice pursuant to Ordinance 44, defective as it was, on 14th February no real follow-up action was taken with the owner of the offending septic tank until 8th May, almost three months later. I am prepared to accept that the Health Inspector carried out inspections on 21st March and 24th April; however, the overall delay appears inexcusable, particularly as, I understand, the matter is still not resolved by court action.

I cannot accept that the format of the Notice issued on 14th February was in accordance with 'the advice of Council's solicitors', unless the former Shire President was referring to the style of the Notice and not to its contents. It is clear, and it should have been clear to Council's officers, that, in terms of Ordinance 44, the Notice should have clearly told the recipient what it was that he had done 'without the approval of Council'. It seems quite obvious that words necessary to give the Notice any real meaning were omitted and none of the Council's officers who were involved detected this, either at the time of issue or later, until Council's solicitors drew the matter to attention. It seems to me that this reflects a degree of carelessness that, in future, should be guarded against.

Despite what your predecessor had to say in his letter, there is no doubt at all that the advice given by Council in its letters of 20th and 25th June, was incorrect and misleading. It seems to me irrelevant that, on the day the second letter was sent, the Shire Clerk's approval to refer the matter to Council's solicitors was sought. I suggest that steps be taken to ensure that incorrect advice is not again given in official Council correspondence.

In the light of the foregoing, I have determined the complaint to be sustained. However, in view of the current legal proceedings initiated by Council with a view to rectifying the cause of the drainage nuisance, I do not propose to take the matter any further in terms of the Ombudsman Act. Nevertheless, I would ask that you bring my comments to the notice of those officers of Council concerned."

WARRINGAH SHIRE COUNCIL

Failure to notify affected persons of building applications AND failure to give opportunity to object

I received a complaint about Council's alleged practice of not consulting affected residents when new houses are constructed.

My complainant was particularly concerned about a house being erected in an adjoining street, which she considered would destroy the water views of several residents of existing homes, including her own.

In taking the matter up with the council I acknowledged the fact that Councils have no statutory duty to call for objections in such circumstances. However, in previous correspondence with Warringah Council on a similar matter, Council had advised me that its building inspectors did consider the amenities, including views of adjoining properties, when examining new building applications.

During 1977 I had also raised with the then Shire President of Warringah Council, the possibility of Council notifying affected adjoining neighbours of the receipt of development and building applications, to permit objections if desired. However, at that time Council considered that the administrative costs of such a system were too high. I also drew attention to the fact that a number of other councils did notify properly interested adjoining owners.

Accordingly I sought Council's comments on the particular complaint and the general issue involved. The Shire President advised me that several residents near to the subject land had previously taken the matter up with Council following which a survey was made of the situation. Council's Health and Building Inspector considered that the approval granted for the proposed building was reasonable.

The Shire President also informed me that Council's previous views regarding advertising and seeking adjoining owners' views remained unchanged. He pointed out that this was not a statutory requirement and that where the Local Government Act required advertising, as in the case of residential flat buildings, the comments on the proposed development were invariably subjective. The President also indicated that the particular building complained of was the same height as similar adjacent buildings and that the new builder was entitled to a building commensurate with those in the vicinity.

The Shire President commented that in view of the difficulties, he felt Council would be reluctant "to reduce one person's equity in favour of another's views". Nevertheless he undertook to bring a Minute before Council for more careful consideration of the matter.

Following consideration of my comments, opinion from the Local Government Department and Council's officers, the Shire Clerk advised me in relation to a similar complaint that Council had subsequently resolved as follows:

1. That general approval be given for the inspection of building applications and development applications, and associated plans and other material, by properly interested persons (as defined hereunder).
2. The applications to inspect such material, be required to be in writing setting out the nature of the interest of the applicant.
3. That for the purpose hereof the term "properly interested persons" be defined to mean an adjoining owner or other person who has an interest in land which, in the opinion of Council, might be detrimentally affected by the proposed building or development.

   Notices will be displayed at the Health and Building and Town Planning Department Counters indicating to applicants for building or development approval, that owners or persons interested in adjoining land may be given permission to inspect their applications.

In the circumstances, while I found the particular complaints in this case justified, in view of Council's action to rectify similar situations in the future I did not pursue the matter further.

WAVERLEY MUNICIPAL COUNCIL

Minimum rates exceeding the value of land

In June, 1979, I received a complaint from a ratepayer about a liability for the minimum rate which had been attracted by a piece of land subdivided from the complainant's home-site to provide for the passage of a sewer main.

The subdivision reflected the practice followed many years ago by the constructing authority of subdividing from the affected residential allotments a corridor of land to allow the passage of the sewer main. Whilst this established absolute right of entry for maintenance purposes the granting of a licence over the subdivided corridor to the property owner allowed the land to remain, for all practical purposes, an integral part of the overall home-site.

The practice of subdivision was discontinued some time ago, but the subdivided corridors remained in existence. These are not known to have presented any particular difficulties up until the introduction in more recent years of section 126A of the Local Government Act which, whilst it allows Councils a discretion to aggregate the unimproved capital value of separate ratable properties for which one ratepayer is liable, requires Councils in so doing to apply that policy uniformly to all lands within their boundaries without exception. This requirement has operated to inhibit some Councils from exercising their discretion. This was the case in this instance, and in these circumstances the complainant became liable for the payment not only of the rate assessed for that portion of the property upon which the dwelling was situated, but also for the minimum rate of one hundred and fifty dollars fixed by the Council and attracted by the subdivided corridor. The terms of the licence held by the complainant in respect of that land made this unavoidable.

The end result was that the complainant was compelled to pay one public authority, that is, the local council, a sum of one hundred and fifty dollars per annum in respect of a small portion of land, situated within the area of the complainant's home-site, but subdivided from it solely for the purposes of another public authority. The subdivided sewer main corridor had an unimproved capital value of one hundred dollars, and the one hundred and fifty dollars minimum rate it attracted was additional to the rate levy payable for the remainder of the home-site owned by the complainant who was, in effect, burdened with two separate rate levies for what was essentially one narrow residential allotment.

Obviously, the predicament in which the complainant was placed was most unjust and quite indefensible. However, my investigation soon disclosed that the Council involved really had little alternative other than to apply the option available under section 126A to all of its ratepayers, a course it had only recently discontinued because it felt the loss of revenue entailed was against the general interest of the ratepayers as a whole. This it remained unwilling to do, and I could not really take issue with the council on that point. In the circumstances, I raised the matter with the Minister for Local Government.

The Minister recognized the injustice of the situation and conferred with the Valuer-General to ascertain whether anything could be done. Happily, the Valuer-General, accepting the ratepayer as a ratepaying lessee of the strip of land in question, was able to adopt measures which resulted in an aggregated valuation being placed on the subdivided property as one residential allotment, a course which in turn allowed Council to levy the single rate which the property ordinarily would have attracted. The complainant was, of course, delighted and my investigation was closed.

APPENDIX B

STATISTICAL SUMMARY OF COMPLAINTS

APPENDIX B

STATISTICAL SUMMARY OF COMPLAINTS

FOR THE PERIOD ENDING 30TH JUNE, 1980

Explanatory Notes to Statistics

NO JURISDICTION—

1. Not Public Authority under the Ombudsman Act.

2. Conduct of class described in Schedule to Ombudsman Act—i.e., excluded by Schedule, e.g., courts, employer/employee, Parole Board, etc.

3. Conduct or complaint out of time—i.e., in respect of public authorities other than local government authorities the conduct took place before 18th October, 1974; and in respect of local government authorities the conduct took place before 1st December, 1976.

DECLINED—

4. General discretion, e.g., complaint premature or concurrent representations made to the public authority.

5. Insufficient interest, trading or commercial function, alternate and satisfactory means of redress, complaint trivial, frivolous, vexatious or not in good faith.

6. Local Government Authority—right of appeal or review and no special circumstances.

7. *Withdrawn*—

   Complaint withdrawn by complainant either prior to or during investigation.

8. *Not sustained*—

   Complaint found not to be sustained, either after preliminary enquiries or following investigation.

SUSTAINED—

9. Sustained as result of investigation.

10. Partially sustained as result of investigation.

11. *Discontinued by Ombudsman*—

    These often involve those in a grey area where the investigation of the complaint is discontinued following some action by the authority although it is not clear whether or not there has been any wrong conduct by the public authority.

Public Authority	No Jurisdiction			Declined			Withdrawn	Not Sustained	Sustained		Discontinued	Under Investigation as at 30th June, 1980	Total
	Sec. 12	Sec. 12 1 (a)	Sec. 12 1 (b)(c)(d)	Sec. 13 (4) (a)	Sec. 13 (4) (b)	Sec. 13 (5)			1	2			
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review			Wholly	Partially			
	1	2	3	4	5	6	7	8	9	10	11	12	13
Adult Education Board	..	1	..	..	..	..	..	..	..	..	..	..	1
Agriculture Department	..	2	..	..	..	..	..	3	..	2	..	1	8
Albury Wodonga Development Corporation	..	..	..	..	..	..	..	2	..	..	..	..	2
Anti-Discrimination Board	..	..	..	..	..	..	..	..	..	..	..	1	1
Apprenticeship Directorate	..	..	..	..	1	..	..	..	1	..	..	1	3
Architects—New South Wales Board of	..	..	..	..	..	..	..	..	..	..	1	..	1
Attorney-General and Justice—Department of	..	28	..	2	..	..	..	5	..	..	3	4	42
Australian Gas Light Company	..	..	..	..	..	..	..	2	..	..	1	..	3
Australian Music Examination Board	..	..	..	..	..	..	..	1	..	..	1	4	6
Banana Marketing Control Committee	..	..	..	..	..	..	..	..	..	..	1	..	1
Barham Memorial Hospital	..	1	..	..	..	..	..	..	..	..	..	..	1
Blacktown Technical College	..	..	..	..	..	..	..	..	..	..	2	..	2
Builders Licensing Board	..	1	..	1	1	..	2	30	1	1	1	14	52
Bungunyah Irrigation Trust	..	..	..	1	..	..	..	..	..	..	..	..	1
Burrendong State Recreation Area	..	..	..	..	..	..	..	1	..	..	..	..	1
Bursary Endowment Board	..	..	..	..	..	..	..	1	..	..	..	..	1
Bush Fire Council of New South Wales	..	..	..	..	..	..	..	..	..	..	..	1	1
Business Franchise Licenses Branch (Petroleum)	..	..	..	1	..	..	..	3	..	..	..	..	4
Central Mapping Authority	..	1	..	..	..	..	..	..	..	..	..	..	1
Chipping Norton Lakes Authority	..	..	..	1	..	..	..	..	..	..	..	..	1
Chiropractice Registration Board	..	..	..	..	..	..	..	..	..	..	..	1	1
Coal and Oil Shale Mine Workers Superannuation and Long Service Leave Branch	..	..	..	2	..	..	..	..	..	..	..	1	3

Public Authority	No Jurisdiction			Declined			Withdrawn	Not Sustained	Sustained		Discontinued	Under Investigation as at 30th June, 1980	Total
	Sec. 12	Sec. 12 1 (a)	Sec. 12 1 (b) (c) (d)	Sec. 13 (4) (a)	Sec. 13 (4) (b)	Sec. 13 (5)			1	2			
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review			Wholly	Partially			
	1	2	3	4	5	6	7	8	9	10	11	12	13
Conservatorium of Music	..	..	..	..	..	..	..	..	..	..	..	1	1
Consumer Affairs Department	..	..	..	3	..	..	1	15	5	4	..	8	36
Consumer Claims Tribunal	..	..	..	2	..	..	1	9	1	..	3	3	19
Corporate Affairs Commission	..	..	..	5	..	..	..	11	2	..	1	5	24
Corrective Services	1	4	..	36	1	..	5	100	29	6	66	144	392
Council of Auctioneers and Agents	..	..	..	..	..	..	..	..	..	..	..	2	2
Counsellor for Equal Opportunity	..	..	..	..	..	..	..	1	..	..	..	2	3
Courts	..	13	..	..	..	..	..	..	..	..	..	..	13
Crown Solicitors Office	..	..	..	..	..	..	..	2	..	..	..	..	2
Cumberland College of Health Sciences	..	..	..	..	..	..	..	..	..	..	..	1	1
Dairy Industry Authority	..	..	..	..	3	..	..	1	..	..	1	2	7
Dental Board of New South Wales	..	..	..	..	..	..	..	1	..	..	..	..	1
Dental Technicians Registration Board	..	..	..	1	..	..	..	..	..	..	..	1	2
Drug and Alcohol Authority	..	..	..	..	..	..	..	..	..	..	1	1	2
Dubbo Base Hospital	..	..	..	..	..	..	..	..	..	..	1	..	1
Dust Disease Board	..	..	..	..	..	..	..	..	..	..	..	1	1
Education Department	..	10	..	6	..	..	3	28	2	2	5	14	70
Electricity Commission	..	2	..	..	..	..	..	3	..	2	..	2	9
Energy Authority	..	1	..	2	..	..	..	2	..	..	..	1	6
Fire Commissioners—Board of	..	..	..	..	..	..	1	3	..	..	..	..	4
Fisheries—N.S.W. State	..	..	..	1	..	..	..	8	..	1	1	1	12
Forestry Commission of New South Wales	..	1	..	1	..	..	..	4	..	1	1	1	9

Public Authority	No Jurisdiction			Declined			Withdrawn	Not Sustained	Sustained		Discontinued	Under Investigation as at 30th June, 1980	Total
	Sec. 12	Sec. 12 1 (a)	Sec. 12 1 (b)(c)(d)	Sec. 13 (4) (a)	Sec. 13 (4) (b)	Sec. 13 (5)			1	2			
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review			Wholly	Partially			
	1	2	3	4	5	6	7	8	9	10	11	12	13
Geographical Names Board	..	..	..	..	..	..	..	1	..	..	..	..	1
Goulburn Base Hospital	..	..	..	..	..	..	..	1	..	..	..	..	1
Government Insurance Office	..	..	..	2	3	..	..	35	5	2	8	14	69
Government Offices, Dubbo	..	..	..	..	..	..	..	1	..	..	..	..	1
Government Printing Office	..	..	..	..	..	..	..	1	..	1	1	..	3
Government Stores Department	..	..	..	1	..	..	..	1	..	..	..	..	2
Greyhound Racing Control Board	..	..	..	..	..	..	..	2	..	..	2	2	6
Health Commission	..	5	1	9	1	..	..	19	3	5	5	16	64
Health—Minister for	..	1	..	..	..	..	..	..	..	..	..	..	1
Heritage Council	..	..	..	..	3	..	..	..	..	..	..	..	3
Higher Education Board	..	..	..	..	..	..	..	..	..	..	..	1	1
Home Help Service of New South Wales	..	..	..	1	..	..	..	..	..	..	..	..	1
Hornsby Hospital	..	..	..	..	..	..	1	..	..	..	..	..	1
Housing Commission	..	..	..	7	1	..	..	32	1	1	2	15	59
Hunter District Water Board	..	..	..	..	..	..	..	7	2	..	3	4	16
Industrial Development and Decentralisation	..	..	..	..	..	..	..	..	..	..	..	1	1
Industrial Relations and Technology—Department of	..	1	1	3	1	..	..	3	3	1	1	4	18
Kenmore Hospital	..	1	..	..	..	..	..	..	..	..	..	..	1
Land Board Office	..	..	..	..	..	..	..	1	..	1	..	..	2
Land Commission	..	..	..	..	..	..	..	2	..	..	..	..	2
Lands—Department of	..	..	..	3	..	..	1	18	..	1	7	7	37

Public Authority	No Jurisdiction			Declined			Withdrawn	Not Sustained	Sustained		Discontinued	Under Investigation as at 30th June, 1980	Total
	Sec. 12	Sec. 12 1 (a)	Sec. 12 1 (b)(c)(d)	Sec. 13 (4) (a)	Sec. 13 (4) (b)	Sec. 13 (5)			1	2			
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review			Wholly	Partially			
	1	2	3	4	5	6	7	8	9	10	11	12	13
Land Tax Office	..	..	..	3	1	..	..	3	..	1	..	1	9
Legal Services Commission	..	..	..	1	..	..	..	1	..	..	2	2	6
Local Government Appeals Tribunal	..	3	..	..	..	..	..	..	..	..	..	..	3
Local Government Authorities	1	3	5	126	5	23	22	654	19	31	114	315	1 318
Local Government Boundaries Commission	..	..	..	1	..	..	..	..	..	..	..	9	10
Local Government—Department of	..	..	..	..	..	..	..	1	1	..	..	2	4
Local Government—Minister for	..	1	..	..	..	..	..	..	..	..	..	..	1
Local Government Superannuation Board	..	..	..	..	..	..	1	2	..	1	1	4	9
Lord Howe Island Board	..	..	..	..	..	..	..	..	..	..	..	1	1
Main Roads—Department of	..	1	..	2	..	..	..	12	2	4	5	19	45
Maritime Services Board	..	1	..	..	..	..	1	12	..	..	..	4	18
Marsden Hospital, Westmead	..	..	..	..	..	..	..	1	..	..	..	..	1
Mater Misericordiae Hospital	..	..	..	..	..	..	..	..	..	..	..	1	1
Metropolitan Local Land Board	..	1	..	..	..	..	..	..	..	..	..	..	1
Metropolitan Water Sewerage and Drainage Board	..	..	..	11	..	..	1	91	20	8	12	45	188
Mineral Resources—Department of	..	1	1	3	..	..	..	7	1	..	..	4	17
Mines Subsidence Board	..	..	..	..	..	..	..	..	..	..	..	1	1
Motor Transport—Department of	..	1	..	6	1	..	1	20	5	2	7	10	53
Mount Canobolas Park Trust	..	..	..	..	..	..	..	..	..	1	..	..	1
Music Examinations Advisory Board	..	..	..	..	..	..	..	..	..	..	..	1	1
National Parks and Wildlife	..	..	..	1	..	..	2	12	..	1	7	6	29
Nepean District Hospital	..	..	..	..	..	..	..	..	..	..	1	..	1
New South Wales Chiropody Board	..	..	..	..	..	..	..	..	..	..	..	1	1

Public Authority	No Jurisdiction			Declined			Withdrawn	Not Sustained	Sustained		Discontinued	Under Investigation as at 30th June, 1980	Total
	Sec. 12	Sec. 12 1 (a)	Sec. 12 1 (b)(c)(d)	Sec. 13 (4) (a)	Sec. 13 (4) (b)	Sec. 13 (5)			1	2			
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review			Wholly	Partially			
	1	2	3	4	5	6	7	8	9	10	11	12	13
New South Wales Government Travel Centre	..	..	..	..	..	..	..	..	..	..	1	..	1
New South Wales Nurses Registration Board	..	..	..	..	..	..	..	3	..	..	..	1	4
New South Wales Retirement Board	..	..	..	1	..	..	1	3	..	..	..	..	5
North Ryde Psychiatric Hospital	..	..	..	..	..	..	..	..	..	1	..	..	1
North Shore Gas Co. Ltd.	..	..	..	..	..	..	..	..	..	..	..	1	1
Parole Board	..	7	..	..	..	..	..	1	..	..	..	4	12
Pastures Protection Board—													
Casino	..	..	..	..	..	..	..	1	..	..	..	..	1
Moss Vale	..	..	..	..	..	..	..	..	..	..	..	1	1
Narrandera	..	..	..	..	..	..	..	1	..	..	..	..	1
Tamworth	..	..	..	..	..	..	..	1	..	..	..	..	1
Tenterfield	..	..	..	..	..	..	..	1	..	..	..	..	1
Young	..	..	..	..	..	..	..	1	..	..	..	..	1
Pay Roll Tax—Commissioner	..	..	..	1	..	..	..	..	..	..	..	..	1
Pharmacy Board of New South Wales	..	..	..	..	..	..	..	..	..	1	..	..	1
Planning and Environment Commission	..	..	..	1	..	..	..	17	3	1	3	12	37
Plumbers, Gasfitters and Drainers Examining Board	..	..	..	..	..	..	..	1	..	..	..	1	2
Police Department	..	9	1	3	9	..	2	53	18	2	8	18	123
Premier's Department	..	1	..	..	..	..	..	..	..	..	..	..	1
Prince Henry Hospital	..	..	..	..	..	..	..	..	..	..	1	..	1
Prison Medical Service	..	..	..	..	..	..	..	11	4	..	7	8	30
Probate Office	..	1	..	..	..	..	..	..	..	..	..	..	1
Protective Commissioner	..	..	..	4	..	..	1	4	..	..	1	6	16
Public Service Board	..	3	..	..	..	..	..	..	..	..	..	..	3

Public Authority	No Jurisdiction			Declined			Withdrawn	Not Sustained	Sustained		Discontinued	Under Investigation as at 30th June, 1980	Total
	Sec. 12	Sec. 12 1 (a)	Sec. 12 1 (b) (c) (d)	Sec. 13 (4) (a)	Sec. 13 (4) (b)	Sec. 13 (5)			1	2			
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review			Wholly	Partially			
	1	2	3	4	5	6	7	8	9	10	11	12	13
Public Solicitor	..	..	..	2	..	..	..	3	..	..	2	2	9
Public Transport Commission	1	4	..	19	1	..	4	30	9	33	8	45	154
Public Trustee	..	..	..	2	..	..	1	12	..	1	1	4	21
Public Works—Department of	..	..	..	1	..	..	..	6	..	1	..	11	19
Railway Service Superannuation Board	..	..	..	..	..	..	..	1	..	..	2	1	4
Registrar General's Department	..	..	..	1	..	..	1	10	..	1	2	3	18
Registry of Births, Deaths and Marriages	..	..	..	..	..	..	..	4	..	..	..	1	5
Registry of Co-operative Societies	..	..	..	..	..	..	..	2	..	..	..	3	5
Rental Bond Board	..	..	..	..	1	..	..	13	..	1	1	1	17
Riverina College of Advanced Education	..	..	..	..	..	..	..	..	..	..	..	1	1
Royal North Shore Hospital	..	..	..	..	..	..	..	2	1	..	..	..	3
Royal Prince Alfred Hospital	..	..	..	..	..	..	..	..	..	1	..	..	1
Rozelle Psychiatric Centre	..	..	..	..	..	..	..	1	..	..	..	..	1
Rural Assistance Board	..	..	..	..	..	..	1	..	..	..	..	..	1
Rural Bank	..	..	..	1	..	..	..	1	..	..	..	1	2
Senior School Studies—Board of	..	..	..	..	..	..	..	..	..	..	..	1	3
Services—Department of	..	..	..	..	..	..	..	..	..	..	2	..	2
Seven Oaks Drainage Union	..	..	..	..	..	..	..	1	..	2	..	..	3
Sheriff's Office	..	..	..	..	..	..	..	2	..	..	..	..	2
Sport and Recreation	..	..	..	2	..	..	..	3	..	1	1	1	8
Stamp Duties Office	..	..	..	..	..	..	..	..	..	..	..	..	1
	..	..	..	4	1	..	1	11	1	..	3	7	28

Public Authority	No Jurisdiction			Declined			Withdrawn	Not Sustained	Sustained		Discontinued	Under Investigation as at 30th June, 1980	Total
	Sec. 12	Sec. 12 1 (a)	Sec. 12 1 (b) (c) (d)	Sec. 13 (4) (a)	Sec. 13 (4) (b)	Sec. 13 (5)			1	2			
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review			Wholly	Partially			
	1	2	3	4	5	6	7	8	9	10	11	12	13
State Contracts Control Board	..	..	..	..	..	..	..	1	..	..	..	2	3
State Emergency Services	..	..	..	..	..	..	..	..	..	..	..	1	1
State Library of New South Wales	..	..	..	..	..	..	..	..	..	..	..	1	1
State Lotteries Office	..	..	..	..	1	..	..	6	..	2	..	1	10
State Pollution Control Commission	..	..	..	2	..	..	..	11	..	..	3	5	21
State Superannuation Board	..	..	..	1	..	..	..	11	..	..	7	1	20
Strata Titles Board	..	..	..	..	..	..	..	1	..	..	2	4	7
Sydney Cricket and Sports Ground Trust	..	..	..	..	..	..	..	2	..	..	..	..	2
Sydney Eye Hospital	..	..	..	1	..	..	..	..	..	..	..	..	1
Sydney Opera House Trust	..	..	..	..	..	..	..	1	..	..	..	..	1
Sydney Teachers' College	..	..	..	..	..	..	..	..	..	..	..	1	1
Sydney Technical College	..	..	..	1	..	..	..	..	..	..	..	1	2
Teacher Housing Authority	..	..	..	..	..	..	..	1	..	..	1	1	4
Technical and Further Education—Department of	..	2	..	1	..	..	..	6	3	1	..	2	15
Totalizator Agency Board	..	..	..	1	..	..	..	4	..	..	1	2	8
Tourism—Department of	..	..	..	..	..	..	..	..	..	..	..	1	1
Treasury	..	..	..	..	..	..	..	..	..	..	1	..	1
University of Newcastle	..	..	..	..	..	..	..	..	..	..	..	1	1
University of New South Wales	..	1	..	..	..	..	..	1	..	..	..	2	4
University of Sydney	..	..	..	..	..	..	..	1	..	..	2	3	6

Public Authority	No Jurisdiction			Declined			Withdrawn	Not Sustained	Sustained		Discontinued	Under Investigation as at 30th June, 1980	Total
	Sec. 12	Sec. 12 1 (a)	Sec. 12 1 (b)(c)(d)	Sec. 13 (4) (a)	Sec. 13 (4) (b)	Sec. 13 (5)			1	2			
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review			Wholly	Partially			
	1	2	3	4	5	6	7	8	9	10	11	12	13
Valuer-General	..	1	..	2	1	..	..	6	1	..	1	4	16
Water Resources Commission	..	..	..	..	..	..	..	5	1	..	..	3	9
Western Lands Commission	..	..	..	..	..	..	..	1	..	..	..	1	2
Wingham Public Hospital	..	..	1	..	..	..	..	..	..	..	..	..	1
Workers Compensation Commission	..	3	..	..	..	..	..	..	..	..	..	1	4
Youth and Community Services—Department of	..	3	..	1	..	..	..	10	3	1	3	13	34
Total:	4	120	10	298	36	23	55	1 444	147	130	332	893	3 492
Unscheduled Bodies (Outside jurisdiction)—													
Australian Government Departments	62	..	..	..	..	..	..	..	..	..	..	..	62
Private Organizations and Individuals	88	..	..	..	..	..	..	..	..	..	..	..	88
Total from all sources	154	120	10	298	36	23	55	1 444	147	130	332	893	3 642
Less: Under investigation as at 30th June, 1979													891
Total received for year ended 30th June, 1980													2 751

Public Authority (Councils)	No Jurisdiction			Declined			Withdrawn	Not Sustained	Sustained		Discontinued	Under Investigation as at 30th June, 1980	Total
	Sec. 12	Sec. 12 1 (a)	Sec. 12 1 (b) (c) (d)	Sec. 13 (4) (a)	Sec. 13 (4) (b)	Sec. 13 (5)			1	2			
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review			Wholly	Partially			
	1	2	3	4	5	6	7	8	9	10	11	12	13
Albury City	..	..	..	..	..	..	..	..	..	3	..	..	..	4	7
Armidale City	..	..	..	..	..	..	..	1	..	2	..	..	..	3	6
Ashfield Municipal	..	..	..	..	..	..	..	..	1	4	1	..	1	2	9
Auburn Municipal	..	..	..	..	..	..	..	2	..	6	..	..	..	2	10
Ballina Shire	..	..	..	..	..	..	..	..	..	2	..	..	1	3	6
Bankstown City	..	..	..	..	..	..	..	2	..	9	..	2	3	5	21
Barraba Shire	..	..	..	..	..	..	..	..	..	1	..	..	..	..	1
Bathurst City	..	..	..	..	..	..	..	..	..	4	..	..	..	2	6
Baulkham Hills Shire	..	..	..	..	..	..	..	1	..	3	..	..	..	4	8
Bega Municipal	..	..	..	..	..	..	..	..	..	1	..	..	..	..	1
Bega Valley County	..	..	..	..	..	..	..	..	..	1	..	..	..	..	1
Bellingen Shire	..	..	..	..	..	..	..	4	..	1	1	..	2	2	10
Blacktown City	..	..	..	..	..	..	..	1	..	3	..	2	1	4	13
Blue Mountains City	..	..	..	..	..	..	..	2	..	15	..	1	7	9	38
Bogan Shire	..	..	..	..	..	..	..	..	..	..	..	..	2	..	2
Bombala Shire	..	..	..	..	..	..	..	..	..	1	..	..	..	..	1
Botany Municipal	..	..	..	..	..	..	..	1	..	2	..	..	..	2	6
Bowral Municipal	..	..	..	..	..	..	..	..	..	1	..	..	1	..	2
Brisbane Water County	..	..	..	..	..	..	..	..	1	1	..	..	..	..	2
Broken Hill City	..	..	..	..	..	..	..	..	..	..	..	..	..	1	1
Burwood Municipal	..	..	..	..	..	..	..	1	1	6	..	1	2	3	14
Byron Shire	..	..	..	..	..	..	..	..	..	4	..	..	1	2	8

Public Authority (Councils)	No Jurisdiction			Declined			Withdrawn	Not Sustained	Sustained		Discontinued	Under Investigation as at 30th June, 1980	Total
	Sec. 12	Sec. 12 1 (a)	Sec. 12 1 (b)(c)(d)	Sec. 13 (4) (a)	Sec. 13 (4) (b)	Sec. 13 (5)			1 Wholly	2 Partially			
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review							
	1	2	3	4	5	6	7	8	9	10	11	12	13
Camden Shire				1				3			1	2	7
Campbelltown City				3			1	7	1	1		4	18
Canterbury Municipal								1				1	1
Carrathool Shire								3					4
Casino Municipal				1				6	1		2	1	9
Central West County								4				1	5
Coffs Harbour Shire								3				1	4
Colo Shire								1				1	2
Concord Municipal				1				1					1
Coonabarabran Shire												1	1
Coonamble Shire												1	3
Corowa Shire												1	2
Cowra Municipal				1		1		1				1	3
Crookwell Shire												2	2
Deniliquin Municipal								3					3
Drummoyne Municipal								4					4
Dubbo City						1						3	4
Dungog Shire							1	3			2		6
Eurobodalla Shire				2		1		6	1			3	13
Fairfield Municipal				2				6			2	7	17

Public Authority (Councils)	No Jurisdiction			Declined			Withdrawn	Not Sustained	Sustained		Discontinued	Under Investigation as at 30th June, 1980	Total
	Sec. 12	Sec. 12 1 (a)	Sec. 12 1 (b) (c) (d)	Sec. 13 (4) (a)	Sec. 13 (4) (b)	Sec. 13 (5)			1	2			
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review			Wholly	Partially			
	1	2	3	4	5	6	7	8	9	10	11	12	13
Glen Innes Municipal	..	..	..	..	1	..	..	..	..	..	2	..	3
Gloucester Shire	..	..	..	..	..	..	..	..	..	..	1	..	1
Goodradigbee Shire	..	..	..	..	..	..	..	1	..	..	..	..	1
Gosford City	..	1	..	5	..	1	3	13	2	1	2	12	40
Goulburn City	..	..	..	..	..	..	..	5	..	..	..	1	6
Grafton City	..	..	..	..	..	..	..	3	..	..	..	..	3
Great Lakes Shire	..	..	..	..	..	1	..	1	..	..	..	1	3
Greater Cessnock City	..	..	..	2	..	1	..	8	..	..	2	2	15
Gunnedah Municipal	..	..	..	..	..	..	..	..	..	..	..	1	1
Guyra Shire	..	..	..	..	..	..	..	1	..	..	..	1	2
Hastings Shire	..	..	..	1	..	..	..	3	..	..	..	..	4
Holroyd Municipal	..	..	..	3	..	..	..	5	..	1	1	..	10
Hornsby Shire	..	..	..	1	..	..	..	90	..	..	3	10	104
Hume Shire	..	..	..	1	..	..	..	..	..	..	1	..	2
Hunters Hill Municipal	..	..	..	..	..	..	..	5	..	1	..	3	9
Hurstville Municipal	..	..	..	1	..	1	..	8	..	..	1	5	16
Illawarra County	..	..	..	..	..	..	..	2	..	..	2	1	5
Imlay Shire	..	..	..	..	..	..	..	4	..	..	..	..	4
Inverell Municipal	..	..	..	..	..	..	..	2	1	..	..	..	3
Kempsey Shire	..	..	..	..	..	1	..	4	..	..	1	4	10
Kiama Municipal	..	..	..	1	..	..	..	5	..	..	..	1	7
Kogarah Municipal	..	..	..	1	..	..	..	6	..	1	..	2	10

Public Authority (Councils)	No Jurisdiction			Declined			Withdrawn	Not Sustained	Sustained		Discontinued	Under Investigation as at 30th June, 1980	Total
	Sec. 12	Sec. 12 1 (a)	Sec. 12 1 (b) (c) (d)	Sec. 13 (4) (a)	Sec. 13 (4) (b)	Sec. 13 (5)			1	2			
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review			Wholly	Partially			
	1	2	3	4	5	6	7	8	9	10	11	12	13
Ku-ring-gai Municipal	..	..	1	3	..	1	..	11	1	1	2	6	26
Kyogle Shire	..	..	..	..	..	..	..	2	..	..	..	..	2
Lake Macquarie Municipal	..	..	..	5	..	..	..	19	..	2	4	7	37
Lane Cove Municipal	..	..	..	..	..	..	..	4	..	..	..	4	8
Leichhardt Municipal	..	..	..	2	..	1	..	13	1	..	..	8	25
Lismore City	..	..	..	2	..	..	..	1	..	..	1	1	5
Lithgow City	..	..	..	..	..	..	..	1	..	..	..	1	2
Liverpool City	..	..	..	1	..	..	..	9	..	1	1	1	13
Liverpool Plains Shire	..	..	..	..	..	..	..	1	..	..	..	..	1
Lockhart Shire	..	..	..	..	..	..	..	..	..	..	..	1	1
Mackellar County	..	..	..	..	..	..	..	1	..	..	..	..	1
Maclean Shire	..	..	..	..	..	1	..	1	..	..	1	3	6
Macquarie County	..	..	..	..	..	..	..	1	..	..	..	..	1
Maitland City	..	..	..	1	..	..	..	1	..	..	..	1	3
Manilla Shire	..	..	..	..	..	..	..	..	..	..	..	1	1
Manly Municipal	..	..	..	..	..	..	..	6	..	1	..	4	11
Manning River County	..	..	..	..	..	..	..	3	..	..	..	..	3
Manning Shire	..	..	..	1	..	..	..	1	..	..	..	2	4
Marrickville Municipal	..	..	..	4	..	1	..	5	1	..	2	5	18
Mascot Municipal	..	..	..	..	..	..	..	..	..	..	..	1	1
Merriwa Shire	..	..	..	1	..	..	..	1	..	..	..	..	2

Public Authority (Councils)	No Jurisdiction			Declined			Withdrawn	Not Sustained	Sustained		Discontinued	Under Investigation as at 30th June, 1980	Total
	Sec. 12	Sec. 12 1 (a)	Sec. 12 1 (b) (c) (d)	Sec. 13 (4) (a)	Sec. 13 (4) (b)	Sec. 13 (5)			1	2			
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review			Wholly	Partially			
	1	2	3	4	5	6	7	8	9	10	11	12	13
Mittagong Shire	..	..	..	1	..	..	..	..	..	..	1	1	3
Mosman Municipal	..	..	..	1	..	..	..	8	..	1	2	4	16
Mudgee Shire	..	..	..	..	..	..	..	1	..	..	1	4	6
Mullumbimby Shire	..	..	..	1	..	..	..	..	..	..	..	..	1
Mulwaree Shire	..	..	..	..	..	..	..	1	..	..	..	2	3
Mumbulla Shire	..	..	..	..	..	..	..	3	..	..	..	..	3
Murrumbidgee County	..	..	..	..	..	..	..	2	..	..	..	..	2
Murrurundi Shire	..	..	..	..	..	..	..	1	..	..	..	..	1
Muswellbrook Shire	..	..	..	..	..	..	..	1	..	..	..	1	2
Nambucca Shire	..	..	..	1	..	..	..	3	..	1	..	..	5
Namoi Shire	..	..	..	..	..	1	..	..	..	..	..	..	1
Namoi Valley County	..	..	..	..	..	..	..	1	1	..	..	..	2
Narrabri Municipal	..	..	..	..	..	..	..	3	..	..	..	..	3
Narrandera Shire	..	..	..	..	..	..	..	1	..	..	..	..	1
Narromine Municipal	..	..	..	..	..	..	..	1	..	..	..	..	1
Nepean River County	..	..	..	..	..	..	..	1	..	1	..	..	2
New England City	..	..	..	..	..	..	..	1	..	..	..	..	1
Newcastle City	..	..	1	1	..	..	1	1	..	..	..	4	8
North Sydney Municipal	..	..	..	5	..	..	..	9	..	3	2	13	32
North West County	..	..	..	..	..	..	..	1	..	..	..	..	1
Orange City	..	..	..	..	..	..	..	..	..	..	..	1	1
Oxley County	..	..	..	..	..	..	..	1	..	..	..	..	1

Public Authority (Councils)	No Jurisdiction			Declined			Withdrawn	Not Sustained	Sustained		Discontinued	Under Investigation as at 30th June, 1980	Total
	Sec. 12	Sec. 12 1 (a)	Sec. 12 1 (b) (c) (d)	Sec. 13 (4) (a)	Sec. 13 (4) (b)	Sec. 13 (5)			1	2			
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review			Wholly	Partially			
	1	2	3	4	5	6	7	8	9	10	11	12	13
Parkes Municipal	..	..	..	..	..	..	..	2	..	..	..	1	3
Parramatta City	..	..	..	..	..	..	..	11	..	..	2	4	17
Parry Shire	..	..	..	..	..	..	..	1	..	..	..	..	1
Peel Cunningham County	..	..	..	..	..	..	..	2	..	..	..	1	3
Penrith City	..	..	..	1	..	..	1	5	1	..	1	8	17
Port Macquarie Municipal	..	..	..	..	..	..	..	7	..	..	..	2	9
Port Stephens Shire	..	..	..	..	..	..	1	2	..	..	..	1	4
Prospect County	..	..	..	1	..	..	..	4	..	..	2	4	11
Queanbeyan City	..	..	..	..	..	..	..	..	..	..	..	1	1
Randwick Municipal	..	..	..	3	..	..	1	11	1	..	1	7	24
Rockdale Municipal	..	..	..	2	..	..	..	4	..	..	1	4	11
Rous County	..	..	..	..	..	..	..	1	..	..	..	..	1
Ryde Municipal	..	..	..	2	..	..	..	5	1	..	..	3	11
Rylstone Shire	..	..	..	..	..	..	..	1	..	..	..	1	2
Shellharbour Municipal	..	..	..	..	..	..	..	3	..	..	1	2	6
Shoalhaven City	..	..	..	2	..	..	..	7	..	..	..	1	10
Shortland County	..	..	..	..	1	..	..	5	..	..	1	..	7
Snowy River Shire	..	..	..	1	..	..	..	1	..	..	1	..	3
Southern Mitchell County	..	..	..	..	..	..	..	1	..	..	..	..	1
Southern Riverina County	..	..	..	..	..	..	..	..	..	..	..	1	1
Southern Tablelands County	..	..	..	..	..	..	..	..	..	..	..	1	1
South Sydney Municipal	..	..	..	2	..	1	..	4	..	1	1	3	12

Public Authority (Councils)	No Jurisdiction			Declined			Withdrawn	Not Sustained	Sustained		Discontinued	Under Investigation as at 30th June, 1980	Total
	Sec. 12	Sec. 12 1 (a)	Sec. 12 1 (b) (c) (d)	Sec. 13 (4) (a)	Sec. 13 (4) (b)	Sec. 13 (5)			1	2			
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review			Wholly	Partially			
	1	2	3	4	5	6	7	8	9	10	11	12	13
South West Slopes County	..	..	..	..	..	..	..	2	..	..	..	..	2
Strathfield Municipal	..	..	..	..	..	..	..	5	..	..	..	1	6
Sutherland Shire	1	1	1	1	1	1	22	1	1	1	8	39
Sydney City	1	..	..	3	..	..	2	10	..	..	4	5	25
Sydney County	..	..	..	..	..	..	..	25	..	2	3	7	40
Talbragar Shire	..	..	..	..	..	..	..	1	..	..	..	..	1
Tamarang Shire	..	..	..	..	..	..	..	..	..	..	..	1	1
Tamworth City	..	..	1	..	..	..	..	5	..	..	..	1	7
Temora Municipal	..	..	..	..	..	..	..	1	..	..	..	..	1
Tumbarumba Shire	..	..	1	2	..	..	..	..	..	..	..	..	3
Tumut River County	..	..	..	..	..	..	..	1	..	..	..	..	1
Tumut Shire	..	..	..	..	..	..	..	2	..	..	..	..	2
Tweed Shire	..	..	..	..	..	..	..	3	..	..	..	1	4
Ulmarra Shire	..	..	..	..	..	..	..	..	1	..	..	..	1
Wade Shire	..	..	..	1	..	..	..	..	..	..	1	..	3
Wagga Wagga City	..	..	..	..	..	..	..	1	..	..	1	..	2
Wakool Shire	..	..	..	..	..	..	..	..	..	..	..	1	1
Walgett Shire	..	..	..	..	..	..	..	1	..	..	..	..	1
Warringah Shire	..	..	..	8	1	1	3	40	3	3	12	21	94
Waverley Municipal	..	..	..	1	..	..	..	1	..	..	1	10	13
Wellington Shire	..	1	..	..	..	..	..	1	..	..	..	..	2
Willoughby Municipal	..	..	..	7	..	1	..	10	..	1	8	..	27

Public Authority (Councils)	No Jurisdiction			Declined			Withdrawn	Not Sustained	Sustained		Discontinued	Under Investigation as at 30th June, 1980	Total
	Sec. 12	Sec. 12 1 (a)	Sec. 12 1(b) (c) (d)	Sec. 13 (4) (a)	Sec. 13 (4) (b)	Sec. 13 (5)			1	2			
	Not Public Authority	Conduct is of a class described in Schedule	Conduct or complaint out of time	General Discretion	Insufficient interest, trading commercial function, alternate means of redress, etc.	Local Government Authority where right of appeal or review			Wholly	Partially			
	1	2	3	4	5	6	7	8	9	10	11	12	13
Windsor Municipal	..	..	..	..	..	..	..	1	..	..	..	1	2
Wingecarribee Shire	..	..	..	..	..	..	..	4	..	..	..	1	5
Wingham Municipal	..	..	..	..	..	..	..	1	..	..	..	..	1
Wollondilly Shire	..	..	..	8	..	..	..	4	..	..	2	1	15
Wollongong City	..	..	..	..	..	..	..	6	..	..	1	6	13
Woollahra Municipal	..	..	..	2	..	..	..	12	..	..	5	3	22
Wyong Shire	..	..	..	4	..	1	..	9	..	1	1	2	18
Yallardi Shire	..	..	..	..	..	..	..	..	..	..	..	1	1
Yarrowlumla Shire	..	..	..	1	..	..	..	..	..	..	..	2	3
Young Municipal	..	..	..	..	..	..	..	..	..	..	..	1	1
	1	3	5	126	5	23	22	654	19	31	114	315	1 318
Less: Under investigation as at 30th June, 1979	..	..											329
Total Received	..	..	..	..	..	..	..						989

PART II

POLICE REGULATION (ALLEGATIONS OF MISCONDUCT) ACT, 1978.

PART II

POLICE REGULATION (ALLEGATIONS OF MISCONDUCT) ACT, 1978

Statistics

Since 19th February, 1979, when the Police Regulation (Allegations of Misconduct) Act, 1978, commenced, to 30th June, 1980, I received 965 complaints. 34 were not within jurisdiction, 66 were declined for various reasons and 75 were not proceeded with. 42 complaints were conciliated under Part III of the Act. 527 allegations were not sustained and 102 allegations were sustained. Some complaints contain more than one allegation.

For the period 1st July, 1979, to 30th June, 1980, I received a total of 741 complaints. Of these, together with those which had been still under investigation on 30th June, 1979, 21 were not within jurisdiction, 58 were declined, and 68 were not proceeded with. Conciliation was effected in respect of 42 complaints. 497 allegations were not sustained and 96 were sustained.

As at 30th June, 1980, 311 complaints were still under investigation.

Staff

At the time of my last Annual Report, the Assistant Ombudsman and a Senior Investigation Officer, assisted by an Interviewing Officer and a Stenographer, dealt with complaints under the Police Regulation (Allegations of Misconduct) Act, 1978. In December, 1979, and May, 1980, two Investigation Officers were appointed to assist with the increase in the volume of work. The Assistant Ombudsman and to a lesser extent the Senior Investigation Officer, also deal with complaints concerning prisoners.

Conciliation

Since my last Report, the Commissioner of Police and I have paid greater attention to complaints which may be appropriate for conciliation. As already indicated, 42 complaints were conciliated up to 30th June, 1980, and of the matters still under investigation it is likely there will be a number which will also be conciliated.

There is evidence to suggest that on certain files pressure may have been brought to bear to persuade the complainant to agree that the matter had been conciliated to his or her satisfaction. There is no doubt in my mind because of certain attitudes expressed and statements made by complainants, that in some of these cases a fear of reprisal may have influenced their decision in this regard and naturally this has been of concern to me.

I am also concerned with the comments which the Commissioner of Police made after I had conciliated a matter in relation to the North Sydney Highway Patrol. One of my officers contacted the Officer in Charge of the Patrol and was able to deal with the complaint in a manner acceptable to the complainant. I informed the Commissioner of the outcome and he expressed to me concern that I had gone straight to the Officer in Charge of the Patrol rather than refer the matter to the Police Internal Affairs Branch for Police in that Branch to attempt a conciliation. The Commissioner asked me not to contact Police direct when I thought that conciliation could be achieved and he suggested that I refer such complaints to the Police Internal Affairs Branch for the necessary action. I informed the Commissioner that I did not intend to accede to his request in all matters where I thought conciliation may be possible. The Act gives me the power to deal with a complaint in a manner acceptable to the complainant if I am satisfied that such a result can be achieved without a formal investigation.

Reports to Police Officers

Whilst originally I adopted the practice of merely advising the police officers involved that a complaint was not sustained, for some time now when I consider complaints to be not sustained I have been sending to the police officers who were the subject of the complaint, a copy of my Report to the complainant. Therefore, the police officers complained about are provided with as much information about the result of the investigation as is the complainant.

Conflicting Information

Following the investigation of a complaint by the Commissioner and the reporting to me by him, I am frequently confronted with the situation whereby I have conflicting information available to me. The complainant alleges that certain events took place and the Police Officer whose conduct was complained about, alleges a different set of facts. On many occasions the report of the Police Officer is corroborated by other Police. In these circumstances, without independent evidence, I find it difficult to determine where the truth lies or to decide which version of the events is the correct one. I am, under the circumstances, forced to decide that the complaint has not been sustained. This is an unsatisfactory result but if I am of the opinion that the complaint has been properly investigated, I can come to no other conclusion.

Vexatious Letter Writers

The Commissioner has advised that certain complainants have been listed in the Police Department's Register of Vexatious Letter Writers. On one occasion the Commissioner informed me that he proposed to take no further action in respect of a complaint lodged by such a person. I informed the Commissioner that it was of little weight in arriving at my decision as to whether or not I should direct that an investigation should be carried out, that a complainant had been placed in the Department's list of vexatious letter writers. I appreciate the fact that some people who regularly write to the Police Department or any other organization, including my Office, particularly if they continue to write about the same subject, can become very annoying and can put both the Department and my Office to a lot of time, effort and expense. I added that I will never automatically dismiss such a complaint without proper consideration. I determined that the complaint should be investigated.

Opportunity for Complainant to Comment on Reports of Police Officers

It still greatly concerns me that a Police Officer who is the subject of a complaint, is given an unedited copy of the complaint on which he has to report but the complainant is not given the opportunity to see and comment on that Officer's report or record of interview. I again acknowledge that where such reports or records of interview include confidential information or are part of a brief to be used in connection with a pending charge against the complainant, they should not be revealed. However, in most cases this is not the situation. I am firmly of the view that, as I indicated in my last Report, the right to make the Police reports or records of interview available for comment by a complainant should be available.

However, the Commissioner's view, fortified to some extent by the Crown Solicitor, is that I do not have the power without his consent to disclose to complainants or anyone else in these circumstances information contained in papers sent to me from his Department. This is absurd.

Inflexibility of Police Attitude

I am also concerned about the inflexibility of the attitude of the Commissioner towards the withdrawing of minor prosecutions.

I receive many complaints from citizens regarding the issue of Traffic Infringement Notices. It is my policy not to investigate such complaints unless there are allegations of Police misconduct connected with the issue of such notices. I do not consider that it is my task to adjudicate whether or not a particular person was speeding or whatever. However, from time to time, it becomes apparent that some Traffic Infringement Notices are issued, which, in my opinion, for various reasons, should never have been issued and more seriously, that persons are arrested and charged with offences which in retrospect the prosecution of which is blatantly a waste of public time, energy and expense.

On several occasions after carefully considering the file and all the evidence made available to me, I have requested the Commissioner to give serious consideration to not proceeding with what could be described as a minor charge. On rare occasions he has advised that a charge would not be proceeded with but on each of these occasions the decision has been of his own volition. Never has he followed my recommendation or acceded to my request.

With few exceptions, the attitude appears to prevail throughout the Force. The Police Officer in New South Wales seems generally unwilling to admit that he may have been wrong or that he may have acted in the heat of the moment.

I believe there is a reason for this for I do not believe that it is an innate characteristic of every Police Officer. I am of the view that the structure of the Force is so rigidly controlled by the tome of Police regulations and instructions which inhibits elasticity so, if an officer wishes to withdraw a charge or an accusation, the procedure for so doing is cumbersome and may often result in him being reprimanded unnecessarily. The Police have inordinately difficult tasks to perform and it is only natural that they will make mistakes from time to time.

Deferral of Investigation

I am regularly being requested by the Commissioner of Police to agree to the deferral of the finalization of an investigation pending the outcome of Court proceedings. In cases where it is most likely that the allegations made by the complainant will be in issue in the proceedings, I have agreed pursuant to section 20 of the Police Regulation (Allegations of Misconduct) Act, 1978, to such a deferral.

On occasions, after an investigation has been commenced and certain evidence has been gathered, there has been a serious doubt in my mind as to the bona fides of the prosecution and this problem is interrelated with the comments I made under the previous subheading. To allow the prosecution to run its full course is not necessarily the correct procedure in my view. Where, after an investigation has disclosed that serious doubts have arisen as to the correctness of a prosecution, I am of the view that the Commissioner should take more positive steps to allow the benefit of the doubt to be given to a defendant. To say there is a prima facie case is, in some circumstances, trite. If there was no prima facie case an information would never have been laid but where the evidence suggests that there is a very real doubt as to the truthfulness of the original Police report, I am of the view that the investigation should proceed to finality to establish the true position.

Power for Ombudsman to Investigate

I note that the Commonwealth Ombudsman is to be given power to conduct his own investigations into complaints about Police conduct if he is dissatisfied with the investigation carried out by the Federal Police.

I do not have this power. I consider that it is essential for the legislation to be amended so that the Ombudsman, where he is dissatisfied with the investigation performed by the police, has a right to investigate the matter himself or direct that one of his officers does so. To say, as a representative of the New South Wales Police Association was quoted after addressing the Annual Conference of the Association, that the Ombudsman is "all powerful" in relation to the investigation of complaints about the Police, is quite ridiculous. I have no power to perform my own investigation. I receive complaints and make a decision as to whether they should be investigated or attempts should be made to conciliate. The complaint is referred to the Commissioner of Police for investigation following which I receive a report from him and decide whether the matter has been properly investigated. When I am satisfied that the investigation has been completed I decide whether the complaint has been sustained or not. My role is limited to one of monitoring and reporting.

Statutory Declarations

I am opposed to the Police Association's view that all complaints about the conduct of Police should be made in the form of a Statutory Declaration. To do this would, I feel, tend to inhibit the timid or uneducated complainant. If however, it was decided that complaints should be in the form of Statutory Declarations then it must follow that the Police should be required to submit their reports to the investigating officer in the form of Statutory Declarations.

Refusal of Commissioner to carry out my Recommendations

After an investigation has been completed, the Commissioner reports to me as required by section 24 of the Act. On each case he advises whether or not he is of the opinion that the complaint has been sustained. If he decides that the complaint has not been sustained he advises that he intends to take no further Departmental action. If he decides that the complaint has been sustained he advises what action he proposes to take and this ranges from a member of the Force being counselled without the matter being noted on his file, through to the laying of a criminal charge, after which, of course, the officer is suspended.

On a number of occasions I have disagreed with the Commissioner. I have either found that, contrary to his view, the complaint has been sustained or that even when he finds the complaint sustained, I have advised that the action he proposes to take is in my opinion inappropriate. Each time I decide that a complaint is sustained I am obliged, under section 29 of the Act, to advise the Minister responsible for the Police of my findings.

Where I have disagreed with the Commissioner, and on occasion that disagreement could be described as serious, I have asked the Minister in accordance with section 29 of the Act, if he would like to consult with me before I finally publish my Report. On no occasion has the Minister decided to consult with me. Other than on one or two minor occasions the Commissioner has not followed my recommendation when it has been contrary to his initial decision. Summaries of some of these matters are in Appendix C.

In summary, it would be accurate to say that not only do I not have power to carry out my own investigations where I may deem it necessary, but on review of the investigations carried out by the Commissioner any recommendation I have made has generally been totally unacceptable to the Commissioner.

Court Proceedings

Subsequent to the end of the year covered by this report, proceedings were commenced by way of Summons in the Administrative Law Jurisdiction of the Supreme Court by the Police Association on behalf of one of its members challenging my right to request a further investigation of a complaint. The matter has not yet been set down for hearing.

Brief particulars of other complaints about the conduct of police are included as Case Notes in Appendix D.

APPENDIX C

APPENDIX C

POLICE POWER TO SEARCH PERSONS

The complainant was a pillion passenger on a motor cycle which was stopped at approximately 9.00 p.m. on Easter Sunday, 1979, for allegedly exceeding the speed limit. It was claimed by the complainant that she was bodily dragged off the bike by a Police Constable who then "frisked" her. The complainant's solicitors reported that their client acquiesced to the treatment because of fear and they maintain that she had been indecently assaulted by the policeman. In a statement the complainant said—

> "Whilst I was trying to get off the pillion seat he (the Constable) took hold of me by the right shoulder with his hand, he then placed me on to the car . . . he kept pushing my legs apart with his foot and he said 'open them', he stood behind me and ran his hands over my body from the neck down to my ankles, whilst he was doing this he placed his hand on my breasts . . . The Constable who had previously searched me thence commenced to make a further search from my waist up around the vicinity of my rib cage, he then felt my breasts and on feeling my breasts he carried out this manoeuvre slowly . . . I did not know why I was being searched and I was not told of the reason for the search. I considered the search carried out on my person to be unnecessary."

The investigation revealed that three Constables were checking traffic travelling in the opposite direction to that of the motor cycle. One of the Constables reported he checked the motor cycle on the radar beam at a speed of 110 km/h and as the Police were unable to intercept the vehicle because it was travelling in the opposite direction, he and another Constable pursued the motor cycle in a Police vehicle and checked its speed at 140 km/h in a 60 km/h zone. The Constable further reported that when the check was completed the flashing blue light on the Police car was illuminated, the motor cycle pursued and eventually intercepted. In his report the Constable stated:

> " . . . Once satisfied the (speed) check was correct I put the blue flashing light on and commenced to stop the cycle. I asked Constable . . . to check with the Police radio to ascertain of the vehicle was stolen but they were busy and we could not obtain this information until later, therefore at the time I was not aware if the cycle was stolen or not.
>
> . . . Once stopped at the side of the road, I told Constable . . . to go around the couple in case they tried to get away . . .
>
> As the rider and pillion passenger appeared to be of the hoodlum element I commenced to search the rider for any object that my have caused injury to Constable . . . or myself. Constable . . . then did the same thing with the pillion passenger.
>
> I said to . . . (the rider of the motor cycle) . . . "you are under arrest for riding at a speed dangerous to the public". I then placed him and the pillion passenger into the rear of the Police vehicle, as I did the pillion passenger removed the full face protective helmet and that was when I realized it was a female . . .
>
> Constable . . . then drove the couple back to the radar unit where I made further inquiries as to the rider's identification . . . After taking into account the cycle was not stolen and was registered in his name and whilst speaking to them realized they were not of the hoodlum element (sic) I did not feel the female pillion passenger should be subjected to waiting around the Police Station. I separated them and obtained the same information from both of them."

The other Constable who was involved in the incident was not directed to submit a report but was interviewed. Excerpts from that Record of interview are as follows:

> "Q. 4 It has been alleged by . . . (the complainant) that while she was attempting to alight from the motor vehicle, her right shoulder was taken hold of and she was subsequently placed against the nearside of the Police vehicle with her hands resting on the turret and her legs being forced apart. Shortly after this, whilst being searched her breasts were touched.
>
> A. That is correct. They both had full face helmets on and it was a dimly lit area on Windsor Road, and she was wearing some sort of leather jacket and slacks and I didn't know until I touched her breasts that she was a female. After that I just continued the search down her side and on the sides of her legs.
>
> Q. Why did you undertake the search of her person?

A. Whilst Constable . . . and myself were standing at the rear of the radar car outside No. 397 Windsor Road, Baulkham Hills, we heard a bike approaching from the south in a northerly direction which was apparently travelling at high speed. After it passed our position the radar antenna picked up the cycle and registered its speed at 111 kilometres per hour. Constable . . . and myself entered the Police vehicle, serial number 7733 with Constable . . . as the driver and we turned around and began to chase the motor vehicle. By the time we got up to the first hill he was a fair way ahead but we could see him. He was going along Windsor Road. We had the flashing blue light on. Just past Victoria Road we overtook the cycle in order to slow it down and stop it. We both alighted from the Police vehicle but before doing so tried to get on the Police Radio to make a stolen vehicle check on it, but Channel 4 was busy at the time and we couldn't get through. We had checked him at 140 km/h. We both got out of the Police vehicle together and I approached the pillion passenger and took hold of the person's shoulder and told her to stand against the Police vehicle with her hands on the side of the vehicle and her legs apart. She did not say a word. I then proceeded to make a weapon frisk of her body. The person's body because I did not know that it was a girl at that stage. I started to pat her body like this, makes patting motion on the upper portion of his chest, and while I was doing this I noticed something bulky and I was not sure what it was so I patted it again, just touching it lightly and I realized then that it was a girl, so I continued to search down the side of her body and her legs . . .

Q. 10 . . . (the complainant) . . . has alleged that a second search was made of her person from her waist up around the vicinity of her rib cage when her breasts were felt once again. This manoeuvre being carried out slowly.

A. I only made the one frisk. I did not make a second search and I deny that I did . . .

Q. 17 Why did you make a weapon frisk on . . .(the complainant) . . .?

A. Well, because of the manner in which it was being ridden and it speeded away from the radar check, I thought that it could have been stolen. We tried to get a stolen check on it before we stopped it, but couldn't get one so we thought we would treat it as a stolen bike until we made sure. We have been trained that we should think of our safety first and we were trained to frisk them in this manner. I decided to frisk the pillion passenger without realizing that it was a girl . . ."

The papers were referred to the Superintendent in Charge of the Prosecuting Branch who came to the opinion after studying the evidence that the Constable was legally entitled to carry out a search upon the complainant and that his action in doing so did not constitute an unlawful assault upon her.

In his final report the Inspector who performed the investigation stated—

"It is probable from the available evidence that there could be some justification for considering that she (the complainant) had aided and abetted . . . (the rider of the motor cycle) . . . in any offence which he had committed . . . It is my opinion that Constable 1st Class . . . and Constable . . . did not use any more force than was necessary in carrying out the duties on this evening, and that under the circumstances, their actions were reasonable . . .

Whilst I believe that Constable . . . acted wisely in deciding to make a search of the motor cycle pillion passenger, I consider that he was somewhat indiscreet in not first observing that the person was a female. It is my recommendation that Constable . . . be paraded before the Superintendent of Traffic and be suitably instructed in the need to exercise care in similar situations and ensure that the dignity and rights of the individual are not infringed.

In the case of Constable 1st Class . . ., I hold the view that he erred after he had arrested . . . (the rider) in not directly taking him to the nearest Police Station to allow the provisions of the law to be fulfilled. I recommend that he be paraded before the Superintendent of Traffic and be properly instructed in the necessity to carry out the legal requirements once an arrest has been effected."

Subsequently the Commissioner of Police in his report to me indicated that he agreed with the views expressed by the Superintendent in Charge of the Prosecuting Branch with the result that he proposed to direct that both Constables be given suitable advice by their District Inspector. The Commissioner did not propose that the Constables be paraded.

After receiving and carefully considering the report and the Departmental file I was most concerned with certain matters raised in the Commissioner's report. Having carefully considered all the evidence available I was of the opinion that it was quite possible that the Constable had mistaken the complainant for a male pillion passenger and what was of concern to me was not so much the fact that he had passed his hands over her breasts but the fact that he had "frisked" her in the first place. I was not satisfied that the two Police constables had reasonable grounds for suspecting that the motor cycle was stolen in the first place, and I indicated that if one accepts that proposition there was no authority for the Constables to search. The Inspector who carried out the investigation reported that "it is probable from the available evidence that there could be some justification for considering she (the complainant) had aided and abetted . . . (the rider of the motor cycle) . . . in any offence which he had committed." I could not accept that proposition.

As a result of my general dissatisfaction with the matters mentioned in the report, I wrote to the Commissioner of Police in the following terms;

> "There are certain matters that I feel need clarification and I seek your advice or comments on the following points which were raised or disclosed by the investigation.
>
> 1. It is fairly obvious from the report that the Police vehicle which gave chase must have travelled at speeds in the vicinity of 160 km/h in order to interecept the motor cycle.
>
>   Inspector . . . (who carried out the investigation) . . . appears have expressed more concern for the stress suffered by the two Constables than for the very dangerous situation which must have resulted from the Police vehicle travelling through a built up area at very high speeds. He reported:
>
>   > "To travel at these speeds in a built up area at night is likely to cause considerable stress in those participating. Having been subjected to this the reasons for the decisions made becomes apparent. Later, after having recovered from the stress associated with the pursuit . . ."
>
>   Could you please advise what instructions are issued to Police Patrol Officers regarding the interception of motor cycles which break the speed limit. In this connection, I have noted the provisions of Instruction No. 26.25.
>
> 2. Why was it considered "reasonable" by all Senior officers who reported on the investigation that Constable . . . should suspect that the motor cycle was stolen? Was it merely because it "speeded away from the radar check".
>
> It appears that no attempt was made at or near the site of the radar unit to intercept the cycle. What is the normal procedure for intercepting speeding vehicles once they have been checked through radar control areas? Is it not normal for Police Officers to intercept vehicles just past the check point? The report also indicates that the Police vehicle had no trouble in intercepting the motor cycle. There is no suggestion that the motor cycle attempted to accelerate away from the Police vehicle once it identified itself. At this stage was it still reasonable for the constable to assume that the motor cycle was stolen?
>
> 3. Inspector . . . stated:
>
>   > "it is probable from the available evidence that there could be some justification for considering that she (the complainant) had aided and abetted . . . in any offence which he had committed."
>
> What evidence was available to support such a statement?

In his reply the Commissioner drew my attention to the further report made by the Inspector who carried out the investigation. The Commissioner informed me that he adhered to his previous decision and proposed no further action.

The Inspector made the following comments which were pertinent to my first question:

> "The manner in which the Police vehicle was driven was not included in the complaint and therefore was not commented upon. The issue of stress was raised because it was a probable factor which had an effect upon the actions of the Police Officer, particularly, Constable 1st Class . . . and his initial decision to arrest Mr . . ."

In relation to my second question, the Inspector reported:

"Constable . . . has stated that he thought the motor cycle could have been stolen because of the manner in which it was being ridden and the fact that it sped away from the radar trap. (It did not pass through the radar trap—Ombudsman.) I accept this view that has been expressed by Constable . . . and I maintain my opinion that this was a reasonable view. This incident occurred about 8.50 p.m. on 15th April, 1979, which was Easter Sunday night the motor cycle was observed on the outskirts of the . . . Shopping Centre travelling at the speed which was checked by radar at 111 km/h. It continued through the built up area and increased speed by 29 km/h until it was checked at a speed of 140 km/h for a distance of .5 of a kilometre. In my experience, and I think it is the experience of most Police Officers, a motor vehicle which travels at such an excessive speed at night time through a built up area must be viewed with suspicion. The speed was much greater than that normally encountered and was increased after passing the Police radar position. Whether this was a conscious effort to elude the Police is not known since this aspect has not been canvassed for two reasons. Firstly, because it does not form part of the complaint and secondly the act of driving is the subject of two matters which are currently before the Court. On viewing a driver acting in such a manner an alert Police Officer is justified in suspecting that the vehicle is engaged in some clandestine activity. Certainly it is not a normal manner of driving but was of such seriousness that three possibilities immediately occur as to the reasons. Firstly the vehicle could have been stolen, the occupant could be speeding away from the scene of a serious crime, e.g. an armed hold up at a service station or a chemist shop etc., thirdly the driver had a complete lack of responsibility towards other users of the road. Such a high speed and the fact that the motor cycle increased speed away from the Police position would create suspicion in my mind that the motor cycle could have been stolen. Another feature which would increase the suspicion is that the motor cycle races were being conducted at Bathurst during that weekend and many motor cycles are stolen at such times and used to travel to these races. The road on which the incident occurred is one of the direct routes between the Sydney Metropolitan area and Bathurst. The fact that the motor cycle did not attempt to accelerate away from the Police vehicle when the interception was undertaken is not significant if one has any experience in these matters. It is generally found that an offender in a stolen vehicle will try to outrun Police vehicles for a time, but when the Police are able to maintain station behind stolen vehicles the offender will often submit quietly and stop. In the matter under review, it must be remembered that a speed of 140 km/h had been reached and maintained for .5 of a kilometre. This check was undertaken near . . . Road but the vehicle was not finally stopped until after it had passed . . . Road, more than two kilometres further on. Whether Mr . . . was trying to escape or not is a matter of conjecture, but obviously, he travelled for some considerable distance with the Police in pursuit and made no attempt to stop. For the reasons outlined, I consider that Constable . . .'s opinion that the motor cycle could have been stolen was a reasonable one and indeed, I would have had some reservations about his suitability for highway patrol work if he had not entertained some suspicions about the vehicle and its riders after witnessing this incident. Although I have not been able to find any reference to this issue in the submissions of my senior officers, I am confident that they, as experienced policemen and men of integrity, would support me in this view."

The Inspector also commented:

"The remaining query raised by the Ombudsman is in relation to the evidence available to support my statement 'it is probable from the available evidence that there could be some justification for considering that she (the complainant) had aided and abetted Mr . . . in any offence which he had committed' it was quite apparent that . . . (the complainant) . . . was a passenger on the motor cycle ridden by Mr . . . at the time it was ridden in the matter which has been described. When the motor cycle was stopped there was every opportunity for Miss . . . to protest and seek assistance if she did not assent to the actions of Mr . . .

As the cycle was not stolen, and remembering that the Police only have grounds to search if it was reasonably suspected that the vehicle was stolen, why would she protest?

The rule of law in these instances would appear to be that voluntary presence at the scene of the crime is evidence from which a jury may conclude, although they do not have to, that she manifested assent to the commission of the crime (Russell 1933 E.L.R. 59 and other cases cited). The evidence available would appear to be sufficient to bring Miss (the complainant) within the provisions of this rule."

I indicated in my Report under section 28 of the Police Regulation (Allegations of Misconduct) Act, 1978, that it was clear from the Commissioner's report that he is of the opinion that no criticism is to be levelled at members of the Police Force who stop and "frisk" motor cyclists and their pillion passengers provided the Police reasonably suspect the vehicle to be stolen and that such conclusion appears justified if that vehicle is speeding in a manner which the motor cycle on which the complainant was travelling was reported to have been. I indicated that I was not satisfied that the Constable felt the complainant's breasts knowing at the time that she was female. However, I also indicated that I was satisfied that both Constables search of the cyclist and the complainant was premature and therefore unwarranted. I expressed the view that after the motor cycle had been stopped proper inquiries could and should have been made at that point to ascertain whether or not the motor cycle had been stolen. Certainly I would have thought that simple questions could have been directed to the rider or the complainant before they were physically searched.

In addition, I stated that I was concerned that it is also accepted by the Commissioner of Police that his officers may "assist" cyclists and their passengers from the motor cycle and search them for weapons merely because those officers are under the subjective belief that the cycle may have been stolen.

I found the complaint to have been sustained on the basis that the search of the complainant was unwarranted. I recommended that both Constables be paraded before their District Superintendent.

I was subsequently advised by the Commissioner of Police that, as my recommendation was based on different reasons to those set out in his letter to me, he did not intend to direct the action which I had recommended.

POLICE POWER TO SEARCH VEHICLES

A lady made a complaint on behalf of her husband who was driving home from work when he was made by the Police to pull over to the side of the road. She stated that the two Constables on patrol asked her husband for his licence which he produced, asked his name and address and whether or not he owned the car. She also stated that they asked him to get out of the car and the Policemen then searched the vehicle. It was alleged that one of the Constables then asked her husband if he would open the boot which he did and the Police questioned him about the painting equipment which was in the boot of his car. Evidently the lady's husband was then told that he was going to be booked for travelling at 80 km/h in a 60 km/h zone and a Traffic Infringement Notice was issued. The lady's letter of complaint was accompanied by a Statutory Declaration made out by her husband supporting the facts as set out by his wife. In brief, the basis of the complaint was that the complainant's husband had been car searched by two Constables for no valid reason.

In his report a Constable 1st Class stated that he observed the man's vehicle travelling in excess of the 60 km/h speed limit. Therefore he and his companion in their car came up along side of the other vehicle and directed the driver to pull over. The Constable 1st Class continued:

> "I alighted from the Police vehicle and approached the driver's side of the window, standing slightly to the rear of the door as per instructions, I said 'good afternoon sir, I have just followed and checked your vehicle at 80 km/h in a 60 km/h area, may I see your motor vehicle driver's licence please and would you bring your licence and step to the rear of your vehicle'. As he was getting out of his vehicle he said 'I am in a hurry to go home'.
>
> I commenced to issue the Traffic Infringement Notice for the offence, and as I did so, noticed . . . (the driver) . . . *appeared to be in an uneasy state and continually moved around away from his vehicle.* I said to him 'Sir would you mind opening the boot of this vehicle please'. He said 'alright'. I observed a quantity of paint tins and painting equipment. I said to . . . 'sir do you own all this equipment', he said 'yes, I just did a job for a friend'. I said 'have you ever been in trouble with the Police before'. He said 'No'. I proceeded to the driver's side door and looked through the window into the interior as stated by . . . (the driver) . . . I was satisfied that the contents belonged to . . . and made no further search of the vehicle. I completed the Traffic Infringement Notice, explained the procedure for dealing with the matter and returned to the Police vehicle."

The Constable 1st Class was corroborated by his Constable companion.

The then Acting Commissioner of Police reported to me advising that he was satisfied that the speeding offence was clearly disclosed and should remain subject to penalty. He further reported that he was satisfied that the two Constables did not exceed their powers in requesting the complainant's husband to open the boot of the motor vehicle and in this regard he proposed no further Departmental action.

I then wrote to the Acting Commissioner of Police and requested his advice as to how and when Police Officers are empowered to search motor vehicles. I received a reply from the Acting Commissioner setting out several statutes which contain the provisions empowering the Police without a warrant to search motor vehicles. The only power that could have been used by the Constables in this matter was section 357E of the Crimes Act which reads:

"A member of the Police Force may stop, search and detain—

(a) . . .

(b) any vehicle in which he reasonably suspects there is anything stolen or otherwise unlawfully obtained, or anything used or intended to be used in the commission of an indictable offence."

The only evidence which came out of the investigation to support the Constable's reasonable suspicion that the complainant's husband's vehicle contained anything stolen or otherwise unlawfully obtained, or indeed anything used or intended to be used in the commission of an indictable offence, was as follows:

- The Constable stated that the driver "appeared to be in an uneasy state and continually moved around away from his vehicle".
- The other Constable stated that the driver "appeared agitated and in a hurry to resume his journey".

In my Report under section 28 of the Police Regulation (Allegations of Misconduct) Act, 1978, I indicated that even accepting the Police evidence in toto to ascertain whether or not the complaint was sustained, one really has to decide, assuming the driver of the vehicle appeared to be in an uneasy state and continually moved away from his vehicle, whether such action was sufficient justification for the constable to have a *reasonable* suspicion that the driver's vehicle contained stolen goods. Reasonable suspicion means that there must be something more than mere imagination or conjecture. It must be the suspicion of a reasonable person warranted by facts from which inferences can be drawn. To suspect that a citizen's vehicle contained stolen property because that citizen appeared nervous and uneasy about being stopped by the Police and issued with an Infringement Notice, could not, in my opinion, be considered reasonable. There was no other evidence to support the suspicion that the driver was carrying stolen goods and to argue that the Constable could have had a reasonable suspicion is just not tenable.

I reported that after considering all the evidence available I was of the view that the investigation showed clearly that the two Constables acted outside the power granted to them to search the vehicle under section 357E of the Crimes Act. I concluded that the conduct complained of was contrary to law and that the complaint has been sustained. I recommended that the two Constables be counselled by their senior officers regarding the limitation of Police powers to search innocent citizens' vehicles.

After receiving my Report the Commissioner of Police indicated that he did not agree with my recommendation and he adhered to his opinion that the Constables did not exceed their powers in searching the vehicle with the result that he did not intend any disciplinary action whatsoever against them.

ALLEGED FAILURE TO TAKE ACTION FOLLOWING ASSAULT

A firm of solicitors wrote to the Premier and complained on behalf of a client of the alleged failure of Police to take proper action in respect to an assault committed upon their client.

At the conclusion of his inquiries the Detective Inspector who investigated the complaint advised that he was of the opinion that further inquiries could have been made by the investigating Police as to the doctor and hospital attended by the complainant when it was ascertained from him that he had undergone surgery for the injuries received when he was assaulted. The Detective Inspector felt that the failure of the Police to make the inquiries was insufficient to warrant any Departmental charges, however, he recommended that four Policemen be paraded before their District Officer and advised of their responsibilities. He recommended the following:

- That a Constable 1st Class be paraded as a result of the Constable's failure to fully investigate the complainant's claim that he had undergone surgery for fractures to the left cheekbone and further that the Constable subsequently failed to charge the person who committed the assault.

- That a Sergeant 1st Class be paraded. The Sergeant was the officer in charge of the Police Station and he had been informed by the Constable 1st Class of the alleged fractures to the complainant's cheekbones. However, the Sergeant failed to suitably instruct the Constable to reinterview the complainant to confirm the extent of the injuries and the treatment received.

- That a Detective Sergeant 2nd Class be paraded for his failure to have the complainant reinterviewed to establish the authenticities of the complainant's injuries and treatment. The Detective Sergeant 2nd Class, who was the Divisional Detective Sergeant, had been informed by a M.L.A. and the Constable 1st Class of the alleged fractures to the complainant's cheekbone.

- That a Detective Sergeant 3rd Class be paraded as a result of the Detective Sergeant 3rd Class, having been directed by the Detective Sergeant 2nd Class to follow up the investigation, failed to reinterview the complainant to confirm or rebut the allegation regarding injuries and treatment.

The Superintendent in Charge of the Police Internal Affairs Branch and the Acting Chief Superintendent of the Metropolitan Area agreed with the recommendation of the Detective Inspector. In his report to me the Commissioner of Police indicated that he proposed to have the Sergeant 1st Class, the Detective Sergeant 2nd Class and the Detective Sergeant 3rd Class paraded, however, he proposed no action against the Constable 1st Class as the Constable had sought and was acting on the advice of senior officers.

In my Report, I agreed with the conclusions reached by the Detective Inspector who investigated the complaint, the Superintendent in Charge of the Police Internal Affairs Branch, and the Acting Chief Superintendent of the Metropolitan area in that the four policemen should be paraded before their District Officers. I recommended accordingly.

The Commissioner of Police has informed me that he directed that the Sergeants be paraded, but had taken no action against the Constable 1st Class.

REFUSAL TO APOLOGIZE

The manager of a Sydney psychiatric hospital advised that an Occupational Therapist from the Hospital had taken a group of patients on a visit to the City and they were waiting at a bus stop when they were approached by a man in plain clothes who asked the Occupational Therapist what he was selling. After asking who the man was and being told that he was a Policeman the Hospital Manager claimed that the Therapist had to demand on several occasions to see some form of identification before a Police identification card was presented. Another Policeman who was also in plain clothes examined the contents of a handbag of one of the patients. The Hospital Manager indicated that it would be obvious to any experienced observer that the patients were not tourists or sightseers and that one would have expected a trained Policeman to have made inquiries courteously before embarking on a brusque examination. He advised that the incident had had a very adverse effect on the group of patients and he sought assurance on the Occupational Therapist's behalf that such an incident was unlikely to recur.

Following the investigation of the complaints, and me receiving a copy of the Police Department's file together with a report from the Commissioner of Police, I informed the Commissioner that, as the Hospital Manager had expressed the hope that the incident was not a regular Police procedure and that the Therapist could be assured that her experience was an isolated incident, it would seem that conciliation of the complaint should have been attempted in the first place and I asked if the Commissioner would be prepared to direct that an apology be offered by the Policemen concerned. I also pointed out to the Commissioner that there was a degree of contradiction of the reports of the two Detectives concerned. The Commissioner replied to me that one of the Detectives had reported during the investigation that he said to the Occupational Therapist, "I am sorry for any inconvenience to you." The Commissioner considered this to be sufficient apology. I then advised the Commissioner of the contradiction in the reports of the two Detectives involved in the matter and I again asked the Commissioner whether he was prepared to direct that a more formal apology be offered to the Hospital Manager. Again the Commissioner declined to apologize.

As a result I reported that, due to the contradiction in the reports of the two Detectives, I was unable to accept that an appropriate apology was made to the Occupational Therapist at the time of the incident. I recommended that the Detective Sergeant who first approached the Occupational Therapist be paraded before his Divisional Officer. I also recommended that a formal apology be directed by the Commissioner of Police to the Manager of the Hospital and to the Occupational Therapist. The Commissioner of Police informed me that he did not intend to either have the Sergeant paraded or apologize to the Hospital Manager or Therapist.

FAILURE TO RESPOND TO TELEPHONE CALL

The complainant alleged that the Police failed to promptly attend to matters which she had reported to them over a number of years. Only one matter which allegedly took place in July, 1979, came within the provisions of the Police Regulation (Allegations of Misconduct) Act, 1978.

As a result of his investigation of the complaint a Senior Inspector concluded that he was satisfied that the complainant did contact the Police Station at the time she indicated and that the message was received by one of the five Police who were in the Station at the time. He also indicated that for an unknown reason the message was not recorded nor immediately acted upon. None of the Policemen who were at the Station acknowledged that they had received the telephone call. The Senior Inspector recommended that the rostered Station Constable at the time the telephone call would have been received be paraded before a District Superintendent as the Station Constable carried the responsibility for the proper performance of duty within the Charge Room which included the answering of all telephone calls and ensuring that each call received immediate and satisfactory attention. This recommendation was supported by a Senior Inspector signing for the Superintendent in Charge of the relevant District. However, the Deputy Chief Superintendent of the Metropolitan Area agreed that the complaint had been sustained but he was of the view that there was no evidence that the Station Constable had neglected his duties and the Deputy Chief Superintendent recommended that all Police on duty at the Police Station when the telephone call from the complainant would have been received be addressed by their Divisional Officer and instructed of the necessity to ensure that all telephone calls received are properly recorded and that all matters receive prompt attention.

In his report to me the Commissioner of Police commented that he was inclined to the view that the complainant did in fact telephone the Police station at the time and on the date she said she did. However, he was not satisfied that the complaint had been sustained and he did not propose any further Departmental action. I then wrote to the Commissioner, commenting that there seemed to be no doubt in his mind and in the minds of the other Senior Police involved in the investigation that the complainant did in fact telephone the Police Station when she said she did. I indicated that I found myself in agreement with the opinion expressed by the Deputy Chief Superintendent of the Metropolitan Area that all Police on duty at the Station at the time the complainant's telephone call would have been received should be addressed by their Divisional Officer and instructed as to the necessity and to ensure that all telephone calls received are properly received and recorded and that all matters are given prompt attention. The Commissioner of Police replied to me that he extended the benefit of the doubt to the Police concerned and that he was not satisfied that the complaint had been sustained.

In my Report I recommended that all Police on duty at the Station be addressed by their Divisional Officer and instructed as to the necessity to ensure that all telephone calls received are properly recorded and that all matters receive prompt attention. The Commissioner of Police has informed me that he does not consider that the circumstances of the matter warranted the action I recommended and consequently he gave no direction in the matter.

WRONGFUL PURSUIT OF CLAIM FOR COMPENSATION

In statements a husband and wife complained of the alleged actions of Police towards them following a motor vehicle collision in which they were involved in October, 1979. The other person involved in the collision was a Constable of Police. The husband alleged that at the scene of the collision he was informed by one of the attending Police that if he did not pay for the damage caused to the Constable's vehicle he would be "booked". Both complainants claimed that since the accident the Constable made a number of visits to their home looking for payment of the compensation. They indicated that the final visit by the Constable was made in Police uniform and he attended driving a marked Police vehicle. The wife alleged that the Constable's attitude was demanding and he threatened that unless he received payment the complainant would receive a "hard time" and that it would be "hard" for the husband without a licence. The wife further alleged that the Constable claimed that he had checked with the Taxation Office and had been informed that the husband had received his tax cheque and therefore could now pay the debt.

The investigation of the complaint established that the witnesses gave consistent evidence of what occurred when the Constable made his final visit to the complainant's home. The Constable admitted that he left his beat to perform a private function contrary to Police Instruction 30 paragraph 7 (a) and did not report having done so in the Motor Vehicle Diary as required by Police Instruction 30 paragraph 7 (g) and the Instructions contained in the front of the Car Diary and Police Instruction No. 26 paragraph 38 (d). Although the Constable claimed not to have known this at the time, he presumed to know his duty and be responsible for his performance—Police Rule 11 (3). The Inspector who performed the investigation reported that he believed that the Constable was untruthful when he answered questions in regard to what had happened outside the home of the complainants when he last visited. The Inspector pointed out that this was contrary to Police Rule 11 (f). Further, the Inspector believed that the Constable was using his position as a Constable in an endeavour to obtain money (albeit a justified claim for damages) by going to the complainants' home in full uniform and with a Police vehicle. The Inspector considered this to be a serious breach of the Constable's duty of impartiality. The Inspector considered that there was sufficient evidence to support the following charges against the Constable and he recommended accordingly:

- *Neglect of Duty*—The Constable neglected his duty by leaving his beat to proceed to the private home of the complainants in pursuit of a private claim for property damage.
- *Disobedience*—The Constable was disobedient in that he failed to record such deviation from his beat to pursue the private claim for damages.

  He was disobedient in that he was required to exercise strict truthfulness when submitting a report about an occurrence on the last time he visited the complainants' home.
- *Misconduct*—The Constable used his uniform and Police vehicle as a means of endeavouring to collect a private debt in such a manner as to bring discredit upon the Police Service.

The Commissioner of Police reported to me that in regard to the Constable's visit to the complainants' home, whilst on duty, in full Police uniform and whilst driving a marked Police vehicle, there can be no doubt that he breached a number of Rules and Instructions. However, the Commissioner did not consider the Constable's actions to be serious enough to warrant Departmental charges and therefore the Commissioner intended that the constable be paraded before his District Superintendent and given appropriate instructions as to his responsibilities. In addition, regarding the alleged behaviour of the Constable whilst talking to one of the complainants on the last occasion he visited their home, the Commissioner appreciated that there was corroboration of the allegations in the statements supplied by the young children present. However, in view of the relationship of those children to the complainants, their ages and the inconsistencies as to what was actually said by the Constable, the Commissioner did not believe that such corroboration was sufficient to find the complaint sustained. Accordingly he proposed no further Departmental action in regard to this aspect of the complaint.

I concluded that the investigation did not reveal sufficient information which would make me decide that one of the complainants was threatened in October, 1979, at the scene of an accident with Police action if he failed to pay the Constable for the damages caused to the Policeman's vehicle. I indicated that I was of the view that the conduct of the Constable was wrong in that he visited the complainant's home whilst on duty, in full Police uniform and whilst driving a marked Police vehicle. In addition, I reported that I was of the view that the investigation revealed that the conduct of the Constable was wrong when he visited the complainant's home in that he was demanding and threatening. I recommended, as proposed by the Inspector who carried out the investigation, that the following three Departmental charges be preferred against the Constable:

- Neglect of Duty.
- Diobedience.
- Misconduct.

The Commissioner of Police in due course advised me that notwithstanding my recommendation to the contrary he was adhering to his original decision. The Commissioner directed that the Constable be paraded before his District Superintendent and that he be given suitable instruction in respect of him breaching a number of Rules and Instructions in relation to his visit to the complainant's home whilst on duty, in uniform and whilst driving a marked Police vehicle.

The Commissioner included in his direction that a reference to the Departmental papers dealing with the matter be made in the Constable's Service Register. The Commissioner chose not to charge the Constable in connection with the breaching of the Rules and Instructions as well as the manner in which the Constable spoke when he last visited the complainant's home.

UNNECESSARY HANDCUFFING

In July, 1979, the complainant was stopped by a Constable of Police for allegedly driving through a stop sign. The complainant denied the allegation whereupon the Constable asked for his driver's licence and made a call over the Police radio. It was claimed that the Constable then informed the complainant that he was under arrest, handcuffed him, placed him against his motor vehicle and gave him a body search. It was further claimed that it was not until the complainant was in the Police car en route to the Police Station that the Constable informed him that his arrest was made pursuant to a warrant, but the Policeman refused to state what the warrant related to. The complainant alleged that at the Police Station he was told the warrant related to a fine of $18.00, the warrant having issued from Mudgee in 1972. The complainant paid the fine and was allowed to leave. The complaint, which was made by a firm of Solicitors, related to the manner in which their client was treated, having regard to the fact that he had no criminal convictions and that he gave the Police no cause to physically arrest him other than to deny that he was guilty of driving through a stop sign.

The Commissioner reported to me that the warrant upon which the complainant was taken into custody, was for an offence of "Insufficient Silencing Device" committed at Mudgee on 15th March, 1972. Such an offence is now classified as a minor matter which does not appear on a person's Conviction Record Sheet.

The Constable who stopped the complainant stated that when he asked for the driver's licence the complainant argued but produced the licence. The Constable indicated that he detected liquor on the complainant's breath and an alco test was given which, although it proved negative, registered close to the permissible limit. The Constable said that he then made a routine warrant check which proved positive "That being only one small warrant", following which he issued an Infringement Notice. He claimed that the complainant continued to argue indicating that it was not a stop sign but a give way sign and that he had been travelling that way for five years. The Constable maintained that he then informed the complainant that he would be taken back to the Police Station in order that the Committment Warrant could be satisfied. The Constable also mentioned that as there were no other cars available, together with the fact that he was working alone and that he considered the complainant aggressive, he searched and handcuffed the complainant. The Constable denied kicking the complainant's legs apart. The Constable said that he formed the opinion that the complainant was aggressive by what he said as well as the way in which he said it and the Constable claimed that he was concerned for his safety because he was working alone.

The Senior Inspector who performed the investigation did not doubt the word of the Constable and felt that no blame could be attributed to the manner in which the Constable acted. The Senior Inspector noted that the complainant is a person apparently of good character, Italian born, who speaks reasonably good English which can easily be understood. The Senior Inspector formed the opinion that the complainant is an excitable man of temperamental and explosive personality and unless handled with extreme care would be very easily upset.

The Commissioner of Police agreed with the findings of the Senior Inspector that the complaint had not been sustained and accepted the recommendations that the actions of the Constable were both correct and justified.

I disagreed with the conclusions reached by the Commissioner of Police. I am of the opinion that the Constable over reacted and that he did not have sufficient cause to place handcuffs on the complainant and subject him to a search for weapons in a public street when arresting him for a minor traffic breach which had occurred seven years earlier. I recommended that the Constable be suitably advised by his Divisional Officer.

Subsequently, the Commissioner of Police informed me that, as he did not consider that the Constable acted incorrectly in the matter, he had not taken any Departmental action against the Constable.

REVEALING OF INFORMATION TO THE PRESS

The complaint is one in which objection was taken to the Police providing a newspaper with "prejudicial" information about the local Aboriginal community. The complainant advised that as a result of an incident on an evening in August, 1979, a number of people from an Aboriginal community were charged with offences arising from the incident. Those charged appeared before a Court of Petty Sessions and were remanded to appear at the same Court on a date in September, 1979. The complainant claimed that no significant details of the offences were given to the Court

and despite the brief hearing an article appeared on the front page of a country newspaper which quoted extensively from Police sources. The article had the heading "Sequel to Violent Night. Nine appear in Court Yesterday". In part the article went on to say "when the Sailing Club patrons attempted to leave the Aborigines shouted abuse, commencing to pick fights with several whites . . ." and continued "While Police concentrated their efforts on the main group in front of the sailing club, smaller groups broke away and began to fight with any white males in the vicinity, Police said". The article alleged specifically "Police discovered later that a small group had broken nine plate glass windows in the . . . Street business section. Garbage receptacles, garden pots and some seats were thrown on to the roadway and several vehicles were damaged by thrown objects". The complainant stated that it was totally unacceptable that Police should make available their reports to local newspapers or that they should leak stories which are prejudicial to a Court hearing. He suggested that it was not possible for those charged to receive a fair hearing because of the publicity. The complainant indicated that he was particularly concerned as "Police said"—"the Police report said"—"Police said"—"Police discovered later", appearing regularly throughout the article.

The investigation of the matter revealed that the information contained in the newspaper article was supplied to a journalist by a 3rd Class Sergeant who acted at the direction of the Inspector in Charge of the Division. The information which was supplied by the Sergeant was taken from the Occurrence Pad at the Police Station and the article which appeared in the newspaper was a factual account of the incident as recorded on the Occurrence Pad.

Section 10 (2) of Police Instruction 132/3 indicates that Police are permitted to give information to a person outside the Police Force when they are authorized to do so. However, the instruction lays down that the information is to be of a general and non controversial nature on subjects such as crime prevention, road safety and the like. However, Police must comply with the provisions of Police Rules 50–54 concerning secrecy in respect of Police business. I could not accept that the information given to the journalist by the Sergeant and authorized by the Divisional Inspector was of a non controversial nature and fell into the same category as crime prevention or road safety.

I decided that the investigation revealed that the conduct of the Divisional Inspector was wrong in that he directed the Sergeant 3rd Class to give to the media information which did not comply with the provisions of section 10 (2) of Police Instruction 132/3. I also decided that the conduct of the Sergeant 3rd Class was wrong in that he gave to the media information which did not comply with the provisions of section 10 (2) of Police Instruction 132/3. I recommended that the Inspector and Sergeant be paraded before their District Superintendent with a view to them being instructed as to the type of information they are permitted to give to the media.

The Commissioner of Police wrote to me and advised that he rejected my recommendation and that he intended taking no further action in the matter.

ALLEGED THREAT

It was alleged that the complainant, through his Solicitor, was threatened by a Sergeant of Police. The complainant maintained that the Sergeant said to the Solicitor "I'll drive this guy into the ground".

In his statement, the complainant's solicitor claimed that the 3rd Class Sergeant said "I'm not happy with the letter your client wrote to his local member of Parliament. I do not know the exact contents of this letter but I do not like the way he has gone about it. As far as I am concerned I am going to do everything I can to put your client into the ground". The complainant was not within hearing distance of the alleged conversation but the Solicitor reported it to him immediately after it occurred.

The then Deputy Commissioner of Police reported to me that the Policeman who was the subject of complaint had denied the allegations made against him and whilst the complainant's Solicitor made a statement giving details of the alleged threat, the Solicitor was unable to provide any independent evidence to support his version of the events. In addition, the Deputy Commissioner indicated that in view of the conflict in the information which resulted in the investigation, he was satisfied that the complaint had not been sustained and accordingly, he intended to take no further Departmental action in the matter.

In my Report, I commented that in my opinion there was nothing to be gained by either the complainant or his Solicitor making the allegation and neither had any apparent motive in doing so. Even though the Sergeant denied making the threat, the Solicitor firmly stated that the threat was made and this was confirmed by the complainant who a short time later was told by his Solicitor of the threat.

I did not agree with the views of the Deputy Commissioner of Police as I considered that the complaint had been sustained. I recommended that the Sergeant should be suitably reprimanded. However, the then Acting Commissioner of Police subsequently advised me that he still did not believe that any Departmental action should be taken against the Sergeant and that he did not intend to take any further action.

APPENDIX D

APPENDIX D

"SUSTAINED" . . .

BRANDISH REPLICA PISTOL

Two youths and their two female companions complained about the actions of a motorist and the alleged subsequent presentation to them of what appeared to be a pistol.

The then acting Commissioner of Police informed me that initial inquiries had revealed that the person the subject of the complaint was in fact a Constable of Police. In addition, the Acting Commissioner advised me that as a result of immediate inquiries by officers of the Police Internal Affairs Branch, he had directed that the Constable "be suspended from pay and duty and charged in relation to two charges of assault and with respect to his possession of a replica Smith and Wesson Magnum Pistol. The Acting Commissioner also informed me that a civilian was to be charged in relation to aiding and abetting the Constable with respect to the possession of a replica pistol.

The investigation of the complaint revealed that at about 8.10 p.m. on a Friday in mid-August, 1979, the Constable was driving a motor car along Lyons Road, Drummoyne and at the time was accompanied by a 21 year old male friend. On approaching the intersection of Victoria Road the Constable stopped his vehicle in a line of traffic and was seen by the four complainants to blow kisses towards the two young ladies who responded by giving indecent gestures with their thumbs. Shortly after that incident the Constable was seen to produce a revolver with his left hand and then point it in the direction of the four complainants, with the result that the two young ladies became alarmed and left the location. The two youths recorded the registration number of the Constable's vehicle and then approached the Constable whilst he was still seated in his vehicle. They saw the Constable place the revolver in a dark coloured bag between the bucket seats. The Constable then drove off and one of the youths contacted the Police and reported the incident.

When interviewed, the Constable admitted having possession earlier that evening of a replica firearm whilst he was in Lyons Road, Drummoyne, however, he denied pointing the replica out of the vehicle in the direction of any person. He admitted concealing the replica, with the assistance of his passenger, in a hat box in the garage of his passenger's home. The passenger was later interviewed and admitted assisting the Constable in hiding the replica firearm in the garage. After they had been interviewed the Constable and his companion were both taken to the garage where the replica firearm was retrieved and retained as an exhibit.

The Constable subsequently appeared at the Central Court of Petty Sessions where he entered a plea of guilty in relation to the charge of "Possession of Prohibited Article", and not guilty to the two charges of "Common Assault". The Stipendiary Magistrate found that the three charges preferred against the Constable had been proved and discharged the Constable conditionally upon him entering into a bond to be of good behaviour for a period of twelve months in respect to each charge. The Magistrate found the offence of "Aid and Abet Possession of Prohibited Article" against the Constable's companion proved and without proceeding to a conviction dismissed the information under section 556A of the Crimes Act of 1900.

In my Report I found the complaint to be sustained. As a result of the Constable's actions, the Commissioner considered that the Constable could no longer be regarded as a fit person to remain a member of the N.S.W. Police Force and he directed the Constable's dismissal from the Force.

INDECENT LANGUAGE, ASSAULT AND OFFENSIVE BEHAVIOUR

A woman, a visitor from New Zealand, and her twenty four year old daughter complained about the alleged conduct of two Constables. The mother had been staying with her daughter and two other women in a home unit in a Sydney suburb. The ladies claimed that the two Constables made a social call to the unit and during the Constable's visit the two ladies were subjected to vile obscenities and a continuous barrage of offensive and unseemly remarks. It was further alleged that the younger lady was indecently assaulted by one of the Policemen and that her mother was assaulted by both officers.

Following his inquiries, the investigating Inspector expressed the opinion that the complainants had been sustained, both in relation to the use of unseemly language as well as the alleged assaults.

After completing his inquiries, the Inspector sought the comment of the Superintendent-in-Charge of the Police Prosecuting Branch in relation to the preferment of criminal proceedings against the Constables. The Senior Police Prosecutor indicated that whilst sufficient evidence existed to substantiate criminal proceedings, he did not recommend that course of action. The Superintendent-in-Charge of the Prosecuting Branch expressed the opinion that the most effective means of proceeding against the

Constables was on a Departmental basis. Subsequently the Commissioner of Police directed that criminal proceedings against the constables were not to be preferred but the matter was to continue on a Departmental basis.

In his report, the Inspector who carried out the inquiries indicated that he was of the view that sufficient evidence was available to substantiate three Departmental charges of "Misconduct" against one of the Constables and two similar charges against the other Constable. The Inspector's views were supported by the Chief Superintendent of the Police Internal Affairs Branch, the Chief Superintendent of the Metropolitan Area and the Commissioner of Police. In my Report under section 28 of the Act, I agreed that the Constables should be charged with "Misconduct" as proposed by the Commissioner of Police. When the Constables were Departmentally charged they denied the relevant charges and the matters were referred to the Police Tribunal of N.S.W. for Hearing and determination. However, before the matters were heard by the Tribunal, both Constables resigned from the Police Force and their resignations were accepted.

CONDUCT FOR WHICH A SENIOR CONSTABLE DID NOT GIVE REASONS BUT SHOULD HAVE

The Premier received a complaint from one of his Cabinet Ministers on behalf of the Minister's constituents. It was alleged that—

- A Senior Constable obtained the complainant's private address from the complainant's employer.
- The Senior Constable attempted to intimidate the Secretary of the Office in which the complainant worked.
- The Senior Constable informed the complainant's employer that there was a warrant for the complainant's arrest.

The complainant also expressed the opinion that the Senior Constable should have obtained his (the complainant's) address from the Department of Motor Transport's records and not through his employer.

After the investigation had been completed I reported on the results of the investigation and I indicated that I was satisfied that the complaint had not been sustained.

Subsequently I received from the Premier a copy of further representations by the Cabinet Minister on behalf of the complainant. Papers I received contained a letter written by the complainant to the Minister indicating dissatisfaction with the investigation and the result. I re-opened the matter and took up with the Commissioner of Police the point raised by the complainant. Further investigation was carried out with the result that the Commissioner of Police reported to me to the effect that he was of the opinion that the Senior constable should have exercised a greater degree of care in the preparation of his report and, accordingly, the Commissioner indicated that he indended to direct that the Senior Constable be paraded before his Divisional Officer for the purpose of being instructed as to his responsibilities. I indicated in my Report that the Senior Constable had not provided any reasons for his actions in relation to the point raised by the complainant in his second letter of complaint. I further indicated that the Senior Constable had maintained that if he did make an error in his report then it was an unintentional one and that, owing to the time that had elapsed since the occurrence, he could not explain the matter better than he had particularly in view of the number of warrants he had dealt with. I could not accept this explanation.

I reported that in my opinion the Senior Constable should have been able to provide reasons for his conduct, with the result that I was satisfied that the allegations made in the second letter of complaint had been sustained in terms of section 28 (1) of the Police Regulation (Allegations of Misconduct) Act, 1978, in that it "was conduct for which reasons should have been given but were not given". I recommended that the Senior Constable be paraded before his Divisional Officer for the purpose of being instructed as to his responsibilities when gathering information about people who are the subject of warrants.

ASSAULT BY INSPECTOR OF POLICE

The complainant alleged that his wife had driven her car to the rear of his office building in a Sydney suburb. He claimed that his wife stopped the car in the laneway and, as he went to enter the driving seat of the vehicle, he noticed an unmarked Police car had pulled up at the rear of his wife's vehicle. The complainant stated that the laneway was very narrow and it was impossible to turn the car around

due to a truck parked in front of his wife's vehicle together with the fact that another car was parked on the opposite side of the lane to where the complainant's wife's car was parked. The complainant indicated that, with these obstructions in the way and with the Police car behind him, he thought the most logical thing to do was to drive down through the Police Station driveway which was at the end of the laneway.

It was alleged by the complainant that as he drove past the Police Station the Policeman in the following car sounded his horn with the result that before the complainant drove out of the laneway he stopped the car and got out to ask the Policeman what was wrong. The complainant stated that the Policeman told him that it was not a public road and that he could not drive through there and the complainant claims that he replied to the effect that he knew that but, under the circumstances, it was the most logical thing to do. It was then, according to the complainant, that the Policeman got angry, raised his voice and told the complainant that he wasn't to drive through the Police Station driveway. The complainant then stated that he said to the Policeman "Be reasonable and use some common sense. How was a person to turn around? I did the only logical thing". The complainant alleged that he was then violently grabbed by the left forearm and dragged at least ten feet towards the Police Station door. The complainant indicated that he yelled out words to the effect "Let go of me" and his wife jumped out of the car and started screaming. It was maintained that the Policeman then let him go and the complainant said "I won't let this matter go", got into his car and drove off.

The investigation resulted in it being difficult for me to ascertain which version of the events was the correct one. Both the complainant and his wife were adamant that the Inspector of Police forcibly took hold of the complainant and dragged him towards the Police Station. On the other hand the Inspector denied the allegation although he admitted that he did take hold of the complainant by the arm but only to steer him back to his car.

After considering the information which resulted from the investigation the Commissioner of Police received comment from the Police Prosecuting Branch to the effect that what occurred on the occasion under review amounted to an assault at law regardless of which version was accepted. It was indicated that the only legal distinction between the versions of the event was the severity of the assault.

After the complainant had again been interviewed and he advised that he would not be taking any civil action against the Inspector and that he would leave any action in the matter to the Police Department, the then Acting Commissioner of Police reported to me:

> "From the information before me I am satisfied that Mr . . . 's complaint has been sustained. There is no doubt that the Inspector allowed a minor incident to escalate and in so doing assaulted Mr . . . and under normal circumstances I would have no hesitation in directing that a Departmental charge be preferred."

However, the Acting Commissioner indicated that, bearing in mind the Inspector's service together with the fact that the Inspector had not previously come under notice for a matter of a similar nature, he would adopt the recommendations of other Senior Police that the Inspector not be Departmentally charged with "Misconduct" but that he be paraded before the Chief Superintendent, Metropolitan Area, and instructed as to what was expected of him as a senior member of the Police Force and warned of the serious consequences that would ensue should any further misconduct by him come to notice.

In my Report under section 28 of the Act I advised that, in my opinion, there existed no doubt that the Inspector did technically assault the complainant with the result that I was satisfied that the complaint had been sustained. I concurred with the proposal of the Acting Commissioner that the Inspector be paraded before the Chief Superintendent, Metropolitan Area.

DISCLOSURE OF CRIMINAL RECORD TO EMPLOYER

The New South Wales Privacy Committee wrote to the Commissioner of Police about a complaint the Committee had received about the conduct of Police. The Committee advised that early in 1979 the complainant was dismissed from his employment. The complainant maintained that his dismissal followed two cases of theft reported to, and investigated by, Police. He indicated that on the day of the dismissal the Company Secretary went to a Sydney suburban Police Station and when he returned he spoke to the Managing Director who then told the complainant that the Police had provided details of his record and because of its nature he had no future with the company. The Committee also advised that the complainant had claimed that he had a conviction for taking $5.00 from a till while employed by a Department store when he was 16 years of age and that, as he was now 26 years of age without any subsequent conviction, the company should not have been informed of the conviction.

When questioned regarding his reason for disclosing the complainant's conviction, the Detective Senior Constable who was the subject of the complaint replied to the effect that he did so in order to assist his inquiries, bearing in mind that the Company Secretary was a senior executive and a person of considerable responsibility with the company. Even though he was aware of the provisions of the Police Rules and Instructions in relation to matters of such nature, the Senior Constable stated that, under the circumstances, he believed it prudent to reveal the information to the Company Secretary. The Senior Constable made the point that under normal circumstances he does not release confidential information to any person. The Senior Constable indicated that he believed his efforts had been used by the Company Secretary and the Managing Director to get the resignation of the complainant.

In his report to me the Commissioner of Police indicated that he was not satisfied that the Detective Senior Constable was prudent in releasing the information to the Company Secretary. I reported that I was of the view that the complaint had been sustained and that the conduct of the Detective Senior Constable was wrong when he released the complainant's criminal record to the Company Secretary. I recommended, as proposed by the Commissioner, that the Detective Senior Constable be paraded before his District Superintendent and that the Detective Senior Constable be instructed by his District Superintendent about his responsibilities.

ASSAULT AND OFFENSIVE BEHAVIOUR

The Manager of a Registered Club complained about the conduct of a Senior Constable and a Constable whilst they were off duty and in the Club. It was alleged that the Constables were involved in a disturbance at the Club, that the Senior Constable had refused to leave the premises and that he had assaulted a doorman.

The investigation revealed that the only person to suffer any injury was the Senior Constable and the facial injuries he sustained were severe. In his report the Detective Inspector who conducted the investigation pointed out that Police Officers are required to conduct themselves in an exemplary manner whether on or off duty. He commented that the Senior Constable, although off duty, did use indecent language which could be overheard by women sitting nearby and this caused his male companion to warn him of the use of such language. There was no doubt in the Detective Inspector's mind that the use of the language resulted in the subsequent brutal confrontation between the Senior Constable and Club employees, with the Senior Constable receiving retribution in excess of the deed committed.

After considering the Detective Inspector's report as well as the comments made by the then Acting Commissioner of Police, I indicated in my Report under section 28 of the Act that, in my opinion, the conduct of the Senior Constable was wrong in that he failed to conduct himself in an exemplary manner. I also indicated that there was insufficient evidence which would allow me to form the opinion that, under the circumstances, the conduct of the other Constable was wrong. I recommended that no further action be taken in respect of the alleged assault by the Senior Constable on the doorman or the alleged assault by the doorman on the Senior Constable. I also recommended that no further action be taken against the Constable companion of the Senior Constable. In addition, I recommended that Senior Constable be paraded before his Divisional Officer and advised of the necessity of conducting himself in a manner, whether on or off duty, that will not bring discredit upon himself or the Police Force.

ABUSIVE BEHAVIOUR, SWEARING AND DESTROYING OF NEGATIVE TEST TUBE

I received a letter from the complainant alleging misconduct by a Policeman who issued him with a Traffic Infringement Notice. In his letter the complainant explained that he was travelling in his panel van when he was told by a Policeman to pull over. He claimed that the Policeman accused him of being drunk and then requested the complainant to blow into a bag. The complainant indicated that he did as instructed following which the Constable looked at the tube and smashed it on the ground. It was maintained by the complainant that he then said to the Constable "Am I drunk?", to which the Constable swore at him and told him not to get smart. It was also claimed by the complainant that he asked the Constable for his name and number to which the Policeman replied to the effect that if the complainant wanted his name and number he would give the complainant Infringement Notices for being smart. According to the complainant the Constable then proceeded to issue an Infringement Notice for speeding. It was maintained by the complainant that when he advised the Constable that he was not speeding the Policeman told him that if he didn't shut his mouth he was going to give him some more tickets.

During the investigation the Constable admitted that he disposed of the negative alco test tube by smashing it on the ground, although, in a previous report on the matter he stated that he disposed of it in accordance with Police Rules and Instructions. The Constable claimed that he was of the opinion that to dispose of an alco tube by smashing it was the accepted practice, however, since the incident complained about, he was now aware that the procedure was incorrect.

The versions given by the Constable and the complainant as to the conversations alleged to have taken place varied greatly. The Constable denied that he used the word drunk at any time whilst speaking to the complainant and he maintained that he did not swear at the complainant or use any other unseemly words.

The Inspector who carried out the investigation commented that he was satisfied that the Constable was justified in subjecting the complainant to a roadside test and that the Constable was further justified in issuing the complainant with the Traffic Infringement Notice for speeding. The complainant, acting on the advice of his solicitor, paid the penalty prescribed in the Infringement Notice.

Following the receipt of a report from the Commissioner of Police and a copy of the Police Department's file in the matter, I reported that I was satisfied that the complaint had been partly sustained in that the investigation revealed that the Constable incorrectly disposed of the alco test tube. Having regard to the conflicting information in regard to the other allegations, I could not find those allegations sustained.

I recommended, as proposed by the Commissioner of Police, that a Departmental charge of "disobedience" be preferred against the Constable as a result of his action in disposing of an alco test tube contrary to Police Instruction 94, paragraph 15.

SOLICITING FOR PAYMENT OF A COMMISSION

The complainant, a Director of a glass company, alleged that his secretary had drawn his attention to a telephone call she received from a person who said he was a Sergeant of Police. It was claimed that the Sergeant was seeking information in respect to the payment of a "spotter's fee" in relation to a broken department store window. It was further claimed that the Sergeant indicated that he was in a position to put further business the way of the company. The Company Director stated that on receipt of the information from his secretary he caused an investigation to be made within his own organization which revealed that, whilst glazing a job, two after-hours servicemen from his company were approached by a Police Sergeant by the same name as the Policeman who had telephoned the company. The servicemen claimed that the Police Sergeant directed them to the premises of the department store to board up a broken window. It was alleged that the Sergeant proceeded to the department store where he awaited the arrival of the servicemen, that the Sergeant had approached one of the servicemen for a consideration in relation to the job being given to the glass company and that the serviceman had advised the Policeman that he was unaware of company policy in that regard. The Company Director went on to state that his inquiries further disclosed that on the same day that the Policeman had telephoned the company, the Sergeant called at a Branch Office of the Company where he approached the Branch Manager in regard to the same matter. The Manager informed the Sergeant that he would make further inquiries to which the Policeman replied that he would call back two days later.

The Sergeant of Police who conducted the investigation reported that he believed that the alleged conversations attributed to the Sergeant who was the subject of the complaint by the two servicemen, the Director's secretary and the Branch Manager showed a pattern of behaviour indicative that the Sergeant was seeking a "spotter's fee". The investigator also indicated that he was unable to accept the versions given by the Sergeant with the result that he was of the opinion on the facts disclosed in his investigation that the Sergeant attempted to obtain the payment of a gratuity. The investigating Police, the Superintendent in Charge of the Police Internal Affairs Branch, the Chief Superintendent of the Metropolitan Area and the then Acting Commissioner of Police all agreed that there was sufficient evidence to substantiate a charge of "Misconduct" against the Sergeant.

In my Report I found the complaint sustained and recommended, as proposed by the then Acting Commissioner of Police, that the Sergeant be Departmentally charged with "Misconduct".

The Sergeant was Departmentally charged and as a result of him denying the charge the matter was referred to the Police Tribunal of New South Wales for determination. Subsequently, the Tribunal found the charge against the Sergeant proven. An Appeal was lodged by the Sergeant against the decision of the Police Tribunal of New South Wales, however, the Review Division of the Tribunal dismissed the Appeal and determined that the charge that gave rise to the proceedings against the appellant had been proved.

The Sergeant was dismissed from the Police Force as a result of his actions and conduct in relation to this matter and another complaint.

FAILURE TO PROPERLY PERFORM DUTY, CONSUMING INTOXICATING LIQUOR AND USE OF UNSEEMLY WORDS

The complainant, a Bureau of Customs Preventive Officer, was on duty at a Sydney wharf with two other officers in the early hours of a July, 1979, morning. It was alleged that at about 2.30 a.m. a Ford F100 Police utility was driven on to the wharf and stopped about 40 feet from the gangway of a ship. At the time the complainant was seated with the two other Preventive Officers in the Customs vehicle about 100 yards from where the Police vehicle stopped. The officers claimed that they saw two uniform Police leave the utility and board the vessel. It was further alleged that a about 3.05 a.m. the two Policemen came down the gangway. One of them was carrying a black plastic bag. The Policeman carrying the bag placed it on the floor of the Police vehicle and sat in the passenger seat. The three Customs Officers approached the Police and identified themselves. The complainant took possession of the bag which contained twelve small cans of beer. A verbal altercation then occurred as the complainant was adamant that he issue to the Policeman in the passenger seat a receipt of the good seized. In the course of the altercation it was alleged that the Constable swore and that his breath smelt of intoxicating liquor.

The investigation confirmed that the Constable, without approval, whilst on duty and accompanied by another Constable, travelled in a Departmental vehicle from a Sydney Police Station to the shipping terminal which was outside the patrol boundaries of the two Constables involved. The two Police Officers left their vehicle and boarded the ship. No advice was given to Police Radio VKG that they were leaving the vehicle and would be unavailable. They remained on the ship until approximately 3.05 a.m. and returned to their Station at 4.15 a.m. The investigation also confirmed that the Constable who was the subject of the complaint had consumed intoxicating liquor whilst on duty and whilst in uniform as he admitted drinking beer during the time he was on board the ship. There was also sufficient evidence that the Constable had used the alleged abusive language.

As a result of the investigation the Commissioner of Police reported that he proposed to direct the preferment of three Departmental charges against the Constable. I reported that I concurred with the proposal of the Commissioner that the Constable be charged with the following Departmental charges:

- The use of Unseemly Words to the Senior Customs Bureau Preventive Officer in the presence of two Preventive Officers.
- The failure to properly and continuously perform his duty and leaving the area of his patrol without authority.
- The consuming of intoxicating liquor whilst on duty and in uniform.

The charges were all admitted by the Constable and a direction was given that as punishment the loss of six months seniority be imposed on the Constable.

CONFLICTING INFORMATION

The complainant alleged that in mid-1976 at a Sydney hotel he was menaced by a man carrying a knife. That evening he reported the matter to the hotel management but when nothing happened he went to the nearby Police Station four days later and made a complaint. It was further claimed that in April, 1979, the complainant went back to the Police Station and an Inspector of Police looked through records and advised that the complaint laid in mid-1976 was recorded. The complainant maintained that two days later he again visited the Police Station when the same Inspector confirmed that the complaint had been recorded when it was made in 1976, however, on many occasions since then he had endeavoured, without success, to confirm with the Police that he had made the complaint. The complainant then drew my attention to questions asked on notice in the New South Wales Legislative Assembly of the Premier and the answers to the questions. In effect, the Premier told his questioner that the complainant's complaint said to have been made in mid-1976 was not recorded. The complainant alleged that the Police had given him and the Premier conflicting information. I determined that the complaint should be investigated.

The investigation established that a record was in fact made at the Police Station of the incident reported by the complainant in June, 1976, and therefore it was true that the complainant was misinformed regarding the existence of the record. It followed, therefore, that the Premier was also wrongly advised by the Police Department. The Superintendent of Police who carried out the investigation commented that the Inspector of Police who was the subject of the complaint was in fact the only officer to give the correct information concerning the recording of the incident. However, the Superintendent considered that the complainant did receive conflicting information from officers of the Police Department. He was of the opinion that four other Police who found no record of the filed complaint were in error, however, the Superintendent could see no ulterior motive for these experienced Police to deliberately misinform the complainant.

In my Report under section 28 of the Act I concluded that no blame could be levelled at the Inspector of Police who was the subject of the complaint. I did though express my concern about the four Policemen who could not find the record of complaint. I made no recommendation concerning action to be taken against the four Police as I felt that their conduct could probably have occurred because of the complainant's reference to the wrong type of record book.

I wrote to the Premier advising him that I felt that I should direct his attention to the complaint and the result of the investigation.

FAILURE TO TAKE ACTION

The complainant alleged failure of Police to take action in regard to a complaint made by him on 12th November, 1979, concerning the actions towards him of a motorist.

As a result of the investigation it was evident that a Constable was remiss in his duty in that he neglected to take appropriate action to investigate the incident reported by the complainant. The investigation also revealed an oversight on the part of another Constable to record on the telephone message pad his contact with the Constable who failed to investigate the incident. In addition, the investigation established that a letter the complainant wrote to the Police Station on 27th November, 1979, was not acknowledged by an Inspector of Police until 18th February, 1980.

I was satisfied that the complaint had been sustained. As the Constable who did not properly investigate the reported incident was no longer a member of the Police Force, it was not possible to recommend that action be taken against him.

"NOT SUSTAINED" . . .

ASSAULT

The mother of a young man complained that her son had been assaulted after he had been arrested and taken to the Police cells. Her son, along with other young people, were gathered at a popular meeting spot for young people which was located some miles out of the town in which they lived. The arrest took place at the popular recreational spot. The young man was later charged at the Police Station with "Offensive Behaviour" and "Resist Arrest".

The Police investigation uncovered a complex set of facts on which there was no uniformity of opinion by the civilian and Police witnesses who were required to assist in the investigation by supplying information.

An undisputed fact, however, was that when the young man was released from the police cells he sought medical attention because his jaw was swollen, causing him pain and difficulty with speech. The jaw was broken. Because of the nature of the break, it was necessary for the young man to be admitted to a hospital for surgical treatment. His jaw was wired for a lengthy period which caused both personal and economic inconvenience.

The Police investigation explored four versions of how the injury was sustained. The first two versions related to the assault occurring prior to the young man's arrival at the Police Station. Because the evidence for this was extremely scanty and because the Police Officer who fingerprinted the young man at the Station did not consider that there was any sign of injury, I disregarded these alternatives.

The third alternative was offered by the Police Officers who had been accused of the assault. They stated that when he was being taken to the cells he broke free, tripped and fell face down with his head landing on a concrete step at the entrance of a cell. The Constable, however, considered at the time that he had not been injured. When he was placed in the cell after this alleged fall, Police did not notice blood on the young man's face. Blood, however, was noticed by the Police Officer who hours later released him. The young man in his statement and in interview with the Police did not mention this alleged fall. There is doubt, therefore, that the injury occurred in the manner offered in this version.

The fourth version was that two Constables assaulted the young man while he was in the cell. The two Police officers concerned denied the allegation and suggested that because the young man was intoxicated at the time his memory of events was not clear. Because of information supplied by the young man's peer group, I queried that he was as intoxicated as was suggested.

I considered that it would have been difficult for the young man to have sustained the injury at any place other than at the Police Station. While I expressed doubt about the injury having occurred as a result of a fall, I was unable to find sufficient grounds on which to refute this explanation. The young man had no witness to the alleged assault in the cells and the two Police officers denied that they assaulted him. Because of this I was forced to find the complaint not sustained although I considered it highly likely that the young man had been assaulted.

This complaint highlights the dilemma with which I am faced when a civilian without witnesses makes an allegation against Police behaviour. Although I do not suggest that Police, as a matter of course, fabricate evidence or collaborate prior to providing the Police investigator information, I consider that this complaint highlights such a possibility.

PAYMENT OF MONEY TO POLICE IN RELATION TO STARTING PRICE BOOKMAKING AND THE ENGAGEMENT OF POLICE IN ILLEGAL BETTING

Information was supplied that $80 per week was paid to Police by a starting price bookmaker operating at a suburban Sydney hotel for advanced information as to when Police were to visit the hotel in relation to the suppression of illegal betting. In addition, information was supplied that a certain Policeman was engaged in illegal betting.

Despite extensive investigation by an Inspector from the Police Internal Affairs Branch, with the assistance of other staff of the Branch, it was not possible to obtain any evidence to substantiate the claim that Police were involved in illegal betting operations at the hotel or that they were given regular payments of money.

However, the inquiries and observations by the Police resulted in the arrest of a man for conducting a starting price bookmaking concern at the hotel. He pleaded guilty to the charge and was convicted and fined. He denied having made any payments to Police or having information in respect of payments.

The Policeman whom it was alleged was engaged in illegal betting activities, denied the allegations and despite extensive investigation it was not possible to secure any evidence to the contrary.

ASSAULT

I received a complaint from a firm of solicitors on behalf of a client who claimed that he was assaulted and generally mistreated by Police in the upstairs section of a large Sydney hotel. It was alleged that the client was handcuffed with his hands behind his back, his legs tied together and that he was pushed from behind and fell downstairs. It was further maintained that he was hit across the face, his face and lips were severely lacerated both internally and externally and that his dentures were broken. It was also alleged that the Police picked him up at the bottom of the stairs and manhandled him towards a Police wagon at the front of the hotel, that he was vigorously pushed into the door of the wagon and struck the front of his head on the inside panel of the wagon behind the driver's seat.

The solicitor's client was charged with "Common Assault", "Malicious Injury" as well as two charges of "Assault Police" and two charges of "Resist Arrest".

From the information supplied by hotel employees it was evident that the complainant's client received his injuries during a most violent struggle which took place on the first floor of the hotel prior to the Police being called. The investigation revealed that the Police did not enter the hotel on the night in question and that their first involvement with the complainants' client was at the time he was being held by the hotel staff on the footpath outside the hotel. I informed the solicitors that I was of the view that their client was not pushed down the stairs by the Police, nor for that matter by any other person. I indicated that their client was taken by hotel staff from the first floor to the ground floor of the hotel by means of an elevator.

I also advised the solicitors that the information available to me indicated that their client's allegation that he was assaulted by Police when they threw him into the rear of a Police wagon was without foundation. A Police sedan car was used to take their client from the hotel to the Police station and a Police caged truck or wagon was not present during that time. Witnesses of the incident as well as the two Policemen involved, stated that the Solicitor's client was not assaulted by the Police when the Constable endeavoured to get him in the car. Indeed, all of those present at the time maintained that it was the complainant's client who behaved in a violent manner. When he appeared in relation to the charges against him the solicitor's client pleaded "guilty" on each charge. He was convicted on each charge.

I was satisfied that the complaint had not been sustained.

I was informed by the Commissioner of Police that he had been advised that it could be positively established that the complainant's client had, "prima facie", committed a public mischief within the ambit of section 547B of the Crimes Act. The Commissioner also informed me that he had directed that proceedings be taken by way of summons against the solicitor's client for "Public Mischief".

FABRICATION OF EVIDENCE, THEFT OF MONEY AND DERELICTION OF DUTY

The complainant alleged that:

- Indian Hemp was placed in his shop by Police in order to effect his arrest;
- that Police stole a sum of money from his property after he had been taken to the local Police Station following his arrest;
- that while he was at the Police Station following his arrest two of the Police involved played table tennis in an adjacent room, and;
- after his arrest Police concerned adjourned to a hotel where they remained drinking for approximately 7 hours.

I reported to the complainant that, in relation to his first allegation, from the investigations it was apparent to me that the visit of the Police, armed with a search warrant, to the shop which he conducted was as a result of complaints received from citizens of the town and from observations by the local Senior Constable of Police. I indicated that there was no information available to me which corroborated in any way the allegation. I pointed out that, in a voluntary statement, the complainant's brother indicated to the effect that on a prior occasion he had seen at the shop Indian Hemp which he knew belonged to the complainant. Nothing emerged from the investigation which lead me to form the opinion that the Indian Hemp was "planted" by the Police.

In connection with the second allegation, the information secured as a result of the investigation indicated that the complainant's money was not moved from his bag and at no time was it counted. When a detective examined the bag the complainant was looking over his shoulder watching what the detective was doing and was therefore in a position to fully observe all of the Policeman's actions. Evidently, at the time of paying his bail money the complainant mentioned to the Station Constable that he thought approximately $70 was missing from the bag following which he was advised by the Constable to check the bag carefully, make further inquiries at the shop and if he still thought the money to be short to return to the Police Station and the matter would be investigated. The complainant never returned to make a complaint. At no time during his period at the Police Station was his property taken from him. The complainant when interviewing gave differing accounts of how much money he had in his bag.

As there were not bat, balls or a net at the Police Station, the Police officers could not have played table tennis while the complainant was at the Station.

The Police involved in the matter admitted that they adjourned to the local hotel for lunch. The Police and other people indicated that the Police received a telephone call from the hotel in regard to the meals which were being prepared for them with the result that the officers went to the hotel some time after 1.00 p.m. (probably closer to 1.30 p.m.) had their lunch and left at approximately 2.30 p.m. The work that they did during the afternoon would not have permitted the Police to have spent more time in the hotel than they claim that they did.

I was satisfied that the complaint had not been sustained and I agreed with the then Acting Commissioner of Police that no further Police Department action was necessary.

IMPROPER ALLOCATION OF TOWING JOBS

The complainant, a tow truck driver, made an allegation that the Police who investigated a motor vehicle collision, assisted another tow truck operator in obtaining the work involved in the removal of the damaged vehicles.

The comprehensive investigation conducted by an Inspector from the Police Internal Affairs Branch resulted in the Senior Constable who was the subject of the complaint denying that he suggested to any driver that they use a particular towing firm. The two truck driver who did receive the towing job denied that he received any assistance from Police in obtaining a tow and he claimed that he had spoken to the respective drivers of the smashed vehicles prior to Police attending the scene. No evidence was forthcoming to prove that Police assisted any firm to obtain work.

FAILURE TO ATTEND SCENE OF CRIME

The Managing Director of a Sydney gem company complained that the Police would not, or could not, attend his premises when an alarm was activated at those premises.

As a result of the investigation I was given information which indicated that at 6.00 p.m. on the day in question the Police Communications Branch received advice from a security company of an alarm at the gem company. The information was broadcast immediately and acknowledged at 6.01 p.m. by two Constables who were performing duty in a Police vehicle. The Constables reported that they attended the premises only minutes after receiving the call and a check of the front and side doors revealed that the doors were secure. The Police then attended to two further matters returned to the premises when they again carried out checks. It was apparent that at 6.55 p.m. on the same day, a Constable at the Central Police Station received a telephone call from the security company asking that a vehicle be sent to the gem company premises for an external check and advising that a security officer from the company would be waiting for the Police. The same two Constables again attended the premises at 7.00 p.m. when they made a further check of the doors which they found intact. The Constables advised that they waited for approximately 5 or 10 minutes for the security officer to arrive, however, he was not seen and they then left the premises to attend to other matters. The Policemen stated that on the three occasions they visited the premises the Police vehicle was parked in the street and at no time did they see any officer from the security firm or any other person at the premises. It was subsequently indicated by the security company that a patrolman from the company could not attend the premises on the day in question as he was engaged on another job. Police records corroborated the information supplied by the two Constables.

I informed the Managing Director of the gem company that I was of the view that the Police concerned acted properly in relation to the alarm at his company's premises.

RAPE AND INDECENT ASSAULT

As a result of a complaint from a female prisoner that she was raped whilst being held in a Police Station, a Senior Constable was suspended from pay and duty pending the outcome of the investigation into the complaint.

The investigation resulted in the Senior Constable being charged with "Rape" and "Indecent Assault". The Senior Constable was identified by the complainant in an identification parade as being the person who had criminally assaulted her.

At the hearing of the charges against the Senior Constable the Chief Stipendiary Magistrate, after considering the evidence of the complainant, stated that he could not commit the Senior Constable for trial to the District Court and dismissed both charges against him. Further, as no prima facie case was established the Magistrate issued costs in favour of the Senior Constable's legal counsel.

In the light of the dismissal of the proceedings against the Senior Constable the Commissioner directed that he be reinstated to full duty.

Having regard to the result of the Court proceedings, I wrote to the complainant indicating that I was satisfied that the complaint had not been sustained.

IMPROPER ARREST PROCEDURES AND FAILURE TO ISSUE A RECEIPT FOR MONEY CONFISCATED

The complainant, a solicitor, wrote letters of complaint in relation to two of his clients. The solicitor stated that when his clients were arrested neither made any admissions and he expressed concern that the circumstances of their arrest were shrouded with mystery. The complainant indicated that his clients were in no way involved with the possession of any illegal substance. He added that a sum of money was confiscated by Police Officers and no explanation was given as to why it was taken possession of nor was any receipt issued. The complainant's letter concluded by suggesting that there was something sinister in the situation.

I was subsequently supplied with a letter from the complainant in which he withdrew any suggestion that money taken from his clients was misappropriated.

The copy, which I received, of the Police Department's file on the matter, which included a comprehensive report from the investigating Police together with a report from the Commissioner of Police, revealed that the complainant's clients were observed by the Police to be seated in a rented motor vehicle. A search of the vehicle located a quantity of cocaine said to have a street value of approximately $100,000. It was claimed that the sum of $5,500 in cash was also located. It was evident that after taking possession of the money the Police made a suitable entry in the Exhibit Book of the Local Police Station and subsequently the money was transferred to the Criminal Investigation Branch where at the time I reported to the complainant, it was being held. A receipt was issued for the money. The money was being retained as an exhibit in Court proceedings against the complainant's clients and in fact had already been tendered before the Court. The proceedings had been adjourned. The arresting Policeman in the matter agreed with the Solicitor that neither of the complainant's clients had made any admissions regarding the substance found in their possession. The detective reported that when both men were questioned they clearly understood the reason why they had been arrested. Further, when being charged, both charges were read out to the gentlemen by the Station Sergeant and both defendants acknowledged that they understood the charges.

The Commissioner of Police informed me that he was satisfied that the arrest and subsequent charging of the two men was caried out in the proper manner. I agreed with the Commissioner and I wrote to the complainant summarizing the investigation and informing the solicitor of my views.

I received a reply from the complainant commending me on the high standard of thorough investigation.

ASSAULT, DRUNKENNESS AND THREATENING BEHAVIOUR

The complaint arose out of an incident when the complainant was riding his motor cycle and he was stopped by a Senior Constable who was off duty at the time. As a result of the manner in which the Constable claimed that the complainant had ridden his cycle he was subsequently charged with "Unlicensed Rider", "Fraudulently use Licence" and "Exceed Speed". The complainant alleged that the Senior Constable attempted to push him from the motor cycle in order to stop him and that the Senior Constable was under the influence of intoxicating liquor and threatened him.

After receiving the complaint I wrote to the complainant and advised him that further investigation of the complaint had been deferred pending the finalization of the Court proceedings against him. Subsequently, I was informed that the complainant failed to appeal at Court with the result that the three charges were found proven. After receiving a copy of the Police Department's file in the matter, together with a report from the Senior Assistant Commissioner of Police, I wrote to the complainant and advised him that I had noted that when interviewed he made a statement indicat-

ing that since lodging his complaint he had considered the circumstances with the result that he did not wish to continue the complaint and that he did not desire to have any further action taken in relation to it. I also informed him that, having regard to the determination of the Court in relation to the three charges against him and his wish that his complaint should not be proceeded with, I had decided that the complaint had not been sustained.

PERSECUTION OF TAXI DRIVERS

The complainant was a taxi driver who had ben issued a Traffic Infringment Notice for speeding. He alleged that the speed shown on the Infringment Notice was a lie and that his passenger at the time could confirm this. He also alleged that the Constable who issued the Notice hates taxis and had a reputation of being physical when dealing with motorists. The complainant had paid the penalty prescribed in the Infringement Notice.

Following the investigation I wrote to the complainant and explained that whether he was fairly or otherwise issued with the Traffic Infringement Notice was not a matter with which I chose to become involved. I explained that, as he was aware, if he had not paid the penalty prescribed in the Notice a summons would have been issued in due course and he would have been entitled to have the matter determined by a Court of Petty Sessions. I also explained that the alleged conduct of the Policeman who issued the Infringement Notice fell into a different category and it was in relation to this matter that I had directed that an investigation should take place.

The Policeman who was the subject of the complaint emphatically denied the allegations. The complainant had nominated a number of persons as being able to support his allegations, however, the information provided by those people did not support the allegations. The passenger in the complainant's taxi at the time the Constable issued the Infringment Notice refuted the statements attributed to him by the complainant. Other taxi drivers in the area also refuted the complainant's claims.

I decided that the complaint had not been sustained.

EXCESSIVE USE OF FORCE AND THREATS

The complainant was a journalist with a newspaper group. He complained about the alleged actions of a Policeman when he was outside a Sydney Police Station. He alleged that the Policeman obstructed him from taking a photograph of a prisoner being escorted into the Police Station and that the Policeman dragged him from the footpath across the street. He claimed that despite his protest the Policeman threatened to break his camera if he did not move on.

When interviewed the complainant advised that the facts contained in his statement were correct as well as he could remember. He added that he knew that he was a bit upset at the time he made the statement and that he did not think any more would come of it. In addition, he indicated that he was unable to recall the exact words spoken at the time of the incident and he admitted that he did not initially produce his Press Pass to the Policeman.

The versions of the events as supplied by the Police at the scene differed considerably to the complainant's version. According to the Policemen the complainant was in the middle of the street and was attempting to photograph a person arrested a short time earlier. They claimed that he was approached by a Senior Constable and told that he could not remain on the roadway and photograph the prisoner. The Police maintained that the complainant protested and it was at that stage that a Detective Senior Constable joined in the dispute. Both Constables reported that the complainant informed them that he had a Press Pass but it was not on him at the time and they indicated that the complainant then left the area to obtain the Press Pass from a motor vehicle parked nearby, whereupon, on his return he threw the Pass at the Detective. The Police reported that by the time the Pass was retrieved and handed back to the complainant, the escort of the prisoner had been completed and the complainant left the area. The allegation that the complainant was physically dragged off the footpath, dragged across the roadway, and that he was threatened were denied by the Senior Constable who was supported by the other Policeman present at the scene.

The complaint is one in which I was confronted by conflicting information. The complainant alleged one set of circumstances took place and the policemen involved alleged that something else took place. The result was that I was unable to decide which version of the events was the correct one. Under the circumstances I decided that the complaint had not been sustained.

INDIFFERENCE TO POTENTIAL DISTRESS OF ANIMALS

The complaint was made as a result of the alleged actions of a 3rd Class Sergeant of Police stationed in a country district in stopping two livestock transports which were loaded with sheep owned by the complainant and were part of a mob being conveyed from one property to another. According to the complainant the Sergeant's actions in interrupting the transport operations caused distress to the sheep and resulted in a loss of stock.

The investigation revealed that the Sergeant was patrolling the district when it was necessary for him in the course of his duties to stop two livestock transports in order to check their credentials. According to the Sergeant it soon became apparent to him that there was a number of serious discrepancies in relation to the livestock being carried and that the two motor lorries involved did not comply with the provisions of the Motor Traffic Act. After obtaining the necessary particulars for the submission of Breach Reports for the offences detected, the Sergeant then permitted the two vehicles to travel a short distance further along the road to their original destination and there unload the stock they were carrying. However, in the course of the breaches detected and in particular due to the lorries being engaged in intra-state transport when they were registered for the inter-state movement of produce and livestock, the Sergeant directed that the two vehicles take no further part in the transport of further sheep.

In statements made by the drivers of the two vehicles it was apparent that neither of them informed the Sergeant that the sheep still to be transported were in any danger due to the lack of feed and water or that any lambs might suffer as a result of mismothering. However, even if this information had have been given to the Sergeant he could not have authorized the further use of the vehicles unregistered for intra-state purposes.

I could find no wrong conduct on the part of the Sergeant.

After I had reported to him the complainant wrote to me and informed me that he considered my report quite unsatisfactory and made without due consideration of the facts. He stated that I had taken the Sergeant's report "as gospel". I replied to the complainant assuring him that his views that I reported to him without due consideration of the facts were far from accurate. I pointed out that my file dealing with the complaint consisted of some 100 pages, which included a copy of the Police Department's file of approximately 85 pages. In addition, I informed the complainant that I took into consideration all the facts before making a decision on the complaint and only found the complaint not to have been sustained after careful consideration of all the data available to me. I did not, as he claimed, take the Sergeant's report "as gospel" and I pointed out to the complainant that nowhere in my complaint to him did I say I believed the Sergeant rather than anybody else. My report to the complainant contained information which the investigation revealed. I confirmed my opinion that the conduct of the Sergeant was not wrong when he stopped the two livestock transports and that the Sergeant did not have the authority to permit the further use of the vehicles which were unregistered for intra-state purposes. I added that if the drivers of the vehicles had have ignored the directions given by the Sergeant, he would have been carrying out his duty in apprehending them and charging them with an appropriate offence. I commented that I could only conclude that the problems which occurred as a result of the transports being stopped could not be blamed upon the Sergeant. Instead, I informed the complainant that it seemed to me that any blame should lie with the transport company engaged to carry out the work or perhaps the stock and station agent he employed to organize the operation.

UNWARRANTED SEARCH OF VEHICLE AND VICTIMIZATION

According to the complainant, on a Monday evening in November, 1979, after he had parked his vehicle in George Street, Sydney, he was approached by two Detectives. It is alleged that the Police gave no name but requested that the complainant get out of his car so that they might search the vehicle. The complainant claimed that he asked the reason for the search but no explanation was given. Consequently, he handed the Detectives his licence and after certain details were recorded he left his vehicle and went to a restaurant on the other side of the street. On his return with friends some time later, he was again approached by Police who requested a search of his vehicle. On this occasion it was maintained that the Police identified themselves but two other Policemen who were allegedly present refused to give their names. It was further alleged that the Police still refused to give any reason for the search; however, the complainant opened the boot of his car, the contents of which were then emptied on to the footpath by Police. The complainant stated that the items were left on the footpath whilst the Police proceeded to search the rest of the vehicle. Nothing of a suspicious or incriminating nature was found. Whilst complaining of this particular incident the complainant also alleged that over the years he had previously been stopped, searched and questioned by Police for no apparent reason.

The Police involved in the matter reported that one of them received information from an anonymous source that the complainant had a quantity of stolen jewellery in his car and that he would be visiting a certain restaurant that night. They claim that the unknown informant described the complainant's vehicle and later that night when patrolling in the vicinity of the restaurant, two of the Police saw the complainant's car and noticed that just prior to parking his vehicle the complainant made an unlawful "U" turn over double separation lines. The two Police maintained that they approached the complainant and requested his licence. In addition, the Police maintained that they informed the complainant of the alleged traffic offence and particulars from his licence were recorded. According to one of the Police, he then informed the complainant of the information he had received earlier that night and requested a search of the vehicle. The complainant refused and he then left the car heading in the direction of the restaurant, at the same time claiming that he was going to get witnesses. The two Police also reported that they waited for some time before one of them went in search of the complainant. He was unable to locate the gentleman and after a further period the other detective went in search but he was also unsuccessful, resulting in him walking to Central Police Station where the Traffic Infringement Notice was prepared and then on his return to George Street he again visited the restaurant where he was able to locate the complainant. However, the complainant evidently refused to co-operate and the Detective left to join his partner. It was at about this stage, the Police maintain, that two other Detectives were passing and their colleagues spoke to them in relation to the matter. At about 11.00 p.m. the complainant returned to his car accompanied by a woman, a child and two other men. The two Police who were originally involved with the complainant further reported that they again approached the complainant who consented to having his car searched. According to the Police concerned the search was conducted in a proper fashion and no items of property were left on the footpath as alleged. The Police reported that during the proceedings the complainant continually shouted and claimed that the matter would be reported and when nothing of an untoward nature was detected the complainant was handed the Traffic Infringement Notice and the Police left the scene.

The complainant advised the investigating Police that he did not wish to be interviewed; however, he did indicate that one of the men with him when he returned to his car on the night in question was the Manager of the restaurant. A Director of the firm that operated the restaurant as well as the Manager of the restaurant were interviewed. Both gentlemen recalled seeing Police in or in the near vicinity of the restaurant on the night in question; however, they advised that they did not accompany the complainant or any other person to his car as was alleged.

The investigation did not reveal any information to make me decide that the Police acted wrongly towards the complainant.

INJECTION OF YOUNG GIRL WITH DRUGS, BRIBERY AND FAILURE TO TAKE ACTION

It was alleged, not by the complainant, that a Detective Constable had injected the complainant's daughter with heroin. The complainant alleged that comments were made by the Detective Constable which indicated that Police had given preferential treatment to a man whom the complainant suspected of having introduced his daughter to the use of drugs. It was further claimed by the complainant that his daughter had asked him for money to assist her friend who was said to be in trouble with Police. The complainant suspected that the money may have been for payment to Police.

When questioned about the Detective injecting his daughter with heroin, the complainant pointed out that neither he nor his wife ever suggested that the Detective was involved in injecting his daughter with drugs. The daughter claimed that she had no complaint to make about the Detective Constable and the Policeman denied the allegation.

In respect of the second allegation that a man had been protected from prosecution by Police, this was denied by the man himself and the Detective Constable. The complainant's daughter stated that although the Detective had been a good friend to both the man and himself he had not, as far as she was aware, protected her friend.

Investigation of the third allegation, that money the complainant's daughter asked for may have been for payment to Police, revealed that the daughter's friend maintained that the money was for his Solicitor and that he told the complainant's daughter on more than one occasion what he needed the money for. The Detective Constable reported that the only knowledge he had of this allegation was that the complainant mentioned it to him on one occasion and said that his daughter told him that her friend wanted it for a Solicitor or Barrister but his daughter believed that it may have been for Police. According to the Detective Constable the complainant expressed the opinion that his daughter may have wanted the money to buy drugs either for herself or her friend.

No evidence emerged to support any of the allegations.

ILL-TREATMENT IN POLICE CELLS

The main complaint centred around allegations that the complainant was denied certain items and facilities when in custody. He complained that food, cigarettes, magazines, etc., purchased by his mother were not delivered to him and that he was refused a towel and blankets and not allowed to take a shower. In addition, he complained that a day or so prior to leaving the Police Station he was detained in the adult section of the cells.

It was evident that the complainant was arrested in the act of breaking and entering a chemist shop where he intended, with a co-offender, to steal drugs. He was remanded and during this period was returned to a Remand Centre. At a later Court hearing he was again remanded for a further seven days after pleading guilty to the offence. The Stipendiary Magistrate marked the Court papers "to be detained in a place of safety during the meantime". He was held in the juvenile shelter from 23rd April to 1st May, 1979, when it became necessary to move him to another cell to make way for a female offender. Whilst held in the second cell he was kept apart from adult prisoners as is the policy laid down for juvenile offenders. He was escorted to the Remand Centre on the afternoon of 2nd May.

All Police on duty at various times during the period the complainant was held in the cells reported that he was supplied with a towel, the hot water system was working quite satisfactorily and that no complaints were received from him or any other prisoners in the cells. The Police also maintained that the complainant was not denied use of any facilities, was supplied with an adequate number of blankets and that he was not mistreated in any way. None of the Police on duty during the time of the complainant's confinement had any knowledge of items being left at the Police Station by the complainant's mother. In regard to this last point, the complainant's mother was unable to provide additional information which would allow the matter to be pursued further.

The Resident District Officer of the Department of Youth and Community Services advised that it had been his experience during his nine years in the area that juveniles in custody were treated well by the Police on duty and he had not received any complaints in the past about unsatisfactory treatment. He confirmed that no complaints were made by the complainant to him or any of the other staff of the Department.

Based on the information available to me I could only form the view that the conduct of the Police during the complainant's detention was not improper and as a result I decided that the complaint had not been sustained.

OFFENSIVE LANGUAGE

The complainant admitted driving on the incorrect side of the double unbroken separation lines but he alleged that the Sergeant who directed him to pull over to the side of the road acted with impropriety towards him. He also complained that after asking the Sergeant for his particulars the Sergeant changed the alleged offence from one of "Cross Offside of Separation Lines" to "Drive in a Manner Dangerous to the Public".

The Sergeant denied a lot of the conversation alleged by the complainant. He reported that he adopted a firm approach when he spoke to the complainant. On the other hand, the complainant contended that the Sergeant was abusive.

I was unable to determine where the truth lay in relation to the conversation that allegedly took place. It seemed, though, that the Sergeant over-reacted in his approach to the complainant. In relation to the alteration of the offence for which the complainant was reported, the Sergeant stated that unknown to him his Constable companion commenced to prepare a Traffic Infringement Notice for the offence of "Cross Offside of Separation Lines" whilst he, the Sergeant, was speaking to the complainant. On realizing what the Constable was doing, the Sergeant claimed that he directed the Constable to cancel the Infringement Notice and informed the complainant that he would be reported for "Driving in a Manner Dangerous to the Public". Subsequently, a Breach Report for this offence was furnished together with a second Breach Report for the offence of "Drive Offside of Unbroken Separation Lines". I was not prepared to decide that any criticism should be levelled at the Sergeant.

UNLAWFUL EVICTION FROM BUILDING SITE

The Secretary of a Trade Union complained about the alleged actions and interventions by Police towards one of the Union's Organizers in an industrial dispute at a building site.

It was apparent that the incident which occurred at the building site revolved around the use of telephones in the offices of the Site Manager and the Site Foreman. Whatever the reason for the ill-feeling which developed, it was a fact that the Site Manager telephoned the nearest Police Station and advised the Police that a representative from the Union was on the site demanding the use of the office telephone as well as other conveniences and was refusing to leave the office.

Reports indicated that the Inspector in Charge of the Division informed the policemen who were to attend the site that they were not to become involved in any argument between the parties and that their only reason for attending the site was to see that no breach of the peace was committed.

What transpired when the policemen attended the site was a matter in which I was provided with conflicting information. The Union Organizer alleged that one of the Constables advised him that the site was private property and therefore he, the organizer, had no right to be there. The Organizer went on to claim that he informed the Constable that as a Union Official he did have right of entry on building sites but the policeman then advised the Site Manager and the Organizer that his Divisional Inspector had informed him that Police cannot remove Union Representatives from a building site but management could use whatever force was necessary for that purpose and that if the Union Representative resisted he could be arrested for assault. However, the Organizer's account of the events was not supported by the Site Manager, the Divisional Inspector or the Policemen who attended the scene. They refuted the Organizer's allegations by claiming that the two Constables informed both the Organizer and the Site Manager that they, the Police, had only attended the site to see that no breach of the peace was committed. It was further maintained that on reading an authority under the Industrial Arbitration Act which the Organizer had shown them, one of the Constables informed the Organizer that this interpretation of the authority gave the Organizer power to enter the site for the purpose of investigating industrial matters but it did not give him the power to enter the offices of the building company to make a telephone call. In addition, they claimed that the Constable then advised that Police powers were limited in such matters and, under the circumstances, the Site Manager could request the Organizer to leave and if the request was not complied with then the Site Manager could remove the Organizer by using only such force as necessary. It was also claimed that the Police advised that their function was to prevent any breach of the peace.

In brief, the Union Organizer accused the two Constables of taking sides in an industrial matter and inciting violence, but the allegation were denied by the Police and the Site Manager who claimed that it was made clear by the two Constables that they were present to see that no breach of the peace occurred.

I was of the view that I could only decide that the complaint had not been sustained.

FABRICATED RECORD OF INTERVIEW

The complaint was one primarily alleging that Police from the Armed Hold-up Squad, Criminal Investigation Branch, fabricated a record of interview with the complainant.

After considering an initial report from the Commissioner of Police, together with a copy of the Police Department's file in the matter, I wrote to the Commissioner and agreed that further investigation of the complaint should be deferred pending the finalization of the Court proceedings against the complainant. I was of the opinion that the subject matter of the complaint, namely the validity of the record of the interview, would be directly in issue before the Court.

I subsequently wrote to the complainant and informed him that I was aware that he was the subject of two criminal trials in the District Court. The complainant was found guilty at the second trial.

As a result of the investigation I was provided with information that revealed that during the course of the criminal proceedings the allegations made by the complainant about the record of interview being fabricated were fully covered and the Police concerned denied the allegations. The Police were subjected to cross examination and their evidence was accepted by the Court. The record of interview was admitted into evidence by the Court. No adverse comment was made by either of the presiding Judges in the two Criminal hearings in relation to the allegations about the record of interview.

As the complaint had been dealt with at trials in the District Court and the Police version of the events was accepted by the two Courts, I found that I had no alternative but to decide that the complaint had not been sustained.

ILL-TREATMENT OF PRISONERS

Eight prisoners or ex-prisoners complained of the alleged actions of Policemen involved in an escort of prisoners. The eight co-complainants complained of unequal distribution of people being conveyed in a Police prison van which resulted in considerable discomfort. They further alleged that when they complained to the Police carrying out the escort, they were subjected to unseemly words and told that they would be given "a ride to remember". They claimed that during the trip the prison van was subjected to heavy braking which resulted in three of the prisoners, who had been handcuffed and who were required to stand, falling to the floor where they remained for the rest of the trip. In addition, they alleged that they received further discomfort by having to remain in the van for some time after it arrived at the gaol.

The investigation resulted in all the Policemen who were involved in the matter denying the allegation of improper conduct. The Police were supported to a considerable extent by nine other prisoners, all of whom indicated that they had no complaint whatsoever in relation to the journey. The Police maintained that the distribution of prisoners in the two compartments of the van was eight and ten and not eleven and seven as alleged. Indications were that the prisoners were divided into those on remand and those already serving sentences and that the arrangement was made in order to facilitate their off-loading at the gaol. The Commissioner of Police did not consider that the distribution was unequal so as to cause discomfort to any of the persons concerned. Some delay evidently occurred in the unloading of the prisoners; however, indications are that the delay was caused by the procedures adopted by the Prison authorities and in no way could it be attributed to neglect on the part of the Police. The Commissioner of Police in his Report to me stated—

> "It may have been that in the compartment containing the ten prisoners that insufficient room was available for possibly two of those prisoners to be seated. However, the Statutory Declaration by the complainants, their reluctance to be further interviewed and the information forthcoming from the other nine prisoners does not assist in determining the exact number not seated nor their identities. Whilst nothing can be done to preclude prisoners from electing to stand whilst being conveyed in Police prison vans, and notwithstanding the nature of the evidence forthcoming as a result of this particular inquiry, I am concerned that the possibility could exist of prisoners being conveyed in Police prison vans where provision does not exist for all such prisoners to be seated. In this regard, I intend to take this aspect up with the Inspector in Charge, Police Transport Branch, in order that suitable instructions can be formulated."

DANGEROUS AND PROVOCATIVE DRIVING

In his letter of complaint and in a statement later obtained, the complainant described an incident which resulted in him being issued a Traffic Infringement Notice for "Exceeding the Speed Limit". According to the complainant it was the actions of the driver of the Police vehicle involved in the incident that caused him to drive at a speed in excess of the limit. The complainant accused the driver of the Police vehicle of driving in a dangerous and provocative manner.

In the reports made by the Constable who drove the Police vehicle and by his observer, a Senior Constable, they described the incident a lot differently to the interpretation given by the complainant and his wife. According to the Policemen, after observing the complainant's vehicle travelling in what they considered to be in excess of the speed limit they took up a position at the rear of the other vehicle in order to carry out a speed check. They claim that after determining that an offence had been committed they signalled from that position and caused the complainant to pull to the side of the roadway. Both the Constable and his escort denied the allegation that the Police vehicle was driven in a dangerous and provocative manner. A statement obtained from the complainant's wife supported the allegations made by her husband.

It was quite clear to me that the complaint was one in which, again, I was confronted by two versions of an incident. The complainant and his wife alleged one set of circumstances and the Police involved alleged another set. In the absence of any evidence to support either version I was not in the position to decide what version I supported. As a result I was unable to find that the complaint had been sustained.