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of the

Ombudsman of New South Wales

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PARLIAMENT OF NEW SOUTH WALES

REPORT

OF THE

OMBUDSMAN

OF

NEW SOUTH WALES

For the

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OMBUDSMAN ACT

THE OMBUDSMAN OF NEW SOUTH WALES

SIXTH ANNUAL REPORT

(1st July, 1980–30th June, 1981)

Under the Ombudsman Act, 1974, the Ombudsman as soon as practicable after the 30th day of June in each year is required to prepare and submit to the Premier to be laid before both Houses of Parliament, a report of the work and activities of the Ombudsman for the twelve months preceding that date. By virtue of section 56 of the Police Regulation (Allegations of Misconduct) Act, 1978, the requirements to make such annual report is extended to cover the work and activities of the Ombudsman under that Act also. The first Ombudsman, Mr Kenneth Smithers C.B.E., retired just 13 days prior to the end of the period of the Annual Report. In these circumstances this Report has been prepared by officers of the Office of the Ombudsman in consultation with Mr Smithers. The first person pronoun in this report refers to Mr Smithers, the retired Ombudsman.

The report is divided 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, 1978.

PART I

OMBUDSMAN ACT

Complaints

During the year a total of 3 077 new written complaints under the Ombudsman Act were received in respect of public authorities (including local government authorities), and the investigation of 893 carried over from the previous year was continued. Of this total of 3 970, 247 were completely outside my jurisdiction. In addition 89 were excluded from investigation by virtue of the list of excluded conduct set out in Schedule I of the Act. In respect of 7, 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 326 complaints exercising one or other of the discretions contained in section 13 (4) of the Act. In addition, in 18 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right of appeal or review and where there were no special circumstances, I declined to investigate. 49 complaints were withdrawn at varying stages of my investigation.

I completed an investigation in 1 567 complaints and of these I found 263 to be wholly or partly 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 346.

The total number of complaints received under the Ombudsman Act for the full year showed a small increase, mainly as a result of a quite substantial increase in the number of complaints received after 31st December, 1980. I should add that in addition to the above complaints, some 830 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.

NOTE: Throughout the Report the first person pronoun refers to the former Ombudsman Mr Kenneth Smithers who retired on the 17th June, 1981.

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	2 571
1st July, 1980 to 30th June, 1981 ..	1 839	991	247	3 077

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 was 3 829.

646 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

In past Anual Reports I have referred to proposals which I have made for amendments to the Ombudsman Act which I have regarded as necessary to render the Act more effective and perhaps make the task of the Ombudsman slightly easier.

I am very pleased that whilst I did not see these amendments brought into being prior to my ceasing to hold office as Ombudsman, at least a number of them have received the approval of Cabinet and are included in a draft Bill approved by Cabinet for presentation to Parliament in the near future. The principal matters included in these amendments and in respect of which I have made recommendations, are as follows—

(1) A power for the Ombudsman to apply to the Supreme Court for an order staying the action of a public authority in situations where the Ombudsman is of the opinion that the action, if taken, will negate in whole or in part the exercise of his functions under the Act.

(2) That the Ombudsman be granted immunity from all legal actions except in respect of questions of jurisdiction and actions based on alleged bad faith.

(3) To facilitate investigations in inter-jurisdictional matters, particularly those involving the Commonwealth and the State.

(4) That provision be made for the appointment of one or more Assistant Ombudsmen and, in doing so, to regularise the previous appointment.

(5) That it be clarified that the Ombudsman be exempted from compellability to produce documents in Court proceedings.

(6) That the Ombudsman be empowered to specify a place at which public authorities are to produce documents to him.

In addition to these, a recommendation which I made that Item 15 of excluded conduct in Schedule 1 of the Act, namely that which relates to payment of any money as an act of grace, be omitted, was accepted and this was recently done by proclamation.

Unfortunately, some other amendments which I have recommended for consideration have not, up to the present, been accepted and, in particular, I mention that 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. My view is that the Ombudsman should have the right to investigate such matters where he considers that the conduct merits investigation in order to avoid injustice. As I have stated before, there is no suggestion that matters which are covered by awards or which are dealt with by unions should be the subject of the Ombudsman's investigation.

I trust that my successor will be able to convince the Government of the necessity for this additional power.

Staff

Again it has been necessary because of the increase in the work carried out by this Office and also because of the rising number of complaints received in respect of the conduct of members of the police force, for a small increase to be made in staff. Some changes have occurred during the year with retirement and with officers leaving to take up other appointments.

Assistant Ombudsman

Mr Roger Vincent, LL.B., resigned in February, 1981. Mr Vincent had been appointed as from 2nd April, 1979, for a period of 2 years to deal with matters arising under the then newly enacted Police Regulation (Allegations of Misconduct) Act and to have prime responsibility for the handling of complaints concerning prisoners. Following Mr Vincent's resignation, Mr Clive Robertson, a Senior Investigation Officer was appointed to act as Assistant Ombudsman. He carried out that task from February, 1981, and I was most grateful for his assistance.

Deputy Ombudsman and Staff

During the year I have been ably assisted by the Deputy Ombudsman, Mr Daryl Gunter, LL.B. (Sydney), LL.M. (London); by the investigation staff and by all the support staff. I am most appreciative of their work.

Local Government Authorities

Nine hundred and ninety-one complaints relating to 155 different councils were received during the year. This compares with 989 complaints in respect of 161 different councils last year.

Three hundred and fifteen complaints had still been under investigation at the beginning of the year, making a combined total of 1 306. Of these 436 were still under investigation at the end of the year. I declined to investigate 128 complaints for various reasons, 7 were found to be outside jurisdiction and 16 were withdrawn. Of the others, investigations were completed in 627 and 79 were found to be sustained. In addition, in 92 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.

As previously reported, many matters related to the problems arising from noise, barking dogs, pollution of one sort or another, drainage problems and actions which caused annoyance to neighbours. In many cases Council has a responsibility to act to resolve these matters, but the contribution which can be made by the Community Justice Centres should also be recognized. Many of the problems that are raised relating to the actions of Council are amenable to mediation through the Community Justice Centres where the dispute is essentially one between neighbours. In many cases, Council has not been able to take action because of limitations under the Local Government Act but the dispute continues. This Office has made available information about the Community Justice Centres at the time of initial inquiries of this Office, and in several cases, it has been recommended to complainants that they should consider approaching the Community Justice Centres for mediation of a dispute where it has not been possible to have the matter resolved by my intervention with the Council.

It is rarely appreciated the extent to which Local Councils do effect a resolution of complaints between neighbours.

One of the most vexing problems in the Local Government area is the concern expressed by persons who have placed objections to Building Applications or Development Applications that their views have not been taken into account by Council when it made its decision. Investigation of such complaints in most cases has shown that the objections were taken into consideration but Councils have been acting within the guidelines that they regard as being laid down and developed by the Appeal Courts. Where it is clear to Council that a developer will be successful before the Land and Environment Court, the Council has little alternative but to approve an Application provided that it is in proper compliance with the Local Government Act, the ordinances and its own regulations. In a number of cases, it has been found that the requirements of the law have not been fully complied with but they have been in the minority.

An associated problem is the question of notification to adjoining owners or of persons affected by a Building Application or a Development Application. This Office conducted a survey of all local government authorities in New South Wales to attempt to determine the extent to which such notification was being made. The result of the survey showed that with the exception of those cases covered by section 342ZA of the Local Government Act where a Council is obliged to give notification to persons affected where an Application is made for the consent to the erection or alteration of a residential flat-building, most Councils failed to give notification to persons affected. A variety of reasons were advanced for this, the principal one being the additional time and expense to Council resulting from inquiries being made in respect of the plans and also many Councils had doubts as to their authority to make such plans available given the terms of the Local Government Act and Ordinances. In my view there is much to be gained by making neighbours aware of building plans as early as possible so that their comments can be taken into account by the Councils' Officers when assessing the plans and that it is in the long run far preferable to provide for this as a matter of course. Whilst it does necessarily increase the work of Councils' Officers in

the short term, it provides a much better long term situation in that neighbours can be made aware of intentions and can resolve very early whether the proposal is likely to be against their interest. In the vast majority of cases, it will not be against their interest, and the matter can be resolved immediately. Disputes with neighbours can be considerably reduced.

Prisoners

The current year has seen an increase in the number of complaints received from prisoners.

Three hundred and thirty-eight complaints were received during the year, as compared with 228 complaints received from individual prisoners during the previous year.

In addition to the 338 complaints received in respect of the Department of Corrective Services during the year, 144 from the previous year were still under investigation. Of the total of 482, 243 were still under investigation at the 30th June, 1981. Of the 239 complaints dealt with during the year, 7 were outside jurisdiction, 14 were declined for various reasons, 11 were withdrawn. Of the balance of 207, 79 were discontinued, 95 were found not sustained, 29 were found wholly sustained and 4 were found partially sustained.

In addition to complaints received from prisoners about the Department of Corrective Services, I have received 104 complaints related to other bodies, some of which were outside my jurisdiction.

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
1981	338	104	442

The subjects of complaint from prisoners are many and varied but it is possible to observe some basic causes for complaint. These are often the lack of access prisoners have to information or to the appropriate authorities within the prison system, or both. Although these problems can often be expeditiously resolved by my officers, there is cause for concern that this Office is in such circumstances obliged to take on a function which more properly ought to fall to the Department of Corrective Services.

This Office in many cases is dependent upon replies from the Department of Corrective Services which, in turn, obtains reports from Superintendents or from officers. There is a great need for improvement in the speed with which such reports are provided to my Office. Otherwise good co-operation has been received from the Department. Very urgent matters are now increasingly dealt with by telephone in the initial stages of an investigation.

As a result of investigations which have revealed defects of administration, a major review of prisoners' mail is being undertaken and other matters of importance have also been raised with the Department for its consideration and determination. An example, relating to the issue of cassette tapes to prisoners, is described in the case notes of this Report.

Regular meetings have been established with the Chairman of the Corrective Services Commission and these have been extremely helpful.

Publicity

The number of occasions when I have been called upon to address various bodies and organizations has lessened with the greater awareness on the part of the public of the role of the Ombudsman. However, together with the Deputy Ombudsman and members of the staff, addresses have been given to such bodies or organizations on over 20 occasions. In addition, I have appeared on television and spoken on radio on several occasions.

I am aware that there is still need to publicize the facilities that the Ombudsman's Office offers to members of the public who are concerned with regard to their relationship with public authorities.

Visits

During the year I have been visited by the Ombudsmen from the Northern Territory, New Zealand and Fiji and by members of the staff of the Queensland and South Australian Ombudsmen. In addition, the Chairman and Vice Chairman of the English Administrative Law Review Committee, namely Messrs F. P. Neill, Q.C., and D. Widdecombe, Q.C., had discussions with me. Professor Stanley Anderson of the University of California, who is a prolific writer on the subject of Ombudsmen, also called.

Australasian Ombudsmen

The majority of the Australasian Ombudsmen were in Jerusalem for the Second International Conference held at the end of October, 1980. Consequently, no Australasian Conference was held during the year under review. The next such Conference is to be held in New Zealand at the end of September, 1981, and it is anticipated that my successor will attend. He will doubtless receive great benefit from the opportunity to meet with his Australasian colleagues. I personally have found the close association with them invaluable.

I attended and addressed a workshop on the Ombudsman held by the College of Advanced Education in Canberra at the end of August, 1980.

Overseas

I was fortunate in being able to attend the Second International Ombudsmen's Conference held in Jerusalem from 26th October, 1980, to 1st November, 1980. The Conference was attended by over one hundred persons representative of Ombudsmen or members of their staff or persons otherwise associated with Ombudsmen, accompanied by their wives.

The subjects discussed included the following—

"The Ombudsman as mediator, reformer—and fighter".

"The Ombudsman's role in the freedom of information".

"Evaluation of the efficiency and effectiveness of the Ombudsman".

Other papers covered the Ombudsman in the fields of local authorities, corrections and mental health, military service and State authorities.

I was the main speaker and delivered a paper on the subject of "The Ombudsman in the field of local authorities".

There is considerable value in attending such Conference and apart from the practical uses, there is the opportunity to learn from other Ombudsmen the way in which they regard their role and carry out their functions.

Whilst overseas I took the opportunity of having discussions with the Parliamentary Commissioner in London, the various Commissioners for Local Administration in London, York, Scotland and Wales, and also with the French Mediateur.

General Matters

(a) *Complaints about complaints*

From time to time, a public authority gets upset with what I have to say during the course of an investigation. This is good and as it should be for, without differences of opinion, life would indeed be dull.

I become concerned, however, when a public authority appears to be adopting a resentful attitude as a matter of course and I regret to say that this situation appears to have been reached with the Department of Industrial Relations.

My concern appeared justified when, during my absence from the Office and in the course of investigating a complaint against the Department, the Deputy Ombudsman, who was Acting Ombudsman in my absence, raised a matter with the Under Secretary. The Under Secretary in his response addressed to me asked that I personally examine the file as, he said, he regarded the issues raised by my officers to be "pin-pricking" and "time-wasting impertinences which only increase times to bring other cases to finality".

I did examine the file and, as a result, my confidence in my officers was substantiated. The complaint, basically, concerned the issue of whether a former employee (the complainant) of a company had been correctly paid under the Plumbers and Gasfitters (State) Award.

The complainant had worked from 12th March, 1979, until 26th July, 1979. Only the period 12th March to 20th June, 1979, was covered by the State Award, the remainder of the period being covered by a Federal Award. The Department had no jurisdiction in respect of the period covered by the Federal Award but, clearly, had a responsibility to ascertain whether the complainant had received all he was entitled to under the State Award.

The problem was that, when the complainant's former employer adjusted his wages following the Department's intervention, a composite adjustment covering the total period of employment under *both* Awards was made and a composite gross adjustment figure was given. No split-up or details of the adjustment made under either Award and, in particular, under the State Award, was given and the Department took no action to find this out.

The Department's attitude was that as the complainant was entitled to receive $X under the State Award and, as the total gross amount paid by the former employer exceeded this, his entitlement under the State Award had obviously been satisfied. The Acting Ombudsman pointed this out to the Under Secretary and went on to say—

> "It would seem to me, then, that the Department is not in a position to say, with certainity, that the payment made by (the complainant's) former employer included the amount to which he was entitled under the State Award in respect of the period 12th March to 20th June, 1979."

This evoked the response referred to earlier.

I subsequently wrote to the Under Secretary and said—

> "It seems perfectly clear that you have missed the point that I made regarding the amount recovered in terms of the State Award. In the absence of any details from the former employer as to how the (gross) figure was made up in terms of each of the applicable Awards (State and Federal), it is not possible for anyone, let alone the Department, to say whether (the complainant) was paid his correct entitlement under either Award. Whilst the total amount paid . . . was in excess of the amount underpaid in terms of the State Award, the Department took no action to establish definitely that the employer's obligations had been correctly fulfilled for the peroid covered by the State Award. Quite clearly, the Department had a duty to ask the employer to detail the adjustments made for the period in question.
> I do not agree with your description of the issues raised by my officers as either 'pin-pricking' or 'time-wasting impertinences' ".

I think it is important for public authorities to realize that, where they have a job to do, it is important that the job be done properly and accurately. "Near enough" is not good enough particularly where the payment of money is in dispute.

(b) *Where to turn*

Sometimes, it is difficult to determine against which public authority a complaint is being made or the best way to try to help the complainant. One such case, received during the year, concerned a woman in South Australia who had travelled to Sydney in her motor car and there had disposed of it.

The complainant claimed that she had notified the South Australian motor vehicle registration authorities of the disposal of her vehicle but she had received summonses in respect of parking offences in which the vehicle had been involved after she had sold it. The complainant described the position thus—

> "On receipt of the first summons (which was the only advice or intimation of the offences) a letter was forwarded to the Clerk of the Court giving details of the change of ownership, etc. Further parking summonses continue to arrive and each time the same advice has been forwarded. In July, 1980, a letter was received from the Police Department advising that if any further summonses were received they should be returned together with a copy of the said letter from the Police Department. This has been done on each occasion, but notwithstanding such, the offences have proceeded to Court and two judgments have been handed down requiring (the payment of) parking offence fines plus court costs or if not paid by the date stipulated, jail would ensue."

The complainant was obviously distressed about the situation and, as a first step, I decided to write to the Under Secretary of the Department of the Attorney-General and of Justice to see if he could help. He subsequently wrote to me and said, *inter alia*—

> . . . the law in New South Wales provides that either the actual offender or the owner of the subject vehicle may be prosecuted for a parking breach. Where the actual offender is not detected, it is the practice to commence

proceedings by way of information alleging that the defendant was the owner of the subject motor vehicle at the time when a parking offence occurred.

'Owner' in this context pursuant to section 18A (5) (b) of the Motor Traffic Act, 1909, means:

> 'The person in whose name the vehicle is registered except where such person has sold or otherwise disposed of the vehicle and has complied with the provisions of the regulations applicable to him in regard to such sale or disposal.'

(The complainant) indicates that she did in fact comply with the appropriate provisions in South Australia regarding the notification of the sale of the subject vehicle, although there seems to be some doubt about whether the notification was acted upon by the appropriate authority in that State.

The prosecution of parking offences in this State is entirely a matter for the Commissioner of Police. The Commissioner has the discretion to bring proceedings against the registered owner and accordingly it is he who has the power to withdraw such proceedings where he considers it appropriate.

It appears however, that in relation to the summonses initially listed for 4th June, 1980, and 13th August, 1980 (the complainant) chose to make her representations direct to the Court. The 4th June matter was eventually heard on 8th October, 1980, when the Police offered no evidence and the information was dismissed. The 13th August matter was dealt with on that date and on this occasion the presiding Magistrate made an order dismissing the information under the provisions of section 556A of the Crimes Act, 1900. On both occasions (the complainant's) representations were drawn to the attention of both the Police and the Court.

So far as the summons listed for hearing on 27th August, 1980, is concerned, there is no suggestion of any representations being made to the Court by (the complainant) direct or by the Police on her behalf. This matter proceeded *ex-parte* in the ordinary course with the imposition of a penalty and costs of $41.50.

I note the Commissioner advised (the complainant) on 1st July, 1980, that it is not possible for his Department to stop the issue of further summonses unless the necessary adjustment has been made to the appropriate Motor Registration Records (in South Australia).

The Commissioner also advised in the same communication that should (the complainant) receive any further summonses, arrangements should be made to forward them together with a copy of his communication to him. I can only suggest that (she) continue to follow the Commissioner's advice in the event of any further summonses being received. It is noted that in two of the above matters (the complainant) wrote to the Court and not, it seems to the Commissioner, which may indicate some confusion so far as the Commissioner's requirements are concerned. Unfortunately, I am not in a position to assist (her) in this regard because, as I have pointed out previously, this is a matter solely for the discretion of the Commissioner of Police.

In relation to the one matter which did result in (the complainant) having an order made against her I am awaiting a decision on a submission I have placed before the Minister on the question of annulment. I hope to be in a position to advise of a final decision in the near future.

It seemed to me that the complainant's problems stemmed from the failure of the authorities in South Australia to act on her notification of disposal of her car and not from any action taken by the New South Wales authorities. I wrote and told her this and said that I would enlist the aid of the South Australian Ombudsman to try to resolve the matter. At the same time, I suggested that she do exactly as the Commissioner of Police had requested in the event that she received any more summonses.

At my request, my compatriot in South Australia took up the matter with the Motor Vehicles Registration Division of the South Australian Department of Transport and his inquiries revealed that—

- it was possible that the complainant's advice of sale of the vehicle had not been acted upon;
- as the registration of the vehicle had lapsed for a period in excess of 12 months, it no longer appeared on the registration records and, therefore, the complainant should have no further problems.

In addition, I ascertained that the penalty imposed on the complainant on 27th August, 1980, upon the recommendation of the Minister of Justice, had been annulled by the Governor.

I informed my complainant accordingly and discontinued my inquiries.

(c) *Acquisition of land*

In my last report, I mentioned briefly the matter of adequate notice being given to people whose properties are to be acquired for public purposes and referred to the recommendations made in this regard by the Interdepartmental Committee on Land Acquisition procedures.

The Committee has recommended that adequate notice of all land acquisition proposals should be given and the public be given the right to object, with the principal right of objection being 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 had occasion to raise with the Department of Main Roads the question of giving adequate notice to property owners affected by new road proposals or by changes to existing road proposals and referred the Department to the recommendations made by the Interdepartmental Committee. Of course, in doing this I realized that the Committee's recommendations were simply that and no more as the Government had neither accepted nor rejected them.

I received a reply from the Department which indicated that it had not been the Department's practice to notify owners of property affected by a future road proposal of the effect. The Department had relied on the statutory planning process for the dissemination of this information together with advice to individual owners, prospective buyers and prospective vendors, when they inquire, usually as part of the normal conveyancing process. The Department realized that this was not a foolproof procedure for ensuring that every owner of affected property was made aware of an effect.

The Department said that there were two discreet phases in the development of a road project—

the development of a proposal;

the development of a detailed design which results in the preparation of working drawings.

The development of a proposal, from inception of investigation to final acceptance, and adoption, was a lengthy process often spanning several years. It involved not only detailed technical investigation but also consultation with others, and particularly with Councils. During the course of the investigation the effects on property are continually changing. That Department felt that it would not be appropriate to notify property owners at this stage.

When a proposal has been finally accepted, and adopted, the position is somewhat different. At that stage properties which will clearly be wholly or partially required can be identified, although for the latter the dimensions of the affected parts are not known with any exactitude. However, the Department pointed out that it must be understood that a proposal is not a detailed design. A detailed design results in the preparation of working drawings which show the precise dimensions of all aspects of the future road including property dimensions. A proposal is taken to what is called the "outline design" stage. This is sufficient for an appreciation of the feasibility of the future project and, *inter alia*, indicates approximate property effects. The result is that when a proposal has been adopted there can still be properties in the "may be affected" category.

Where an adopted proposal is such that the property effect can be positively identified for all properties in the vicinity of the road, the Department is in a position to notify owners of affected properties and has in fact taken this action where this has appeared appropriate (for example, the Sydney–Newcastle Freeway projects in the Ourimbah–Wyong and Wyee areas where the Department's proposals were discussed with the owners of the affected properties and also at public meetings convened by the Department.)

Further, the Department anticipated that it would be in a position to notify property owners who were affected by the original proposals included in the planning scheme for the Eastern Distributor between Sir John Young Crescent and Flinders Street, Darlinghurst, of the amended effect of the new scheme when it is approved. This approval would follow a firm announcement by the Government following discussion with the Sydney City Council.

The Department went on to say—

> "The Department accepts, and always has accepted, that it has an obligation to advise property owners on request, whether their properties are, are likely to be, or are not affected by road proposals. It concedes that owners of properties affected by adopted proposals should be notified as soon as practicable after final acceptance of the proposals. However, the decision to notify or not must depend on an assessment of whether any good purpose would be served by vague or uncertain advice where the Department cannot make a positive commitment. Each proposal will need to be dealt with on its merits."

There can be no doubt that the question of when to give notice to affected property owners is a vexed one and there is no easy answer to it. I agree, however, with the general principle enunciated by the Interdepartmental Committee that notice must be given at a time when a person's objection can be realistically and properly considered—not when a proposed public work is a *fait accompli*.

Since September, 1980, of course, some additional protection has been afforded landowners affected by proposals involving the acquisition of their properties by virtue of the Environmental Planning and Assessment Act, the provisions of which provide for considerable public participation and debate in relation to land reserved for a public purpose. The provisions of the Act, of course, bind the Crown and, therefore, the Department of Main Roads.

There is little I can do to overcome the many problems inherent in the question of giving adequate notice of proposed or possible acquisition. However, I express the hope that the Government will give expression to the recommendations made by the Interdepartmental Committee on Land Acquisition Procedures in the not too distant future.

(d) *The Problems of Planning*

In my report for the year ended 30th June, 1977, I expressed concern that, in my view, ". . . far too often the planners become absorbed in the niceties of planning and are very much inclined to forget that human beings are vitally affected by what the planner is doing. Where it takes a long time to do nothing, people are affected even more".

A perfect example of my concern occurred during the year. A Council, in 1973, had adopted a Draft Planning Scheme included in which were planning proposals to relocate a section of State Highway. Such proposals affected a considerable number of property owners all of whom claimed inability to sell or adequately improve their homes because of uncertainty about and their inability to find out whether the proposals would ever become reality.

Several of the property owners affected had made inquiries of the Department of Main Roads and had ascertained that the Department had no plans for any road proposals of the nature included in Council's Planning Scheme.

Finally, in mid-1980, the local Member of Parliament complained to me on behalf of the property owners concerned and I took up the matter with the Council. At the same time, I wrote to the Department of Main Roads seeking information, for it seemed to me ludicrous that a local authority would plan road proposals involving a State Highway if the public authority having direct responsibility for State Highways considered the proposals impractical or undesirable.

Council later informed me that the road proposal was deleted from a Second Draft Planning Scheme adopted by Council in August, 1980, because there was "no likelihood of the road being constructed by 1990". Of course, I informed my complainant of this.

I was most concerned that here was a case where peoples' property had been adversely affected for *seven years* without any real possibility of the road proposal becoming a reality in that time. My concern was not alleviated when the Department of Main Roads wrote to me and, *inter alia*, said—

> ". . . you will appreciate that Councils are autonomous planning bodies. Provided any such proposal affecting the Main Road system conforms to the Department's standards, is compatible with the Department's own proposals for a particular area and the Council involved is prepared to meet the cost, then the Department would raise no objection to the work being undertaken."

I began inquiries to pursue the question of whether a local authority should be required to consult with the Department before a road proposal is included in a Draft Scheme. Such "prior consultation" it seemed to me, would at least enable identification and "weeding out" of proposals which were not "compatible with the Department's own proposals for a particular area" and might reduce the incidence of unnecessary adverse effect on peoples' properties.

In the meantime, however, the Environmental Planning and Assessment legislation was passed and came into operation. In terms of section 62 of the Environmental Planning and Assessment Act, a Council, in the preparation of an environmental study or a draft local environmental plan, is required to consult with, *inter alia*—

> ". . . such public authorities or bodies . . . as, in its opinion, will or may be affected by that draft local environmental plan;"

In addition, of course, before a draft local environmental plan can have effect, it must be approved by the Minister for Environment and Planning and would be carefully reviewed by the Department of Environment and Planning in the process. I am confident that the Department would look to see that appropriate consultation had occurred.

In view of this, I concluded my inquiries.

(e) *Refusal to Amend Legislation to Allow Concessions for Improvements when Assessing Land Tax*

I received a complaint from chartered accountants on behalf of two land-subdivision companies that raised a rather interesting problem which, at first glance, appeared to be insoluble.

Briefly, in terms of the Land Tax Management Act, when land has been subdivided, the subdivided lots are valued and an allowance is given (i.e., an amount is, in effect, deducted from the valuation for taxing purposes) to the subdivider for the value of improvements (roads, kerbing and guttering, etc.) to the land. The problem arose because, before the date on which valuations were made but after the base date applicable to the valuations, some blocks were sold by the two companies. Quite correctly, when the valuations were actually made on the sold blocks, the Valuer-General issued his valuation notices to the owners (i.e., the people who had purchased them) and not to the companies who were the owners as at the valuation base date. The owners, of course, were not entitled to any allowance for improvements as they had not carried them out. Unfortunately, the companies could not object to the valuations on the sold blocks, even though they were liable for the land tax, because the valuation notices had not been directed to them; neither could they request new valuations.

The accountants claimed that the companies had paid over $2,000 in their 1976 land tax assessments that they should not have been liable to pay.

As both the Commissioner for Land Tax and the Valuer-General were involved in the matter I wrote to both and, in particular, sought their comments about a possible solution to what seemed to be a legal impasse.

I received firstly a long reply from the Commissioner which set out the relevant provisions of the Land Tax Management Act and the Valuation of Land Act and concluded by saying—

> "The land tax assessments for the 1976 and 1977 tax years in relation to the subject items of land appear to be correct and in accordance with the Act."

Neither I nor the complainants had ever contended otherwise but I was disappointed that the problem involved in the complaint had not been attacked and no suggestions had been made about how it could be overcome.

Then, I received a comprehensive reply from the Valuer-General. In his usual forthright and pragmatic way, the then Valuer-General, Mr Bird, faced the issue squarely and concluded his letter by saying—

> "There is one contribution which I may be able to make to alleviate recurrence of some of the types of difficulties for similar circumstances as they arise in the future. That is, by administrative action, I will avoid including in the one valuing action separate valuations caused by sale of part of land and which would otherwise include sales before and after the commencement of a rating year. Thereby there would be available to rating authorities and the Land Tax Commissioner values of all land as it was held at the 31st December of each year.
>
> Whilst that action, if carried out in the subject case, could have alleviated the present difficulties raised by the complainants, nonetheless I have no power to reopen the matters to cancel the valuations made and to remake them with retrospective effect.
>
> In any event the scope for avoiding future similar problems, resting as it does on the watchfulness of my officers, is too tenuous and unreliable in a taxation system and needs a more positive legislative remedy. This I believe needs an amendment to the Land Tax Acts, whilst they continue to contain the value and valuation prescriptions, which would enable the Commissioner to request retrospective action to provide special valuations as at the commencement of each land tax year.

> In the meantime I have issued instructions alerting my officers to the need to take action which will minimize the subject problems.
>
> As far as your complainants are concerned they may have to seek some *ex gratia* adjustment of their tax, and, in this regard I would readily provide assistance and advice if requested to do so."

I considered that, in the light of the Valuer-General's advice, I should pursue with the Commissioner the questions of amending the legislation and making some adjustment to the land tax assessed in respect of the two companies as an act of grace. Before I did so, however, I asked the Valuer-General if he objected to my making known to the Commissioner the views that he had expressed. The Valuer-General told me that he had "no objections whatsoever" and he went on to say—

> "... Provision should be made for the Commissioner to be able to request the valuer (Valuer-General in situations where the Valuation of Land Act applies) to provide a special valuation in all cases where there is no valuation standing in the name of a taxpayer at relevant date (the commencement of the tax year).
>
> I place emphasis on the ownership by the taxpayer; first, because it is a personal tax and, secondly, and perhaps, more importantly in the subject class of cases, because the subject concessions built into the system are personal to the owner who made them."

I then took up the matter again with the Commissioner.

The Commissioner in October, 1979, replied and said that he proposed to recommend to the Treasury that the Land Tax Management Act be amended so as to create, for land tax purposes only, an allowance to be deducted from the unimproved value and to enable the Valuer-General to determine such an allowance. He added that, as a concession for the benefit of taxpayers involved, he also intended to ask the Treasurer to approve that the Act be administered in accordance with the proposed amendments, pending actual amendment of the Act, and that such approval apply to the companies concerned in the complaint made to me and to any other similar situations which might arise prior to the Act being amended. The Commissioner said that he would firstly consult with the Valuer-General as the operation of the proposed amendment would involve that officer.

In December, 1979, the Commissioner informed me that he had written to the Treasury along the lines outlined above.

I considered the Commission's approach in the matter to be completely satisfactory and I was confident that, in the face of the views expressed by both the Valuer-General and the Commissioner, the situation that existed and which so clearly operated unfairly and unjustly to the detriment of taxpayers would be quickly rectified. Alas—this was not to be.

Between December, 1979, and October, 1980, the Commissioner kept me informed as to the progress of his recommendations and it was clear that there was no progress, even though the Commissioner had again written to the Treasury on 9th October, 1980, recommending again the changes he had earlier put forward.

On 29th October, 1980, I wrote to the Secretary of the Treasury and asked him to let me know what was happening and when the Commissioner's recommendations might be acted upon. Finally, in April, 1981, the Secretary replied and said *inter alia*—

> "No amendments have been made to the Land Tax Management Act since 1975 but the Commissioner of Land Tax has drawn attention to a number of areas where he feels that the administration of the Act could be improved, including the matters referred to in the representations which were made to you. In addition, the Commissioner and the Treasury make a detailed review of the Land Tax Management Act and the Land Tax Act as part of the Budget review process each year and a report is furnished to the Government on the results of that review.
>
> The question of the amendments which might be made to the legislation is considered by the Government as part of its overall Budget strategy. For a number of reasons Ministers have decided against the Acts being amended. I might mention that Ministers have been conscious of the desirability of making such amendments but overall Budgetary considerations have precluded them from giving approval. In this connection it is appreciated that the present provisions in relation to the deductible allowances for improvements effected by the owner result in a higher tax being payable in a number of instances but there are many other cases where relief from land tax could be considered to be at least as justified.
>
> The Commissioner's suggestion that the Minister authorize him to make assessments as a variation to statute has certainly been taken fully into

account. However, in addition to the question of equity so far as the operation of the Land Tax Management Act is concerned, there is the very important consideration that Parliament is becoming increasingly critical of the use of this procedure particularly where taxing legislation is concerned.

As a result of your further inquiries Treasury will ensure that the matter is again drawn specifically to the Government's attention when next year's Budget is being formulated and we will seek a clear Ministerial direction as to whether, if the Act is not to be amended, the Government would be prepared to authorize a variation of statute to cover the particular cases. I must stress, however, that I would be compelled to bring to the Government's attention other areas where relief from land tax could be considered to be equally warranted."

I noted all that the Secretary had to say with concern and disappointment and I replied to him in the following terms—

"I am concerned that, quite clearly, an anomalous and unjust situation is operating which can be remedied by amendment of the appropriate legislation. This has been recognized by both the Valuer-General and the Land Tax Commissioner. Again, the Commissioner, recognizing that persons affected by the particular provisions of the Act involved have been seriously disadvantaged, has recommended that he be authorized to administer the Act, pending amendment, in a way designed to remove such disadvantage.

I am disappointed that, in the face of clear evidence that the law, as it stands, is resulting in injustice and disadvantage to taxpayers, the Government has not seen its way clear to authorize amendment of the offending legislation.

I have seriously considered whether, in this particular case, I should find the conduct of the Land Tax Commissioner to be wrong in terms of section 5 (2) (b1) of the Ombudsman Act. That section provides that conduct of a public authority is wrong if it is in accordance with any law or established practice but the law or practice is, or may be, unreasonable, unjust, oppressive or improperly discriminatory. However, I have reached the view that to take this course would be unfair to the Commissioner in the light of his efforts to have the law amended and to remedy the injustice that has occurred and, no doubt, will continue to occur.

I, of course, am unable to intervene so far as the Government's decision, as related by you, is concerned except to bring the facts to the notice of the public when I next report to Parliament and I propose to do so.

In the meantime, I note your assurance that the matter will again be drawn to the Government's attention when next year's Budget is being formulated."

I informed my complainants and the Land Tax Commissioner of my views, of my inability to take the matter further in the light of the Government's decision and of the fact that I proposed to include details of the matter in this report.

I can only express a fervent hope that the Government will act in the manner recommended by its taxing officer, the Commissioner, and so remedy the unjust and unfair situation that has deliberately been allowed to continue in operation. It may well be, as the Secretary of the Treasury said in his letter, that there are "many other cases" where relief from land tax would be justified. My only comment is that, if relief is indeed justified, then the Government should act to give such relief.

(f) *Patients in Psychiatric Hospitals*

On page 14 of my last Annual Report I raised once again the problem of fees payable by long term patients in psychiatric hospitals.

Whilst almost everyone recognizes the existence of a problem, progress has been slow in achieving justice for these people.

I have been informed that the Commonwealth is not prepared to accept responsibility but I do understand that involved in a review of the State Mental Health Act, which is now under consideration, are proposals which may lead to a more satisfactory and equitable situation. I trust that this position is achieved in the not far distant future.

Appendices

A selected number of cases dealt with during the year are set out in summary form in Appendix "A". I have endeavoured to ensure that the identity of the complainant is not revealed.

Appendix "B" is a statistical summary of complaints.

APPENDIX A

CASE NOTES

APPENDIX A

CASE NOTES

BUILDERS LICENSING BOARD

Offer of inadequate amount in settlement of claim

It is sometimes the case that, on the material submitted by a complainant, I have considerable doubt that the complainant has taken sufficient action to resolve his or her problem with the relevant public authority and, therefore, whether I should embark on an investigation under the Ombudsman Act.

On some occasions, I attempt to resolve my doubt by seeking further information from the complainant. On others, as in this case, I make some preliminary inquiries with the public authority and inform both the authority and the complainant that I will decide whether I will investigate the matter in the light of the results of my preliminary inquiries.

My complainant had entered into a contract with a builder for the construction of a home. The builder failed to complete the work and my complainant approached the Board. As a result, the builder was disciplined in terms of the Builders Licensing Act and the complainant was invited to make a claim under the House Purchasers Agreement insurance provisions of the Act.

The complainant in his letter to me which I received on 7th January, 1981, said—

> "(I have a) Solicitor acting on my behalf . . . but the matter has once again become stalemated in so far as she has requested my further instruction following the Board's offer of $1,000 compensation.
>
> The final figure of the cottage is in excess of $60,000 but the Board's assessment process has arrived at the figure of $1,000 compensation. I would be prepared to settle for $5.000 which I understand is the maximum under these circumstances."

He had written to the Board following his Solicitor's request for instructions but, he claimed, had not received a reply.

I wrote to the complainant and told him that I had not decided whether I should investigate his complaint. I expressed some surprise that he had elected to write directly to the Board, following the offer of $1,000, instead of consulting with and instructing his legal representative. Notwithstanding this, I asked the Board to let me know the circumstances.

The Board's reply was quite comprehensive and the events that had occurred were related as follows:

(a) On 19th March, 1980, the complainant lodged Notification of Claim under clause 4 (b)—completion costs—of the House Purchasers Agreement. The claim was investigated and the costs to complete the builder's work was assessed by the Board's Inspection Branch.

(b) In so doing, the Branch also estimated a fair and reasonable price for the original contract. This was done as the builder had admitted to the investigating Inspector that the contract had been considerably underquoted. In calculating a purchaser's loss under clause 4 (b) the Board has the right under clause 2 (2) of the House Purchasers Agreement to adjust the original contract price to a "reasonable" price, so as to remove any unjust gain the purchaser may achieve from a less than reasonable original price;

(c) Whilst the conditions precedent to establishing a valid claim under clause 4 (b) appeared to have been fulfilled, clause 2 (2) was applied as follows—

Assessed Cost to Complete		$21,000
Adjusted Original Contract Price . .	$60,000	
Less Payments by the complainant . .	$40,000	
		$20,000
Net Loss		$1,000

Accordingly, the sum of $1,000 was approved and offered to the complainant in settlement of his claim.

(d) On 16th October, 1980, the Board received a letter from the complainant requesting review of the claim on the basis of a quotation received from another building firm which the complainant considered to be comparable with the contract price of the original builder. A reply to this letter had been sent on 23rd October, 1980, contrary to the complainant's claim in his letter to me.

(e) The matter was then reassessed in the light of the further quotation, and the investigating Inspector, having contacted the building company and having closely re-examined methods of construction, etc., conceded that it was "conceivable that (the building firm) using the light timber framing code (thereby using a lot less timber in the framework to that installed by the original builder), could have constructed the dwelling for around $51,000 allowing for adjustment of prime cost allowances".

(f) In the light of the revised assessment, the complainant was given the benefit of any doubt, so far as the application of clause 2 (2) of the Agreement was concerned, and on 6th January, 1981, approval was given by the Board to increase the offer of settlement to the maximum $5,000 subject to the building work being satisfactorily completed.

(g) The complainant had been informed by letter dated 7th January, 1981, of the increased offer of settlement, and when the Board wrote to me, a reply as to his intentions was awaited.

I noted that the Board's decision to offer the complainant $5,000 had been taken the day before I received the complainant's letter and several days before I referred the matter to the Board. Accordingly, I decided that there was no need for me to take the matter any further; I declined to investigate the complaint and concluded my inquiries.

CONSUMER CLAIMS TRIBUNAL

Unreasonable and Incorrect Refusal to Dismiss Claim

I received a complaint concerning the conduct of a Consumer Claims Tribunal Referee at a hearing of a consumer's claim in which my complainant was the Respondent.

As I have said elsewhere[1], whilst I do not regard the actual decision of a Tribunal to be a matter which I can investigate, I consider that I am able to investigate such matters as a Referee's actual conduct during the course of a hearing and administrative matters connected with the functioning of the Tribunal. Even so, I invariably inform my complainants (and I did so in this case) that my attempts to investigate are seriously hampered by the fact that the Tribunal, by law, is not required to keep a proper record or transcript of proceedings before it.

My complainant alleged that the Referee at the hearing had unreasonably and incorrectly refused to dismiss the consumer's claim. The details can be summarized as follows:—

(a) My complainant (I will refer to him as "Mr A") had performed some work for the consumer who subsequently queried the account rendered. Mr A had informed the consumer that he would take out a summons. This he did at 9.45 a.m. on 10th September, 1979.

(b) Mr A personally served the summons on the consumer's wife on the evening of 10th September, 1979, and was informed by her that her husband had referred a claim to the Consumer Claims Tribunal. Subsequent inquiry made by Mr A revealed that the consumer had commenced Tribunal proceedings at 10.20 a.m. on 10th September, 1979 (this was later confirmed as fact during my investigation), i.e., some 35 minutes after Mr A had issued his summons.

(c) Mr A had queried with Registry staff whether, in the circumstances, the Tribunal had jurisdiction to hear and determine the consumer's claim and he was told to raise the matter with the Referee at the hearing, which was listed for 7th December, 1979, and seek dismissal of the claim.

(d) Mr A described the events that followed thus—

"I raised this matter with the referee at the hearing, he condescendingly informed me that I could not possibly have issued the summons at 9.45 a.m. as, quote, 'The Court of Petty Sessions does not open until 10 a.m.' unquote. Mr Smithers, I am sure you are well aware of a 9.30 a.m. opening time for the Courts of Petty Sessions, in fact the Chamber Magistrates commence their day at 10 a.m.!"

Prior to deciding whether to investigate Mr A's complaint, I had inquiries made which revealed that it was possible, at the Court of Petty Sessions concerned, to have a summons issued between 9.30 a.m. and 4.00 p.m. each day, Monday to Friday. Time of issue, unfortunately, is not shown on a summons.

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[1] Report of the Ombudsman of N.S.W.—1977/78—pp. 15.

I also considered the terms of section 19 of the Consumer Claims Tribunals Act, which says—

"19. (1) A court has no jurisdiction in respect of any issue in dispute in a consumer claim which has been referred to a consumer claims tribunal and has not been withdrawn or dismissed for want of jurisdiction.

(2) Where proceedings for the determination of any issue were commenced in a court before a consumer claim in which that issue is in dispute was referred to a consumer claims tribunal and those proceedings have not been withdrawn, nothing in subsection 1 prevents that court from having jurisdiction in respect of that issue and the tribunal on the application of any party to those proceedings who is a party to the proceeding before the tribunal, shall make an order dismissing the claim.

(3) For the purposes of this section, an issue is in dispute in a consumer claim referred to a consumer claims tribunal only if the existence of the dispute was shown in the claim referred to that tribunal or was recorded in the record made by that tribunal in accordance with section 12 (1) (b).

(4) For the purposes of this section, "court" includes any court, tribunal, board or other body or person—

(a) which or who has power under any Act; or

(b) which or who has, by agreement between 2 or more persons, authority,

to determine by arbitration, conciliation or otherwise any issue that is in dispute."

I, therefore, decided to investigate the complaint and in referring the matter to the Commissioner for Consumer Affairs, I asked that he particularly inform me of the attempts made by the Referee to ascertain whether, in terms of section 19 (2) of the Act, proceedings for determination of the issue before the Tribunal had been commenced in a court before reference to the Tribunal.

The Commissioner subsequently informed me that, in addition to complaining to me, Mr A had written to the Minister for Consumer Affairs in similar terms about the behaviour of the Referee at the Consumer Claims Tribunal hearing. The Commissioner enclosed a copy of the Minister's reply which, he said, relayed the Senior Referee's comments about Mr A's claims. The Minister's letter said, *inter alia*—

"I have now had the opportunity of discussing the matter with the Senior Referee, ..., who also presided at the hearing. (He) has indicated that the determination was made only after a consideration of the total evidence adduced by the parties at the hearing. He further indicated that he had no further comment to make with regard to the matters raised in your letter, other than to point out that the Referees must, at all times, rely on the evidence produced by the parties which can include expert evidence from persons such as officers of the Builder's Licensing Board. Ultimately, however, the final decision must rest with the Referee alone.

I can only reiterate the comments made in my previous letter that I am not empowered to intervene in, or review a decision of the Consumer Claims Tribunals."

The Commissioner, in his report to me, went on to say—

"Your letter sought information about what steps a Referee takes to determine whether or not other proceedings have been commenced but other than (the Senior Referee's) response that he acts on evidence produced at the hearing I cannot comment further.

However officers of the Department do take certain steps and I will mention these. Prior to a hearing if the Department's officers are advised of matters likely to affect jurisdiction and specifically the existence of proceedings in another court, details are then obtained from the parties as to the Court, nature of action and the plaint number. A check is made with the Court of issue to ascertain the identity of the parties and the particulars of claim. If it is clear that section 19 (2) applies, the matter is referred to the presiding Referee prior to hearing in order that the claim might be dismissed. In this case, (Mr A) contacted the Department's Chatswood office and advised he had taken out a summons on the same day as the consumer in this case had lodged a claim. No note was made of the time of day (Mr A) claimed to have taken out the summons but he was told it would have to be left to the Referee at the hearing to decide the matter. I am sure you will agree

that in such circumstances it would not be appropriate for administrative action to be taken to dismiss a claim and a hearing was the only way for the parties to present evidence in support of their claims."

I informed Mr A of all that the Commissioner had to say and of my intention to write to the Senior Referee to seek his report regarding the steps he took to satisfy himself that he had jurisdiction to hear and determine the consumer claim. I stressed again my inability to set aside the Tribunal's order and advised Mr A of the availability of judicial review of the Tribunal's decision on the ground of lack of jurisdiction. I suggested that he would need to discuss that aspect with his legal representative.

I wrote to the Commissioner and, *inter alia*, said—

"I am not satisfied, on the comments you have made, that the Referee took reasonable steps to satisfy himself that the Tribunal had jurisdiction to hear and determine the claim, bearing in mind the provisions of section 19 of the Consumer Claims Tribunals Act, following (Mr A's) application to the Referee for dismissal. In this regard, there is nothing in your reply which in any way refutes the claim made by (Mr A) that the Referee merely disbelieved his statement about the prior issue of a summons on the basis that the Clerk of Petty Sessions Office would not be open at the time (Mr A) claimed to have taken out the summons.

Bearing in mind the binding nature of an order made by a Tribunal and the quite restrictive grounds on which an appeal can be lodged, I am of the view that Referees must be extremely careful in the proper exercise of their power to hear and determine claims and must take all reasonable steps to satisfy themselves that they have jurisdiction to proceed with the hearing of a claim, particularly once the issue of jurisdiction is raised.

As I am now aware of the identity of the Referee who presided at the hearing involving (Mr A), I am writing to (him) and, pursuant to section 18 of the Ombudsman Act, am seeking further information from him about the steps he took to satisfy himself that he had jurisdiction."

I wrote to the Senior Referee, outlining the nature of Mr A's complaint, the results of my inquiries with the Commissioner and my intention to investigate his (the Senior Referee's) alleged conduct. I asked that he report to me regarding "the steps you took, as presiding Referee, to satisfy yourself that you had jurisdiction to hear and determine the claim, particularly in view of the application for dismissal made by (Mr A) and in the light of the comments he made in this respect in his complaint to me."

The Senior Referee reported to me in the following terms—

"I cannot of course agree that you have any right to ask any questions concerning the conduct of a Referee during the course of a proceeding of a Tribunal and particularly with regard to how a Referee arrives at a finding either of jurisdiction or Order.

No notes of evidence are taken during a proceeding or form part of the record of a Tribunal hearing.

In this claim which was heard on 7th December, 1979 (Mr A), a Director of the Respondent company, appeared as well as the Claimant. Both parties were sworn and gave evidence.

I made the findings on the evidence (proof) produced by the parties. He who alleged must prove. I do not look for any other evidence (proof). The parties must give me the information. All evidence must be on oath. I hear both sides on oath.

I considered that the answer given by the Commissioner was correct.

I do not agree with and I reject your contention that I unreasonably and incorrectly refused to dismiss the claim the subject of the complaint."

Following receipt of the Senior Referee's report which, it seemed to me, did not address itself to the question posed in my request, I ascertained that, on 28th November, 1979, certain amendments to the Consumer Claims Tribunals Act had taken effect. One of the effects of the amendments had been to insert a new section 20A, in the Act. Section 20A provides—

"20A. (1) If at any time before an order has been made by a tribunal under section 23 in respect of a consumer claim the jurisdiction of the tribunal to hear and determine the claim is disputed by a party to the claim, the tribunal shall not make an order determining the claim without first giving a ruling as to whether it has jurisdiction to hear and determine the claim.

(2) A tribunal shall not of its own motion make an order under section 23 (1) (e) dismissing a consumer claim for want of jurisdiction without first giving a ruling as to its jurisdiction to hear and determine the claim.

(3) If a tribunal has given a ruling under subsection (1) or (2) in respect of a consumer claim it shall not make an order under section 23 in respect of the claim—

(a) until 14 days have elapsed following the giving of the ruling; or

(b) if at any time before it has made an order it receives notice that proceedings for the relief or remedies referred to in section 21 have been commenced in a court in respect of the ruling, until the proceedings before the court have been determined."

I, therefore, wrote again to the Senior Referee and said—

"As I have outlined on several occasions in the past, I consider that I do have jurisdiction to look at the conduct of a Referee in a Consumer Claims Tribunal hearing but not at his decision or order.

It is on this basis that I am investigating (Mr A's) complaint in respect to your conduct up to the time that you made your decision to proceed with the hearing of the claim. Nothing that you have said in your letter persuades me that you made any serious attempt to properly determine the question of jurisdiction once it was raised at the hearing.

More importantly, perhaps, your conduct in this particular case appears to have been contrary to law in that the procedures laid down in subsections (1) and (3) of section 20A of the Consumer Claims Tribunals (Amendment) Act, 1979, do not appear to have been followed. No doubt, you are familiar with the provisions of the Act to which I refer.

In terms of section 5 (2) (a) of the Ombudsman Act, your conduct might be found to be wrong and be made the subject of adverse comment. Before I make any decision in this regard, you are afforded the opportunity, pursuant to section 24 of the Ombudsman Act, to make submissions to me about the matter.

Accordingly, I would appreciate your comments concerning your apparent failure to comply with the provisions of section 20A of the Consumer Claims Tribunals (Amendment) Act, 1979, as soon as possible and, in any case, within four (4) weeks of the date of this letter."

At the same time, I wrote to the Commissioner and *inter alia* said—

"I indicated in my letter of 17th June that I was taking up the matter with (the Senior Referee) and I now enclose for your information a copy of the reply that (he) made to me. I am sure you will agree that his reply could not be regarded as terribly helpful."

However, I am concerned to note that the Tribunal, in the hearing concerned on 7th December, 1979, apparently did not act in accordance with the law as set out in subsections (1) and (3) of section 20A of the Consumer Claims Tribunals (Amendment) Act, 1979, the provisions of which came into effect on 28th November, 1979.

However, leaving aside the fact that the Tribunal appears to have acted contrary to law (the Senior Referee), has said nothing which persuades me that he made any serious attempt to fairly or properly determine the question of jurisdiction when it was raised at the hearing. In view of this, I have written to (Mr A) in the following terms—

"Whilst it is not my function to offer legal advice to any person, I can do little more than suggest that you give consideration to seeking a review of the Tribunal's decision in this case if, of course, you are still able to do so. In this regard, you would need to consult with your legal representative. Of course, you may wish to explore the possibility of seeking legal aid and you can do so by contacting the Legal Aid Services Commission of N.S.W., or the Law Society of N.S.W."

I note from your letter of 27th May that officers of your Department do take certain steps to ascertain whether proceedings have been commenced in another jurisdiction in respect of a matter the subject of a claim referred to a Tribunal. The Department's usual procedure appears to be to refer questions of jurisdiction, after inquiry, to the Referee concerned, prior to the hearing, for a decision to be made. In this case, however, that procedure was not followed and the matter was left for the complainant to raise at the hearing.

I cannot see that the fact that (Mr A) issued his summons on the same day that the consumer referred her (sic) claim to the Tribunal was a valid reason for departing from normal Departmental procedure and, perhaps, you would let me have your further comments in this respect as soon as possible.

Notwithstanding (the Senior Referee's) views about my jurisdiction, with which I disagree, I propose to seek his further comments regarding his apparent failure to act in accordance with section 20A of the Consumer Claims

Tribunals (Amendment) Act. His conduct in this regard might well be found to be wrong in terms of section 5 (2) (a) of the Ombudsman Act in that it was contrary to law."

I also wrote to Mr A, outlining the results of my inquiries to that time and advising him in the terms indicated in my letter to the Commissioner.

The Commissioner replied to me, again pointing out that he was not in a position to influence the manner in which Tribunal hearings are conducted. He went on to say—

"In relation to the conduct of the Tribunal Registry's staff I am sure you understand they have no authority generally to either reject claims that consumers wish to lodge or to prevent a claim being heard once it has been lodged. I make this comment because there are many situations where people seek to lodge claims that are clearly beyond the scope of the Tribunal and as a practical course of action staff will advise that the matter may be dismissed. If the person insists, as often happens, the Registrar and his staff have no choice but to take the claim.

A similar situation arises where a respondent questions the jurisdiction of the Tribunal and sections 17, 19 and 20A are the relevant ones to consider. While the staff take the steps mentioned in my letter of 27th May, 1980, the procedure is different where it is suggested the summons and the claim were taken out on the same day. Tribunal claim forms note the time a claim is lodged but I understand this information is not recorded by Courts of Petty Sessions when summons are issued. As it is a frequent occurrence that disputes arise because the commencement of claims and other court proceedings are contemporaneous it has been the practice as directed by the Referees not to refer these cases to a Referee but to list directly for the issue to be dealt with at a hearing. In (Mr A's) case as in others the telephone messages about the matter would be on the file for the Referee to peruse.

You will be aware that the commencement of proceedings in another court is not of itself sufficient to prevent the Tribunal having jurisdiction but section 19 also provides that the issue in dispute must be the same. Whatever the circumstances surrounding the date of commencement of proceedings if there is any debate about the issue the matter is listed for hearing without reference to a Referee.

As I mentioned above, Tribunal staff cannot reject claims nor can they prevent matters coming to a hearing even though the result of a jurisdictional dispute may appear to be obvious. A similar situation has been dealt with already by the Victorian Supreme Court in an unreported case: *R* v *The Referee of the Small Claims Tribunal and Burford*: ex parte *Rostill Pty Ltd* on the 13th February, 1979. A copy of an extract from the C.C.H. Reports about this case is attached. I can only assume that such a judgement would probably also be made in New South Wales.

I hope the above information satisfies your inquiry as in my view the Registry staff were acting within the requirements of the legislation and the procedures set by the Referees."

In my view, all that the Commissioner said rendered the Referee's duty to consider the question of jurisdiction, once raised at a hearing, all the more important. The basis of the Victorian decision to which the Commissioner had referred me was simply that the appropriate time to raise the issue of the Tribunal's jurisdiction is at the hearing before the Referee. A copy of the extract mentioned in the Commissioner's letter is reproduced at the conclusion of these case notes and marked "A".

The Senior Referee's reply was in the following terms—

"I now have the Tribunal file returned from the Commissioner, following his reply to yourself.

There is no mention on my notes of the hearing of any request by the Respondent for the claim to be dismissed or any other matter concerning jurisdiction.

The amendment to the Consumer Claims Tribunals Act to which you refer, had not been brought to my notice for distribution to the Referees until 12th December when I brought it to the notice of a solicitor appearing before me, although section 20A was passed on 27th November, 1979.

Section 20A is welcomed by the Referees and has been invoked on many occasions.

I certainly do not do anything at a hearing which is contrary to any law of which I am aware."

I was somewhat amazed and certainly concerned that, apparently, the Senior Referee and, presumably, the other Referees of the Consumer Claims Tribunals were not aware of a change in the law under which they operated and which was of particular significance in relation to the conduct of hearings. Therefore, I asked the Commissioner to let me have a report regarding the steps taken by his administration to keep the Senior Referee informed of the progress of the proposed amendments to the Act and their effect and implementation once they became law on 28th November, 1979. I also asked that the Departmental and Tribunal files be made available to me.

I also considered it desirable that Mr A be seen and questioned regarding his contention that he had raised the issue of jurisdiction with the Referee at the hearing on 7th December, 1979, particularly in the light of the Senior Referee's report. One of my officers interviewed Mr A at his home on 30th October, 1980. The interview, with Mr A's consent, was tape recorded and subsequently transcribed. A copy of the transcript of the interview can be found at the end of these notes marked with the letter "B".

The Commissioner, after some delay, reported to me in the following terms—

> "I have to advise you that it has not been the practice of the Legal Section of my Department to formally communicate dates of assent or proclamation on new/amending legislation to persons within the Department principally responsible for implementation.
>
> You will appreciate that formal advice is usually unnecessary because the senior officer concerned is directly involved in the preparation of submissions, advising the Minister during passage of the Bill and subsequent action.
>
> In the Tribunal's Amendment Bill of 1979, neither the Senior Referee or the Registrar were so involved except in the very early stages of consideration to a proposed Bill when they made suggestions for various amendments to be put to the Minister.
>
> I have had inquiries made to try and establish the sequence of informal action that would have occurred to bring about implementation of the amendments. Given the lapse of time and the reliance of the officers concerned on memory, it is not possible to establish dates. However, it does seem that several factors including incorrect assumptions of knowledge of the details of the Act and date of assent could have meant that the Senior Referee was not aware that the amendments were in force until 12th December as stated in his reply to you.
>
> In light of the circumstances of this matter I am taking steps to ensure that both the anticipated and actual date of new or amending legislation coming into force are formally conveyed to relevant persons within my Department in the future."

My examination of the Department and Tribunal files revealed the following relevant facts—

(i) Officers attached to the Tribunal Registry spoke by telephone to Mr A on 26th October, 1979, apparently to obtain certain details to enable notice of hearing to issue to the parties. On the same day, Mr A rang Registry officers and raised the question of the Tribunal's jurisdiction to hear the claim. The file is minuted in this respect as follows—

> "(Mr A) advised that he had the summons issued on the 10th September, 1979. I advised him that this was the same day that the claim was lodged. (Mr A) questioned the matter of jurisdiction he was advised that the matter will still be listed for a hearing and that if he considers that the Court of Petty Sessions has jurisdiction he should bring it up before the referee for a decision."

(ii) The Senior Referee, during my inquiries and, earlier, when Mr A had made representations to the Minister, had minuted the file to the effect that he could not remember whether Mr A had raised the question of jurisdiction. His file minutes said—

> "I do not have any recollection of the evidence which was given by either party. There was nothing in the hearing to make anything stand out in my memory"
>
> and
>
> "There is no note on my record sheet that (Mr A) raised the question of jurisdiction. I usually note any point taken on jurisdiction or question of law raised. I do not remember this matter at all . . . I cannot confirm or deny the allegation made in ——————— the letter (from the Ombudsman). There is no note that any summons was produced by either party for consideration."

This case, I believed, well illustrated the unsatisfactory state of affairs that must inevitably arise when a Tribunal, whose decisions are binding on the parties and from which there is no appeal and only a very limited right of judicial review, is not required to keep an adequate record or transcript of proceedings.

Section 12 (1) of the Consumer Claims Tribunals Act provides that the record of a tribunal in respect of a claim referred to it shall consist of—

> the claim as lodged by the claimant;
>
> the notation of the nature of the issues in dispute as determined and recorded by the tribunal during the hearing of the claim;
>
> the ruling, if any, given by the tribunal in relation to its jurisdiction to hear and determine the claim; and
>
> the order, if any, made by the tribunal.

Section 12 (3) provides that notes made by a referee in the course of a hearing of a claim, other than the notation, ruling and order referred to in section 12 (1), shall not form part of the record of the tribunal.

Notwithstanding the provisons of section 12, I was then and am now of the view that a strong case can be made out that a Consumer Claims Tribunal should, in the interests of justice, be required to keep ". . . such notes as (are) necessary to enable the case to be laid properly and sufficiently before the higher court"[2].

I believe that this is particularly important where judicial review is being sought on the ground of alleged denial of natural justice for, in the absence of a proper record, I cannot see how the case could ever be "properly and sufficiently" laid before the higher court.

So far as Mr A's case was concerned, I believed that, in the absence of knowing with certainty just what was said at the hearing, it was reasonable to consider probabilities. In this regard, Mr A had been consistent in his claims that he raised the issue of jurisdiction at the hearing. He had said this in his letter of complaint to me and in his interview with my officer. His conduct prior to the hearing, in October 1979, when he queried jurisdiction with Registry staff at Chatswood, was consistent with his claims to me that he had raised the issue.

The Senior Referee, on the other hand, could not remember whether the issue of jurisdiction had been raised or not. He had said that he "usually" notes any point taken on jurisdiction and he relied on the fact that his notes of the hearing made no mention of jurisdiction having been raised. However, it was significant, I felt, that he said he *"usually"* noted any point taken, etc.—this, to me, simply meant that *he did not always do so*. In this context, then, the absence of any mention of the issue in his notes was simply an indication, and no more, that the issue *may* not have been raised *OR* that it *was* raised but *was not recorded* by the Senior Referee in his notes.

Therefore, there was doubt; but, in my view, bearing in mind that Mr A's actions prior to the hearing had been consistent with a concern about the Tribunal's jurisdiction and with his later claims to me in this regard, I believed that the benefit of such doubt should be given to Mr A. He appeared a reasonable and truthful person and I could not see why his claims should not be accepted in the absence of any evidence that his claims were incorrect.

The Commissioner had told me, in any case, that the notes made by Registry staff following Mr A's 'phone call about jurisdiction "would be on the file for the Referee to peruse". In my view, this being the case, no criticism could reasonably be levelled at Registry staff for having left the matter of jurisdiction for determination at the hearing. On the other hand, I was of the view that the availability of the file notes should have altered the Referee, and had placed on him a degree of responsibility to dispose of the jurisdictional question, even to the extent of asking the respondent (Mr A) if he wished to raise the matter (assuming for the moment that Mr A had not done so).

On all of the material available I felt that it was reasonable for me to conclude that, leaving aside the amendments to the Act which came into force on 28th November, 1979 and which were not followed by the Senior Referee, the Senior Referee had failed to take sufficient steps to satisfy himself on the matter of jurisdiction because—

> (a) the notes of Mr A having raised the matter prior to the hearing had been available to him;
>
> (b) there was nothing to refute Mr A's claim that he had raised the matter at the hearing and the material available suggested that, in all probability, he had.

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[2] Lord Hanworth, quoted in *Pinkstone* v *Goldrick* (1979) 1—NSWLR—279 (See also *Sherring* v *Goldrick* (1979) 1—NSWLR—285).

This brought me to the disturbing situation whereby the Senior Referee of the Consumer Claims Tribunal had not been aware, until 12th December, 1979, of amendments to the law, under which he and the other Referees were required to operate, and which took effect on 28th November, 1979. This was quite incredible! Apart from voicing strong criticism of this state of affairs, however, there seemed little point in my pursuing the matter in view of the Commissioner's claim to have taken steps to ensure that a similar situation did not again arise.

I found the conduct of the Senior Referee to be wrong in that—

(a) he failed to take sufficient steps to satisfy himself on the question of jurisdiction to hear and determine the claim and, pursuant to section 5 (2) (b) of the Ombudsman Act, such conduct was unreasonable and unjust; and

(b) he failed to comply with the provisions of section 20A of the Consumer Claims Tribunals Act, as amended and, pursuant to section 5 (2) (a) of the Ombudsman Act, such conduct was contrary to law.

Before making a report, which I am required to do when I find conduct to be wrong, I informed the Minister for Consumer Affairs of my intention to make such report and asked if he wished to consult with me (this I am also required by law to do). The Minister and I subsequently met and consulted whereupon I proceeded to make my report.

In my report, I strongly recommended that, in future, a referee be required to keep a proper record or transcript of proceedings at a Consumer Claims Tribunal hearing and that, in this regard, the law be amended to require this to be done if necessary. I also recommended that, so far as my first recommendation was concerned, consideration be given to the use of tape recording (e.g., cassette recorders) so that, in the event that it became necessary to transcribe a recording, the cassette could be re-used.

Finally, I recommended that the Commissioner for Consumer Affairs take up with the Department of the Attorney-General and of Justice the question of the desirability of showing the time of issue on a summons taken out in respect of a matter that is capable of referral to a Consumer Claims Tribunal.

Having made my report, I gave copies of it to the Minister for Consumer Affairs and the Commissioner as required by the Ombudsman Act, and to the Senior Referee and Mr A, as I may do if I so choose.

The Minister for Consumer Affairs subsequently informed me that—

(a) for various reasons, particularly bearing in mind the cost factor, he considered the transcription and taping of proceedings before the Tribunals to be impractical at the present time. However, accepting the views that I expressed he had written to the Senior Referee directing that, in futur, each Referee should make notes of such aspects of cases before them as might later become matters of contention and, further, that, where there is any doubt as to the jurisdiction of the Referee, he should adjourn the hearing in order to fully and carefully consider the ruling he should make.

(b) he had raised with his colleague, the Attorney-General, the suggestion that the time of issue he noted on a summons where it is likely or capable that the issue could be referred to the Tribunals. The Minister went on to say:

> "The Attorney has noted that the date of issue is, of course, already appropriately noted on a summons. However, following his referral of your suggestion to the Civil Claims Court and District Court, the Attorney is convinced that noting the time of issue would present practical problems that could only be solved by expenditure, which would be out of all proportion to the difficulties it would attempt to solve. The Attorney has noted that the problem appears to have arisen only once.
>
> It is estimated that some 50 000 matters would fall within this category and that there would subsequently be problems connected with the "bulk" lodgement of process at court offices, a great proportion of which would be consumer orientated.
>
> The Attorney has concluded, regrettably, that there appears to be no economically feasible method of implementing this suggestion and that it would appear practical for such problems to be resolved at the relevant time based on evidence available from the parties concerned."

I was disappointed that my recommendations regarding the transcription of Tribunals' proceedings were not implemented as I considered them important and basic to "justice being done". I adhere to that view now but appreciate, as the Minister has said, that there are practical difficulties involved. Nevertheless, I am not convinced that such difficulties (including alleged costs) are so great as to justify a failure to keep a proper record of proceedings before the Tribunals.

In relation to the matter of showing on a summons the time of its issue, I readily appreciate the problems and concede that to require this to be done would be impractical.

Despite my disappointment, I concluded that I had taken the matter as far as I was able and I discontinued my investigation.

COUNCIL OF AUCTIONEERS AND AGENTS

Refusal to tell complainants of action taken

My complainant, who had made a complaint to the Council about the behaviour of a licensed Real Estate Agent, wrote to me and complained that the Council would not tell him what action it had taken against the Agent, other than saying that "appropriate disciplinary action" had been taken.

I determined his complaint to be Council's refusal to provide details of disciplinary action taken against the Agent and sought the views of the Chairman of the Council of Auctioneers and Agents.

I received a reply from the Registrar which indicated that the Council had considered my letter at its most recent meeting and had directed him to invite my attention to the provisions of section 86A of the Auctioneers and Agents Act.

Section 86A provides as follows—

"(1) It shall not be lawful for any member of the Council or any of its officers or employees, except for the purposes of the administration of this Act or the regulations, to make publicly known or to make available to any person or court any information furnished to the Council pursuant to the provisions of section 38A, or disclosed by an inspection made under the provisions of section 38B or section 55 or by an audit made under the provisions of section 38D, or in an accountant's report made pursuant to section 83, except—

(a) to the court before which any proceedings are pending or being taken for—

(i) the grant of a license to or the renewal, restoration or cancellation of a license of;

(ii) the registration or cancellation of the registration of; or

(iii) the disqualification under section 29A or 51D of,

the person to whom the information is relevant; or

(b) to the court in which proceedings are being taken for a breach of this Act against the person to whom such information is relevant; or

(c) to the court which or the judge or magistrate who may be order in accordance with subsection (4) of section 74 certify that any person should be permitted to claim against the Auctioneers and Agents Fidelity Guarantee Fund.

(2) The Registrar may with the approval of the Council communicate to any person directly concerned in any transaction with a licensee or real estate dealer, as the case may be, any information furnished to the Council in accordance with the provisions of this Act, is so far as it relates to any such transaction and directly concerns any such person.

(3) Any person who commits a breach of any provision of this section shall, in addition to any other proceedings, penalty or punishment to which he may be liable, be guilty of an offence against this Act."

The Registrar said that Council considered that any disciplinary action taken against a licensee was a matter between the Council and the licensee.

I had a close look at the Auctioneers and Agents Act and then wrote to the Chairman and said—

"You will recall that the complaint in this case, related to Council's refusal to provide or disclose details of disciplinary action taken against an agent

and, in this regard, I note that Council relies on the provisions of section 86A of the Auctioneers and Agents Act to justfy its view that "any disciplinary action taken by (the) Council against (a) licensee . . . is a matter between the Council and (the licensee)" and cannot be disclosed, not even to the person whose complaint led to such action being taken.

I am afraid that I cannot agree with Council's interpretation of the effect of section 68A and, in reaching this view, I have had regard to the following considerations:

(a) Section 68A renders it unlawful for any member of Council or any of its officers or employees to make available to the public or any person or court, apart from the exceptions listed in subsections (1) (a), (b) and (c), *any information furnished to the Council* pursuant to section 38A; or *disclosed by an inspection* made under sections 38B or 55; or *disclosed by an audit* made under section 38D *or in an accountant's report* made under section 83;

(b) The various sections mentioned in section 86A have to do with—

the provision of information, on requisition, by licensees relating to trust account operation, payments received, etc. (section 38A);

information obtained by an inspection of books of account and other records required to be kept in relation to trust accounts (section 38B);

information obtained from an audit of accounts and the resultant auditors' report (section 38D);

information obtained by an inspection of the record of all transactions by or with a real estate dealer (section 55) and

information obtained from an accountant's inspection of accounts and the resultant report.

(c) It seems quite clear that the provisions of non-disclosure in section 86A relate only to information which is furnished *to the Council* in a variety of ways, as set out in the other sections of the Act mentioned above, and has no application in relation to disclosure of *action taken by the Council* as a result of a complaint having been made to it. It appears quite clear to me that section 86A does not prevent the Council telling a person what it has done in relation to the conduct of an agent, etc., which has been the subject of that person's complaint".

Consequently, in my view, Council's refusal to disclose details of disciplinary action taken in respect of a complaint has no statutory basis and is merely an administrative practice. The question, then, that I have had to consider is whether such practice is reasonable in terms of the Ombudsman Act.

"I believe that a complainant is entitled to know the action that has been taken in respect of his complaint. In my view, it is not sufficient to tell him that his complaint has been investigated or dealt with, without also telling him whether his complaint was found to be well-made or without substance and, if the former is the case, to tell him the action taken by the investigating authority. In other words, a complainant is entitled to know the outcome of his complaint.

It seems to me that this view cannot be regarded as a novel approach but must be seen as one that is firmly entrenched in modern consumer protection legislation, of which the Auctioneers and Agents Act now forms a part.

On this basis, I suggest that Council's present practice might be found to be wrong in terms of the Ombudsman Act and might be reconsidered with a view to ensuring that complainants are informed of the action taken by Council in respect of their complaints, including details of any disciplinary action taken in respect of an agent, dealer, etc., the subject of complaint."

I sought the Chairman's comments about the views I expressed and he later wrote to me in the following terms—

"It has been Council's policy in the past to advise the complainant that the matter has been dealt with, and indicate what action has been taken without going into detail. If the matter is a straightforward one there is normally no further development.

I understand Council's policy in this regard was adopted following problems created by attempts by complainants and others to improperly use the information given by Council.

However, the Registrar and at times, Senior Officers, when discussing the matter with a complainant, either in person or by telephone, have enlarged on the reasons for and extent of any action taken where they believe such explanation might reasonably be understood.

You will appreciate that very often action taken by the Council either direct or through the Courts resulting from the investigation of a complaint is in no way related to the complaint itself. So often too, in these circumstances the investigation shows the actual complaint to be groundless or, on the point of the complaint there are not sufficient grounds on which we can prosecute. It has been found prudent in these instances to advise the complainant that the matter has been investigated and the agent has been disciplined by Council or advise of the outcome of Court action.

In view of the views expressed by you, I will have the matter of release of information discussed at my next Council Meeting in September."

I replied and said—

"It may be of some assistance to you if I clarify a little the views I expressed in my last letter. In this regard, I do not see that it is necessary to go into considerable detail when informing a complainant of the outcome of his or her complaint. For example, in the case involving Mr Lynam, it would have been sufficient to tell him that the Council had severely reprimanded the Agent concerned; I submit that it was not sufficient to merely tell him that the Council had taken "appropriate disciplinary action against the Agent". In other words, the advice given to complainants should be specific even if it is not extensive.

You mention in your letter that sometimes action is taken through the Courts and sometimes there are not sufficient grounds on which to prosecute. I can see no real reason, in either case, why the complainant cannot be truthfully informed of the position.

Similarly, if the Council's investigation shows a complaint to be without substance, the complainant should be so informed, and, be given reasons for the Council's decision."

After Council had considered the matter and the Chairman had written to me, I was able to inform my complainant as follows—

"The Chairman of the Council has informed me that the matter of disclosure of information regarding the outcome of Council's investigations of complaints was discussed at Council's meeting on 9th September when Council resolved as follows—

'(Council) will advise complainants of the outcome of any investigation it makes or the result of any Court proceedings where, in its opinion the release of such information will not prejudice Council's further actions in the matter.' "

Where Council is of the view that it may seek to take further action against the Agent, even if only to the point that it will keep the Agent's activity under surveillance, it will release to the complainant information it sees fit under the circumstances.

The Chairman has commented in the following terms—

"You will appreciate that this decision is a departure from Council's previous policy but you will note it is still not prepared to release the information when it thinks it unwise to do so.

Reverting back to the complaint by Mr ..... against Agent, ..., I am sure the reluctance to provide precise information to Mr ..... in December, 1979, was influenced by Council's decision to keep the activities of the Agent under surveillance as well as its view that there was not sufficient evidence at that stage for it to lodge a complaint for cancellation of the licenses."

In the light of all of the information available, I regard your complaint to me to have been sustained. However, in view of Council's decision to, in future, advise complainants of the outcome of complaint investigations (except in the circumstances outlined), I propose taking the matter no further in terms of the Ombudsman Act.

In this regard, whilst Council's decision might not go as far as I would have hoped, it certainly represents an improvement over the previous position. Of course, any complainant in future dissatisfied with the information disclosed by Council following investigation of a complaint can still make a complaint to me and I will be able to look into the matter in the light of the specific circumstances of the case."

I then concluded my inquiries.

COUNCIL OF AUCTIONEERS AND AGENTS

Unreasonable Requirement that Multiplicity of Licenses be Held

My complainant, the Managing Director of a firm of Real Estate Agents, Auctioneers and Valuers, with offices in five suburbs, stated his complaint in the following terms—

> "1. In each of our offices we run a number of Real Estate Corporations.
>
> 2. Each Corporation has only one place of business.
>
> 3. Each Corporation holds a Corporation License as a Real Estate Agent.
>
> 4. In each office there is a fully licensed person as an employee in charge.
>
> 5. That employee in charge is an employee of each of the Corporations.
>
> 6. The Council of Auctioneers insist that for each Corporation the person in charge must hold an additional personal Estate Agents License, i.e., 10 Corporations—one employee in common must hold 10 individual identical Licenses.
>
> We maintain that nothing in the Auctioneers and Agents Act allows this. The Council agrees, but says it is a policy matter. Our complaint is that policy not covered or outside the Act is unenforceable, undesirable and merely an unorthodox way of raising revenue."

I received a report from the Registrar of the Council and one of my officers subsequently held discussions with him. In pursuing my investigation, a very close study of the Auctioneers and Agents Act was necessary. The outcome of my inquiries was reflected in the terms of a letter I directed to the Chairman of the Council wherein, *inter alia*, I said—

> "I have noted all that the Registrar has had to say and particularly that the Council interprets the relevant provisions of the Auctioneers and Agents Act as requiring a licensed person in charge of a number of corporations operating from a common place of business to hold separate personal licences in respect of each such corporation.
>
> In addition, one of my officers has had discussions with the Registrar about the matter. I am aware that the complainant has agreed to apply for the additional licences required by the Council on the understanding that, should legal advice by the Registrar support the complainant's interpretation of the legislation, the fees paid will be refunded.
>
> It seems quite clear that the question to which I should address myself is whether the relevant provisions of the legislation require (and therefore render the Council's present requirement correct) a licensed real estate agent to hold additional licences when he is the nominated person in charge of several corporations carrying on business at one place. The provisions of sections 20 and 21 of the Act, in my opinion, do not make the position abundantly clear.
>
> *Section* 20 appears to require a corporation to hold a corporation licence and to employ a licensed person in charge at its sole or principal place of business. *Section* 21 (2) (*c*) appears to additionally require a corporation to employ a licensed person as the person in charge at every other place it conducts its business. *Section* 21 (2) (*a*) appears to prevent *a person*, by virtue of one licence, keeping more than one place for the conduct of his business whilst *section* 21 (3) appears to prevent a person from being in charge at more than one place of business.
>
> Following my officer's discussion with the Registrar, I understand that the Council's present views regarding the interpretation of the various sections mentioned above can be summarized as follows—
>
> (a) the provisions of section 21 (2) (a) should be and are interpreted to mean that a licensed person can only work for one firm or employer by virtue of one licence and, in this context, the word "place" and the phrase "place of business" should, as appropriate, be interpreted to mean "company" or employer";
>
> (b) the provisions of section 21 (3) could be said to strengthen the above contention; and
>
> (c) the intent of the legislation was to make public the identity of the person in charge of every corporation carrying out business in the field and, if separate licences were not required in respect of each company for such a person (even when it is the same person), the public would not be in a position to know who is in charge of each of a number of companies operating at the one place."

The philosophy involved in this interpretation of the legislation might well have merit, but, I regret to say, I am not convinced that such interpretation is correct. It seems to me that the major difficulty in this regard is the use of the words "place" and "place of business" in the Act.

Even if the relevant sections are read in the way suggested by the Registrar (i.e., by substituting "company/employer" for "place" and "place of business") a considerable difficulty then arises in respect of the Council's policy of allowing one person to hold separate licences for separate companies operating from the same "registered place of business", as follows—

(i) Section 21 (2) (a) would read—

"No person shall by virtue of one real estate agent's licence, keep more than one (company/employer) for the conduct of his business".

This would support the Council's present interpretation of the law.

(ii) Section 21 (3) would read—

"No person shall in pursuance of this Section be in charge at more than one (company/employer)".

This would completely negate the policy referred to above.

In addition, I cannot find in the Act any requirement that a licensee publicly display his licence or licences. Section 35 merely appears to require him to paint or affix some type of sign showing particular information on the outside of his registered office and any other place he carries on his business.

On the material available to me, I am of the view that the question posed must be answered in the negative for the following reasons—

1. In the absence of any definite indication to the contrary, the phrase "place of business" should be construed to mean, simply, the place at which a person/corporation conducts or carries out his/its business. The phase, in its own right, is not defined in the Act; however, the definition of "Principal place of business" in section 3 says nothing to indicate that the phrase should be taken to mean anything other than what it says in terms of the usual meaning of the words used in it.

2. (a) In terms of sections 20 and 21 of the Act, the only requirements placed on a corporation appear to be that—

it holds a corporation licence;

and

it employ as a person in charge, at every place it carries out business, *a* licensed person.

(b) The only requirement placed on a licensed person appears to be that he carry out his business, by virtue of one licence, at only one place.

3. (a) There appears to be nothing in the Act or Regulations which requires a person, being the person in charge of a number of corporations all of whom have a common place of business, to take out separate, personal licences in respect of each corporation involved.

(b) In this regard, I have noted the then Minister's comments in the second reading speech, relating to the 1975 Amendment Bill, wherein, *inter alia*, he said—

"The Act will simply require that a licensed person be in charge of every branch office of a corporation, in addition to its principal place of business". (Hansard—19.3.75—pp. 4966)

Such comments appear to support the view I have expressed.

It seems to me, then, that a person placed in charge by more than one corporation, where the corporations carry on their business at the same place, needs only to hold one personal licence, because—

he is a person "who is the holder of a real estate agents licence". (Section 21 (2) (c))

and

he is not "in charge at more than one place of business". (Section 21 (3))

and

he is not keeping "more than one place for the conduct of his business as a real estate agent". (Section 21 (2) (a)).

"Accordingly, at this stage, my view is that the complaint made to me should be held to be wholly sustained and that the Council's conduct in insisting that additional licences be taken out in respect of each of the various corporations by the licensed persons in charge at Chatswood, Crows Nest, Killara, Northbridge and Willoughby, respectively, might be found to be wrong in terms of section 5 (2) (a) of the Ombudsman Act in that it is contrary to law.

In this regard, I would welcome your further comments about the views I have expressed. In the meantime, it would appear appropriate to obtain the legal advice referred to by the Registrar, in his discussion with my officer, before requiring the issue of the additional licences involved in this case."

The Chairman replied that, whilst he could not disagree with my interpretation of the relevant sections of the Act, he felt sure that it had not been the original intent for the Act to operate in the way I'd suggested. He expressed the fear that the arguments advanced by the complainant might be a device to avoid the intent of the Real Estate Salesmans (State) Award and certain provisions of the Auctioneers and Agents Act.

The Chairman went on to say—

"If such a situation obtains and is expanded, I could see unnecessary confusion in the minds of the public with a number of companies working out of one office.

A further question is, to what extent are people who are dealing with one of these companies protected under the Council's Fidelity Fund and indeed what risk is there to the fund itself. You will appreciate that on your interpretation, one contribution only would be made to the fund in respect of the sole licensee working out of one office (for six companies).

As my Registrar has indicated to you, we await our own legal advice on the position.

You are probably aware that we are currently undertaking a complete review of the Auctioneers and Agents Act. In considering the new Act, regard will be had to the points raised, but in the meantime, following receipt of our legal advice, I will seek the Minister's view on an immediate amendment to the present Act."

I replied in the following terms—

"The problems to which you have alluded in your letter are real ones and I can appreciate your concern. However, it seems to me that any question of circumventing the provisions of the Real Estate Agents (State) Award would be one for referral to and action by the Department of Industrial Relations rather than one for the Council to become involved in.

In any case, if the legal advice on which you are at present waiting confirms the interpretation of the Act that I have put forward (and, I note, you do not disagree with my views in this regard), then the remedy lies not in implementing the provisions of the Act incorrectly, as appears to be the case at the moment, but in amending the Act to overcome the problems that you have identified.

I concede that Council should rely on its own legal advice but, leaving that aside, I must say that nothing in your letter persuades me that I should alter the view I expressed in my last letter regarding Council's conduct."

The Chairman subsequently informed me that the question of amending the Act was being considered and that the Minister would make a decision when the legal advice that Council had sought was received.

Following a later telephone discussion with the Chairman, I wrote to him asking that he confirm that the required legal advice had been received and to inform me of the substance of such advice. I also asked that he let me know whether the fees paid by the complainant, in respect of the additional personal licenses sought at the Council's behest, had been refunded in accordance with the agreement made with the complainant.

The Chairman wrote and said—

"As mentioned on the telephone, new Legislation is in the course of preparation and I expect will be presented to Parliament within the next few days. The fees paid by the complainant have been refunded as undertaken by us in the arrangement made with him."

On 30th October, 1980, the Minister introduced the proposed amendments in the House in the Auctioneers and Agents (Amendment) Bill. To use the Minister's words (Second Reading Speech—Hansard—No. 24—pp. 2453), the relevant amend-

ment to section 21 was designed to ". . . prohibit a person being a licensee in charge of a place of business for more than one licensee at that place of business . . .".

In the circumstances, I held the complaint to have been sustained but, in the light of the action taken by Council, took the matter no further.

DAIRY INDUSTRY AUTHORITY OF N.S.W.

Crying over milk that was not spilt

I received a complaint on behalf of a family business about the Authority's refusal to pay them a sum of $4,000 in respect of milk delivered to a receiving agent in the South-West of the State.

The company conducted a dairying and milk vending operation and held a quota to deliver 7 983 litres of milk per week to the factory in question. On the 6th January, 1978, the company applied to the Authority for the surrender of their quota, nominating 3rd March, 1978, as the effective date of surrender.

The company was subsequently notified by the Authority that approval had been given for an *ex gratia* payment in respect of the quota and that the quota would be cancelled on the 31st March, 1978. The company assumed from this that it would be entitled to deliver milk to the Authority through the receiving agency up until 31st March, 1978. This it did until 21st March, 1978, believing that it would be paid for any milk delivered prior to the cancellation date fixed by the Authority.

In the event, although the receiving factory purchased the milk delivered between 3rd March and 21st March, 1978, this did not involve acceptance of the milk by the Authority, and payment was not made at Authority rates. The family company suffered a loss of $4,000 as a consequence.

The matter was pursued by the company direct with the Authority in the first instance and then through the Minister for Agriculture. These efforts proved fruitless. The Minister confirmed the Authority's view that the company had no grounds for expecting payment of any sum by the Authority in respect of milk delivered on and after 3rd March, 1978, the date of the quota nominated by the company.

The company subsequently sought an investigation under the Ombudsman Act and this was done. The Authority proved most co-operative, although its first response was simply to re-affirm and support its decision.

It became apparent, however, that the Authority itself had initially favoured payment to the company and was influenced against doing so by an internal report which, in my view, unduly emphasized the question of legal liability. An additional impediment to payment was provided by an error within the receiving factory, where the deliveries received between the 2nd March and 21st March, 1978, were not recorded on the weight sheets as they should have been, regardless of the currency or otherwise of the quota.

I put my views on the matter of legal liability to the Authority, and also pointed out that, because of the administrative factors involved, and especially the error within the receiving factory, there could be no question of a precedent being created if payment were to be made.

The position was reviewed by the Authority in the light of the arguments I put forward, and an *ex gratia* offer of $3,611 was extended to and accepted by the company. This was the difference between the amount already paid to the company and the amount they would have received if the quota had been deemed to be current to 31st March, 1978.

GOVERNMENT INSURANCE OFFICE

A Claim Following a Visit from a Burglar

I received a complaint from clients of the Government Insurance Office to the effect that the Office was unjustly refusing to meet in full a claim arising from burglary. The Office, through its agents, a firm of Loss Assessors and Investigators, had declined to pay more than $440, whilst the complainants contended that articles with a total value in excess of $1,000 had been stolen from their home.

The difficulty in respect of the claim had arisen from the fact that a preliminary list of stolen items had been prepared and given to the local Police and to the Assessors on the Saturday night in the confusion and distress of the hours immediately following discovery of the burglary. A more comprehensive list was prepared following

a more thorough check of the contents of the home in the calmer atmosphere of the following Sunday. This list was claimed to have been presented at the local Police Station on the Sunday evening, and to the Assessors on the following Wednesday, by which time a piece of jewellery was included on the list given to the Assessors, and also reported to the Police Station as missing.

When in the course of processing the claim it was learnt by the Assessors that the only list of stolen items held by the Police was that given to them on the Saturday night, plus the item of jewellery, the settlement offered was restricted to that list. It was not until some time later that the complainants, in the context of their then current dispute with the Assessors, visited the Police Station with a check list and themselves learnt that the Police had no record of the list presented at the Station on the Sunday after the burglary. The check list was retained at the Police Station and treated by them as the first revision of the preliminary list.

The Assessors took the view that the check list was a belated attempt on the part of the insured to affect a contrived reconciliation between the only inventory presented to the Police and the adjusted investory given to them as the basis of the claim against the Government Insurance Office. Acting as the agent of the Insurance Office the Assessors accordingly refused to recognize any claim other than that arising from the list compiled on the night of the robbery, plus the item of jewellery reported missing on the following Wednesday. In short, the Assessors regarded the later lists as an attempt to cheat the Insurance Office.

Having examined Police reports on the procedures followed in the Police Station, it seemed to me to be at least as likely that the list said to have been presented at the Police Station on the Sunday evening was mislaid and irretrievably lost. After all, it had been made clear to the claimants that it was open to them in the ordinary course of events to adjust the first list given to the Police in the stressful circumstances of their discovery of the crime, and if there was to be an attempt to cheat the Insurance Office it would be glaringly obvious that both lists would need to agree, and exceptionally silly to attempt to effect an agreement between those lists months later and only after quite a considerable discrepancy had been pointed out to them as a reason for refusing to meet their claim in full.

Accordingly, I pursued the matter further with the Chairman of the Government Insurance Office, and this led to direct involvement of the Office itself in a review of all of the circumstances which had led to the complaint under the Ombudsman Act. The outcome of this action was that the Office concluded that the extent of loss claimed was substantiated and a revised offer of settlement on that basis was extended and accepted by the complainants.

GOVERNMENT INSURANCE OFFICE

A De Facto Insurable Interest

My complainant went to the Government Insurance Office when he renewed his house and contents insurance policy and, although the policy was in the name of himself and his wife, as joint owners of the home, he asked to have specified on the policy the jewellery of his de facto wife. He was advised to have a valuation done, and he did so. Some of the jewellery was itemized on the policy and the remainder was in a list from the valuer retained by the Government Insurance Office.

The house was subsequently burgled and the jewellery stolen. The Government Insurance Office refused the claim for the jewellery on the ground that there was no insurable interest, that is, that the insured, the complainant and his estranged wife were not owners of the property claimed for. The Government Insurance Office claimed that "no mention was made that any insured property belonged to a third party" while the complainant pointed out that his de facto wife had accompanied him and had been actively involved in the placing of the jewellery on the policy and that the clerk who dealt with them knew of her relationship to him.

My staff raised the apparent conflict as to the facts with the Government Insurance Office and there followed meetings between the complainant and their staff. Finally the Government Insurance Office accepted that it was the complainant's intention that his de facto wife have an insurable interest in the jewellery and would have placed her name on the policy if he had known that was required. The Government Insurance Office advised me subsequently that "the matter has now been settled to the satisfaction of all parties concerned".

I concluded that the complaint was sustained, but noted that "following further explanation the Office has settled the matter satisfactorily".

GOVERNMENT INSURANCE OFFICE

A "Shake-Up"

Many people approach me when faced with what they consider to be an unfair decision by a public authority. My investigation sometimes reaffirms the decision made by the authority, and satisfies the complainant that the manner of his treatment was fair. Often, of course, a second and more thorough look at a particular matter by an authority following commencement of my investigation results in a changed decision.

In this case, my complainant approached me after a claim under his Householders' Insurance Policy was rejected by the Government Insurance Office. The circumstances leading to this rejection were as follows—

> On 5th July, 1977, at 6.05 a.m. there was an earth tremor centred near the towns of Gunning and Yass. On that morning, a large crack appeared down the wall of his lounge room, plus a number of smaller cracks through the house. He contacted the Head Office of the Government Insurance Office later that same day and again some months later. Despite assurances that an officer would come and inspect the damage and provide a claim form for completion, it was not until early in 1980 when a burglary occurred at his home that an assessor calling on that matter was informed of the earlier earthquake damage. The assessor indicated that an earthquake had not occurred on the date in question and that no claim was payable, and a further letter from the assessors dated 23rd April, 1980, informed my complainant that there was no official record of any earthquake at the time he claimed.
>
> My complainant then contacted the major newspapers and the Commonwealth Meteorological section at the University of New South Wales and his inquiries revealed that an earthquake occurred on 5th July, 1977, at Bowning and that the percussion affected the Parramatta area and spread into the North Shore. A check he made of other Insurance Companies revealed that claims had been paid. He informed the firm of Loss Adjusters acting for the Government Insurance Office of this information. Nevertheless, the firm maintained that its inspection of his property established that the house was over 100 years old, and that while internal cracking had occurred it appeared that this cracking had resulted from normal settlement, and other inquiries made failed to give evidence of any other damage being caused in the near vicinity of his home. Accordingly, the firm wrote to my complainant on 29th August, 1980, denying liability and informing my complainant that, while an earth tremor had occurred on the date claimed, no reports of damage were received in his particular area. The letter further stated that the Government Insurance Office had indicated to its loss adjusters it had no knowledge of the claim being reported and in the circumstances was unable to accept liability. Despite numerous 'phone calls to the Government Insurance Office, the decision remained unchanged.

When furnished with this informtaion, I contacted the Government Insurance Office in early October, 1980. Following this formal notification to that office, my Investigation Officer had discussions with an Officer of the Government Insurance Office and inspected the file on this matter. A further Engineering Report was called for, and my complainant's property inspected again on 27th October, 1980. The findings on this occasion were conveyed to me by letter from the Government Insurance Office dated 2nd December, 1980—

> "It is confirmed that initial enquiries indicated that damage appeared to have resulted from normal settlement and there was no evidence of other earthquake damage in the near vicinity. However, following further enquiries it has been determined that a minor earthquake was recorded at the time in question and that it would probably only affect older buildings. The damage is consistent with the alleged cause and it has therefore been accepted as a claim under the policy.
>
> Settlement has been negotiated at $2,475 and a cheque (in this amount) has now been despatched."

My complainant attended my Office personally to express his thanks for reaching a successful conclusion to this matter which he had been pursuing on his own behalf with the Government Insurance Office for four years.

On 10th December, 1980, I wrote to Mr Trimmer, Chairman of the Government Insurance Office and informed him I found the complaint to be sustained in terms of the New South Wales Ombudsman Act. As the matter was resolved, I then concluded my investigation.

HEALTH COMMISSION

Furnishing of Incorrect Information

The complainants purchased land in a low-lying area in the Gosford district and, prior to exchanging contracts, their Solicitor made a formal search with the Health Commission as to whether the land had been notified as unhealthy for building purposes in terms of section 55 of the Public Health Act.

Section 54 of the Act enables the Commission, "after causing due inquiry to be made", to report to the Minister that it would be prejudicial to health that any land in its then condition be built upon. Section 55 enables the Minister, after considering such report, and publishing notice as required by the Statute, to declare that the land shall not be built upon until corrective measures are taken.

The complainant's search was returned by the Health Commission with a certificate to the effect that the land involved had not been notified under section 55 as unhealthy building land and, consequently, they proceeded with the purchase. Subsequent events were described by the complainant's Solicitor in the following terms—

> "After settlement of the sale the purchasers had plans prepared to erect a dwelling on the subject property and attended Gosford City Council for the purpose of lodging same.
>
> On attending to lodge the plans they were advised that the property was one which may require fill and were told that they must obtain a clearance from the Health Commission prior to building approval being granted.
>
> On notifying (us) of the above we provided our clients with the Certificate which was shown to Council who indicated that the Certificate appeared to be incorrect.
>
> (We) then wrote to the Health Commission asking whether or not the property did in fact require fill and we enclose herewith a copy of their reply dated March 11, 1980."

The reply received from the Commission said—

> "I wish to inform you that the subject land is within an area which is being investigated with a view to its notification under section 55 of the Public Health Act as unsuitable for building purposes. An inspection by an officer of this Commission disclosed that although some filling has been spread over the land it is not sufficient to render the land suitable for building and in order to do so additional filling consisting of clean soil or sand should be spread over the land and evenly graded to the levels shown on sketch below.
>
> On completion of filling operations this Commission should be informed in order that an inspection may be made with a view to excluding this allotment from the area to be notified."

The complainants took the position that, had they known the land required filling before building would be permitted, they would have purchased land elsewhere. They felt that they had been misinformed by the Commission at the time of formal search and they asked the Commission to meet the cost of filling. The Commission declined to do so.

I took up the complaint with the Chairman of the Health Commission and he informed me that the certificate issued as a result of search was correct in that the land was not notified under section 55. He added—

> "The Commission's certificate omitted disclosing that the property was in an area which it was proposed would be notified as unhealthy for building purposes at a later date.
>
> (The complainants) have filled their land to a level which will be satisfactory for building purposes. However, the filling used is not a kind that will allow for on-site disposal of domestic waste water.
>
> I enclose for your information a copy of a letter from the Commission to the complainants indicating that, subject to the approval of Gosford City Council, no objection will be offered to the erection of buildings on their allotment."

I wrote again to the Chairman and said—

> "I am concerned that, notwithstanding that the certificate issued on 20th November, 1979, was technically correct in that the land involved had not been notified under section 55 of the Public Health Act, the complainants obviously relied on the certificate to indicate that the land was not unhealthy building land. They claim that this led them to purchase the land.

There are a number of issues arising from this in respect of which I would appreciate your further advice—

(a) How, other than by approaching the Commission on formal search, could the complainants have ascertained that the land might be regarded as unhealthy building land requiring fill?

(b) (i) When was the decision made to investigate the area in which the land is situated with a view to its notification under section 55?

(ii) Was such investigation current when the certificate was issued and, if so, why was not mention made of it when the formal search was made?

(c) Has additional fill been placed on the land since the letter of 11th March, 1980, was sent to (the complainants)? If not, how is the land now regarded as meeting the Commission's requirements?"

As a result of the Chairman's report, I felt that the position could be summarized as follows—

(a) The subject land was low lying and, when first inspected by Commission officers in 1973, was under water. It was next inspected in February, 1980, when it was found that, in the intervening time, some filling had been spread over the land, but this ended about 5 metres short of the rear boundary and the filling was generally 0.5 metres below the required level.

(b) The allotment adjoining on the north-west corner had been filled in 1976 to the required height and was well above the subject lot. Another lot next door but one, was filled to the required level in 1978. The Commission contended that it should have been obvious that further filling was required to make the land suitable for building.

(c) Gosford Council was aware of the Commission's interest in this area as it was kept informed of the results of inspections. The previous owner, also, may have known of the position but there was no clear evidence in this regard.

(d) The area had first come under notice about 1965. In 1969 a large part of the area had been notified as unsuitable for building. It was realized, then, that the area should be further extended but, at that time and until recently, there had been little activity in the area and its notification had a low priority. Council was aware of the Commission's interest in the land and, in the last few years, several lots had been inspected to supply filling requirements.

(e) The notification of the area has not yet been finalized as more field work was needed before this could be done, and, to date, there had been more urgent work to be carried out.

(f) The Chairman agreed that it would have been preferable had the certificate issued by the Commission drawn attention to the proposal to notify the complainants' land under section 55 of the Public Health Act, but this, unfortunately, had been overlooked. He added that any inconvenience caused thereby was regretted but pointed out that filling the land to the Commission's requirements was to the owner's advantage as the land would otherwise remain wet for protracted periods following rain.

(g) An inspection on 27th May, 1980, had disclosed that the required filling had been spread on the land, and accordingly the complainants had been advised that no objection would be offered to the erection of buildings on the allotment."

After carefully considering all of the material available to me, I took the view that the action taken by the Commission in this case, following reference of building plans to Council, was designed to assist the complainants to overcome the problems evident on the land and which, no doubt, if not corrected, would have led to refusal of permission to build by Gosford City Council pursuant to section 313 of the Local Government Act.

At the same time, I formed the view that the fact that the land was being investigated for possible notification under the Public Health Act should have been made known at the time the formal search was dealt with.

I, therefore, wrote to the Chairman and said—

"It seems clear from what you have had to say that Gosford City Council, being aware of the Commission's interest in the area, informed the complainants of the likely problems at the time building plans were submitted

for approval. Whilst I accept that the Commission was trying to help the complainants by drawing their attention to the problems with the land, the terms of the Commission's letter of 11th March, 1980, to (the complainants) appeared to clearly indicate that, unless the land was further filled, building approval would not be forthcoming. It may well be that it was not the Commission's intent to convey such an impression, bearing in mind that the procedures laid down in sections 54 and 55 of the Public Health Act had not been followed.

In other words, whilst it was open to Gosford City Council to refuse building approval, in terms of section 313 of the Local Government Act, and in the light of its knowledge of the Commission's interest in the area, it was not open to the Commission to infer, in the absence of notification of the land, that approval for building would not be given by the Commission. The position should have been made much clearer to (the complainants) than it was.

In all the circumstances, you might now let me know whether there is any reason why, in future, certificates issued should not disclose that, where such is the case, land the subject of search, is subject to investigation for possible notification in terms of the Public Health Act."

I was pleased when the Chairman informed me that, in future, search certificates would be appropriately endorsed along the lines that I had suggested.

DEPARTMENT OF LANDS

Delay in Dealing with Application

I investigated a complaint alleging extensive delay in dealing with an application to convert a Special Lease to freehold and the reply I received from the Under Secretary for Lands indicated that the complaint was well founded.

Problems had arisen due to a decentralization of work from the Crown Lands Office to Land Board Offices. The need to relocate staff (involving promotion action in most cases) had resulted in some vacancies occurring and had caused delay.

Whilst I appreciated the difficulties facing the Department, my concern was that applicants ought to be warned that their applications were not going to be dealt with quickly and the appropriate time to do this appeared to me to be when an application was first received at a Land Board Office.

In this regard, inquiries I had made indicated that it was not, then, the practice to acknowledge receipt of applications but that a form letter was shortly to be introduced to overcome this difficulty. One of my officers had discussed the matter with the Department's Secretariat and I had been provided with a copy of the form letter.

I wrote to the Under Secretary and said—

"Whilst the letter will certainly be an advantage over the current practice of not acknowledging receipt of applications at all, in my view, bearing in mind the delays that applicants can now expect to encounter, the letter does not go far enough in that it does not specify that a delay of several months can be expected. Neither does it tell the applicant of his ability to put forward special circumstances which might warrant special priority in processing his application.

I am firmly of the view that applicants should be plainly told the situation regarding delay, as you have outlined it to me, and be given the opportunity to put forward any special circumstances which might exist. I realize that form letter A744 has only recently been printed and it would be unrealistic to alter it at this time (perhaps it could be altered when it is being reprinted to replenish stocks)."

The Under Secretary replied, saying—

"It is agreed that applicants should be informed by the Department of the situation regarding likely delay in the processing of a conversion application. Apart from any delay caused by work volumes and staff shortages, etc., in Land Board Offices, the length of time to finalize a conversion application depends on the nature of the administrative action involved in the particular application. In this regard, the early finalization of a conversion application is often outside the control of the Department. In particular, where an application is affected by the provisions of Part 11A of the Forestry Act, 1916, the Forestry Commission is afforded a statutory period of three months after receipt of notice of the application or, on advice, a further period not exceeding three months, in which to certify that it objects to the granting or confirmation of the application.

The National Parks and Wildlife Service is afforded a similar period in which to indicate its attitude towards applications affecting its areas of interest.

In general, it may not be unusual for a period of six months or even more, to elapse in finalizing a conversion application. In all the circumstances, it has been decided to indicate to all applicants by means of a footnote to form A744, that it is not unusual for a period of six months or more to elapse in finalizing a conversion application. The advice will be incorporated into the form on re-print.

The proposal that it should also be indicated to applicants that they may put forward special circumstances which might warrant special priority in processing their applications, is not favoured. This could only be expected to result in a large number of requests for expedition which could only be met to the detriment of other applications, etc., and in many instances, would be incapable of fulfilment because of administrative and statutory requirements.

Where genuine reasons exist for expedition, it has been found that it is usual for applicants to indicate this to the Department of their own volition. Where practicable, the Department endeavours to assist the parties. It is felt that advice to applicants of the likely period of delay will, in itself, serve to result in applicant submitting requests for expedition where special circumstances exist, without the necessity for in effect inviting them to do so."

I accepted the views expressed by the Under Secretary, welcomed the action he proposed to take and concluded my inquiries.

DEPARTMENT OF LANDS

Proposed Termination of a Permissive Occupany and Subsequent Demolition of a Riverside Cottage

This complaint was from a Solicitor on behalf of a brother and sister in relation to a proposal by the Minister for Lands to demolish their family holiday cottage, wharf and boat ramp on the banks of the Kalang River at Urunga.

The family had been advised in June, 1979, that the structures would be removed because in 1965 the Department had adopted a general policy of clearing foreshore occupations as they became available. Part of that policy was that *no transfers would be allowed other than in special circumstances where hardship could occur.* Unfortunately for the family, the father (the holder of the permissive occupancy), died in June, 1966, and the family had not at that stage applied to transfer the Permissive Occupanies into their names.

In early August, 1966, the Lands Department notified holders of P.O.'s in that area of amended conditions relating to them and apparently such a notice went to the father (recently deceased) advising that the P.O. could not be transferred except in special circumstances. Nothing further happened until early 1977 when the Department advised a number of owners of cottages on Permissive Occupancies of the termination of their leases because the structures thereon were derelict.

Such a notice was not issued to the late father as apparently the cottage was in good condition. However, the son on finding out about the notice, on behalf of the estate wrote to the local member of Parliament supporting the other owners of the Permissive Occupancies so served, to have these notices of termination withdrawn. It was as a result of his letter that the Lands Department became aware of the death of the father.

Shortly after the Department issued on 31st August, 1977, a notice of termination of that Permissive Occupancy addressed to the Estate and giving its reasons as "holder deceased and occupancy not transferable".

The family then tried through various members of Parliament to have the notice withdrawn and the Permissive Occupancy transferred to their name.

On 19th July, 1979, I received the complaint and commenced an investigation with the Lands Department. The first action taken was to request the Department to provide a report on the basis that according to the Solicitors the policy of the Department had not been fairly or consistently applied. At the same time I requested that the demolition action scheduled for the removal of the cottage be postponed while my inquiries were under way.

The Solicitor in the meantime had obtained an Exparte Injunction to restrain the Minister and the Department from demolishing the cottage and other improvements.

The Department then provided a report which advised that the proposed demolition had been stayed following the service of a notice of Injunction and Summons.

The report went on as follows—

"In 1965 the Department formulated a policy of clearing the foreshores of the Kalang River near Urunga (formerly Bellingen River) of all the Permissive Occupancies then existing by 31st December, 1983. On 4th August, 1966, the holders of all the occupancies involved were advised of the decision. A copy of the notice sent to Mr S..... is attached. It will be seen that holders were informed that—

1. no transfer will be allowed other than in special circumstances where hardship could occur;
2. in the event of a building becoming derelict through any cause, the remains of the building are to be removed from the site and the land is to be left in a clean and tidy condition;
3. no extensions or alterations to existing buildings will be permitted and no new buildings are to be erected.

In December, 1976, because of the inadequate standard of construction and maintenance of the buildings a number of holders of Permissive Occupancies in the area were issued with notices of termination effective from 6th August, 1977.

In January, 1977, Mr S..... made representations (through the local M.P.) on behalf of the affected tenants. As a result of these representations it was decided to withdraw the termination notices, but it was still the intention to terminate all occupancies by 31st December, 1983.

It was only after Mr S..... letter in January, 1977, that the Department became aware that his father had died and that Mr S..... and his sister were occupying the premises. In accordance with the stated policy the occupancy was terminated from 6th August, 1977.

With regard to the three occupancies referred to in your letter it is true that "transfers" were permitted. These "transfers" were permitted by the Minister as the applicants had shown in each instance that hardship would occur if "transfer" were not permitted. The "transfer" to Messrs ..... occurred in 1977, to ..... in 1970 and to ..... in 1968.

On 11th April, 1978, the Minister directed that under no circumstances were any further "transfers" to be approved but that tenants who were using their occupancies for their own personal use either on a permanent or holiday basis could retain the occupancy for their respective lifetimes. Tenants who were using their premises for rental purposes would have their occupancies terminated as from 31st December, 1983.

On 31st May, 1978, all remaining tenants were advised of this direction. Messrs ....., ... and ..... qualify for a "life" tenancy under the Minister's direction but it does not apply to Mr S..... or Miss S..... as they were not tenants.

A series of representations to the Minister have been received regarding the Mr and Miss S———occupancy. These representations were all carefully considered and Departmental policy explained. The request for "transfer" was refused as the Department was not satisfied that hardship would occur.

Several of the occupancies at Urunga have been terminated and the structures removed. The Department has provided Mr S..... and Miss S..... with explanations for its decision and considers it has applied its policy consistently."

My inquiries over the next few months involved interviewing the Solicitor and his clients, examining the Department's files on all of the P.O.'s in that area, an inspection of the cottages in question as well as further considerable correspondence with the Department. I then pointed out to the Department that there appeared to be some inconsistencies in the transfers of other properties in that area from parents to children on the basis of "hardship" and that it seemed to me that it should act fairly in executing its policy. I specifically pointed out some similarities in other cases and recommended that the Department reconsider its decision and offer the S..... family lifetime tenure.

The Department subsequently advised that the Minister had approved of the brother and sister being offered a P.O. of the structure for a lifetime term, to commence from 7th August, 1977 (the day after the termination of the former occupancy). However that the offer was conditional on the withdrawal of the Summons of 1979 and the dissolving of the resultant notice of Injunction at no cost to the Department.

The Department also pointed out that it did not propose to discontinue with its efforts to clear the foreshore area concerned of the occupations which at that time constituted an infringement of the public's right to use the land. Also that it would have to be satisfied with a much larger term project than was first envisaged in 1965.

I passed on this information to the Solicitor's who agreed to the Department's offer on behalf of their clients.

DEPARTMENT OF MAIN ROADS

Refusal to compensate for damage to vehicle

My complainant wrote to me and, *inter alia*, said—

"1. On 5th September, 1979, I was driving my car, a 1951 Rover with a caravan in tow, south on the Pacific Highway. North of Kempsey a flagman directed me to drive along the shoulder of the road as the roadway was being reconstructed. I saw amongst the stones and loose earth a rock which looked too large to drive over. I could not go to the left of it as I would have had to drive through the drainage ditch. I could not go to the right of it as a grader was approaching from the opposite direction. I applied the brakes but could not stop in time and crashed onto the rock causing considerable damage.

2. Overlooking the scene were three men in the cabin of a truck. I discovered which man was in charge and asked him to sign a piece of paper certifying that my car had been damaged there by a rock, this he did.

3. With considerable difficulty the car was driven to Kempsey where some repairs were effected. Other repairs were effected in Sydney.

4. The next day I spoke by telephone to Mr Max Underhill, the Works Engineer, Department of Main Roads at Port Macquarie. He advised me to write to him making my claim for damages.

5. On 25th September, 1979, I wrote to Mr Underhill claiming compensation of $388.45 and enclosing copies of invoices.

6. A letter dated 6th November was received from the office of the Secretary, Department of Main Roads, rejecting my claim.

7. On 12th November, 1979, I wrote to the Hon. Peter Cox, Minister for Highways, asking for his assistance.

8. The Hon. H. F. Jensen, Minister for Roads, replied on 4th March, 1980, rejecting my claim.

9. On 20th May, 1980, I wrote to my local member, the Hon. Neville Wran, requesting his assistance.

10. From the Premier's Office, I received a letter addressed to the Premier from the Hon. S. D. Einfeld, Acting Minister for Roads, advising that the Department would not accept liability for my repairs.

I request your assistance in obtaining justice drawing to your attention several points.

(a) My claim rests on the following undisputed facts.

1. The road was being reconstructed so the only way the rock could have been in that position was as a result of the action of D.M.R. staff.

2. A flagman was in attendance and directed me to drive where I did.

3. Three employees of Department of Main Roads were in a truck facing the scene.

4. My losses resulted directly from striking the rock.

(b) The denial of damages has been repeatedly based on the statement "at the time of the accident there was a clear path available to your vehicle and this path was used by other traffic quite safely".

What path was followed by vehicles ahead of me I do not know. A 1951 Rover with a van in tow travels at a gentle pace and we were seldom close behind other vehicles and none were in sight on that day.

It is possible that other vehicles went to the right of the rock. As I have repeatedly stated in correspondence I could not go to the right of it as a large grader was approaching and a head-on collision would have resulted.

(c) The value of the claim is reasonable as I have not had the vehicle fully repaired. There is a badly buckled chassis cross member and other bent items but as these damaged parts do not affect road-worthiness they have been left. I do not intend to make any further claims."

In taking up his complaint, I told the complainant (henceforth referred to as Mr A) of the difficulty I face in matters relating to denial of legal liability and of my inability to determine same. I undertook to look at whether the Department had obtained all relevant reports and information, and whether it had dealt with Mr A's claim on a proper basis.

I subsequently received a report from the Department (together with the relevant file which I had asked for), the terms of which were as follows—

(a) A thorough investigation into the cause of the accident was carried out following receipt of Mr A's claim but no evidence of negligence on the part of the Department's employees, which would justify meeting the cost of repairs to his vehicle, could be found.

(b) At the time the accident occurred, Departmental employees were carrying out heavy patching work on the section of the Highway in question and reports indicated that Mr A was directed to proceed through the work site keeping towards the centre of the carriageway. However, instead, he chose to drive his vehicle towards the side of the road where there was a quantity of loose material and, in so doing, struck a rock which damaged his vehicle.

(c) Leaving aside the fact that the Department claimed that there was a clear, unobstructed path available to Mr A's vehicle and that this path was used by other traffic quite safely, the Department maintained that it was the responsibility of a driver to choose and negotiate the course to be followed by his vehicle. The Department pointed out that Mr A admitted being aware of the conditions but had driven at a speed, no matter how slow, at which he was unable to stop when confronted with an obstacle which he recognized as being too high to surmount.

(d) In the circumstances, the Department considered that the accident was the result of an error in judgment on Mr A's behalf and as such, liability could not be accepted by the Department.

Having examined the Department's file, I considered that there were a number of issues arising out of Mr A's complaint that I should pursue. To this end, I arranged for one of my officers to interview Mr A in order to clarify certain aspects of the accident. A transcript of such interview is attached to these notes marked "Annexure A".

At the same time, I wrote to the Department setting out my views following examination of the relevant file and those views can be summarized as follows—

1. It seemed to me that Mr A's claim had been consistently rejected on the basis that—

   (a) there had been a clear and unobstructed path available to him and this path had been used by other vehicles quite safely;

   (b) Mr A had been directed to proceed through the work site keeping towards the centre of the carriageway; and

   (c) it was the responsibility of a driver to choose and negotiate the course to be followed by his vehicle.

2. Quite clearly, the issues in dispute were whether there had been a clear and unobstructed path available, and whether the flagman had directed Mr A to follow any particular route (and, if so, which one). Mr A's claims were clear in both respects; however, in my view, the same could not be said for the reports on the Department's file which I summarized as follows—

   (i) The official Accident Report prepared by the Works Engineer and endorsed by the Divisional Engineer placed Mr A's car and caravan second in a line of three vehicles and taking a different route to that taken by the first and third vehicles. The clear inference here was that, if Mr A had followed the first vehicle, he would have had no problems. That report also placed the grader facing in the same direction as southbound traffic and well to the right hand side of the centre line when looking south.

   (ii) The Grader Operator, however, had reported that he was travelling north and on the right hand side of the road when looking north. He, the operator, placed himself on the opposite side of the road from the position shown in the official report. He also confirmed Mr A's claim that there was no vehicle in front of Mr A's vehicle. The Operator claimed that other vehicles had gone around him to

his left and then back to the correct side of the road once past the grader, but that Mr A had gone past him on his (the operator's) right.

(iii) The Roller Operator reported that he had been rolling "about the centre of the road". He could not remember where the grader was.

(iv) The Flagman's report had Mr A's vehicle second in a line of vehicles and placed the grader well to the right side of the centre line heading south (i.e., in the same position as shown on the official Accident Report and not where the grader operator said he was).

3. It was apparent that some confusion existed, particularly about where the grader was. In my view, there could be little doubt that it had been where the grader operator said it was and his version appeared to support Mr A's version. In addition, he supported Mr A's claim that there were no vehicles immediately in front of Mr A and, therefore, no vehicle for Mr A to follow.

4. It seemed to me that the Department had made practically no attempt to iron out the inconsistencies arising from the various reports. For example, none of the employees concerned had been interviewed as far as I could ascertain. Some attempt had been made in January, 1980, to clarify the situation as described by Mr A in his original letter to the Department and in his subsequent representations to the Minister, particularly his consistent claim that he was the first vehicle to move through the roadwork site at the time (i.e., that there was no vehicle, in sight, in front of him), as opposed to what had been said in the official Accident Report. The minute from the Engineer-in-Chief to the Divisional Engineer in this respect was quite interesting in that it suggested that Mr A might have a case and asked for further information ". . . which would justify a refusal of (Mr A's) claims".

5. The conflicting reports referred to above were provided as result of that minute but, in my view, had done little to clarify the situation.

6. In a minute of 29th January, 1980, from the Works Engineer, under cover to which the reports were provided, it was admitted that there was ". . . conflict as to (Mr A's) position in the line of traffic". Neither this minute nor the report obtained from the relevant Flagman dealt with Mr A's claim that he had been directed to take a particular route by the flagman. In addition, whilst the minute referred to a statement by the Ganger in charge of the workmen such statement did not appear on the Department's file.

7. The inconsistencies apparent in the reports had been disposed of, apparently on the basis that they were not significant, by decision of a Deputy Commissioner rather than by proper investigation.

8. In addition, none of the reports dealt with whether Mr A had been directed to follow a particular route by the flagman and, instead, the concept of a driver's responsibility "to choose and negotiate the course to be followed by his vehicle" had been introduced. I could not agree with this approach. In my view, where the Department had employees in attendance to control traffic, and such employees indicated a route to be followed, it would be a foolhardy motorist indeed who chose, himself, to adopt some other route.

   In the event that a motorist damaged his vehicle after ignoring a direction from a Departmental employee, I assumed that the Department would reject any claim he made on the basis of his non-compliance with the direction given. It seemed that the Department, then, would never be liable.

9. The Department had had two further opportunities to investigate and clarify the inconsistencies referred to—when Mr A made political representations through the Premier and when I referred his complaint. In both cases, the Department had merely drafted replies based on an earlier decision made by a Deputy Commissioner on 25th February".

After outlining all of this to the Department, I went on to say—

"At this stage, I am not satisfied that (Mr A's) claim was properly investigated. There remains considerable confusion in the Department's reports regarding whether the flagman directed him to the left of the grader, to the right of the grader or anywhere at all and about the position of the grader. There was even conflict as to whether there was a vehicle in front of (Mr A) but this was resolved in his favour.

> The significant thing about the latter point, however, seems to me to have been overlooked. If there was no vehicle immediately in front of (Mr A) there was no vehicle for him to safely follow and it matters not that other vehicles, arriving at the scene before him and already through the roadworks, had traversed the work site without incident. The location of the road plant had probably changed by the time (Mr A) arrived from when the last car had gone through before he arrived.
>
> A great deal depends, it seems to me, on whether he was directed onto a particular section of the roadway by (the) flagman, . . ., and this question should have been clarified."

I asked the Department for further information, including a copy of the statement made by the Ganger but not on file. I also asked where I might conveniently interview the various workmen involved if I considered it necessary to do so.

Several weeks later, I had discussions with the Deputy Commissioner of Main Roads and he delivered personally a further letter outlining the Department's position. I regret to say that my discussions with the Deputy Commissioner did not bring about a resolution of the matters in dispute and, in the end, we agreed to differ; his position, in fact, was as set out in the Department's letter wherein the following comments were made—

> "There is no doubt that the driver of a vehicle has the primary responsibility to control and manage the vehicle with safety and the responsibility to avoid conflict with stationary and fixed objects rests clearly with such driver.
>
> Flagmen are provided by the Department to direct traffic at works in progress and drivers of vehicles are required to observe a direction to stop exhibited by a flagman. There is no requirement for a driver to accept a direction to proceed.
>
> This situation exists equally at traffic light signals where the display of a red signal clearly requires a vehicle not to proceed. However, the display of a green signal merely indicates that, subject to the Motor Traffic Act and Regulations, the driver may proceed provided he has a clear path.
>
> Even where a green light is displayed, or conversely a Police Officer indicates that a vehicle may proceed, the onus is still with the driver to avoid a collision. Should a driver enter an intersection which is not clear, even where directed to do so, and collide with a stationary vehicle or other visible object, then the driver is clearly at fault.
>
> In the case in question, (Mr A) admits that he saw the large stone with which he collided and that he was proceeding too rapidly under the conditions to enable him to stop before colliding with the object.
>
> In view of the over-riding responsibility of the driver of a vehicle to avoid stationary and fixed objects it was considered that further inquiries, including the obtaining of additional details from (Mr A) in relation to his version of the accident, were not necessary."

I decided to pursue my inquiries as, I confess, I had some difficulty in accepting the approach that was being put forward by the Department. In this regard, I decided that it was necessary for the Department's employees directly involved at the scene of the accident to be interviewed, particularly the flagman.

Accordingly, one of my officers interviewed a number of the Department's employees, who were involved in the roadworks at the time of Mr A's accident, at Port Macquarie and points North on 22nd January, 1981, following their return to work after the Christmas break. Not surprisingly, such interviews did nothing to resolve the inconsistencies in the various reports that had been obtained by the Department in January of the previous year. The overall results of the interviews can be summarized as follows—

(i) the grader was placed in three different positions including, according to one employee, completely off the roadway altogether;

(ii) the relevant Flagman was placed in two different positions, on the road shoulder (by two employees) and in the centre of the road (by three employees);

(iii) the point of impact was shown in four different positions ranging from one side of the road to the other (and, by one employee, on the centreline);

(iv) the route taken by Mr A through the work was shown in four different locations ranging from one side of the road to the other;

(v) the "safe" route allegedly available to Mr A was shown in three different positions.

The employees who were spoken to were the Grader Driver, the Ganger, the relevant Flagman, a Back Hoe Operator and the Flagman who had been stationed on the southern end of the work site.

I wrote to the Department outlining the results of the interviews and, in my letter, I went on to say—

> "I realize, of course, that in light of the terms of your letter of 18th November, which the Deputy Commissioner handed to me when he attended here on 19th November, the Department's view is that the inconsistencies and conflicting stories are not all that important. For the purpose of my investigation, however, I do regard them as important for several reasons (including the need for me to try to establish what did happen) which will become clearer later in this letter.
>
> In circumstances such as exist in this case, where I am confronted with quite conflicting stories, any attempt to establish the events that actually occurred must, of necessity, involve some consideration of probabilities and the reasonable belief that any reasonably sensible person would be unlikely to do something which could only be regarded as plainly ridiculous.
>
> In my consideration of this matter, therefore, I have taken into account (reasonably, I believe) the version of events recounted by the complainant, both in his letters to the Department and in an interview with one of my officers on 31st October, 1980 (a copy of the transcript of that interview is enclosed) as well as the conflicting accounts related by the Department's employees.
>
> On that balance, I consider that I should accept (Mr A's) version of what occured and his statements concerning the location of road plant and employees. I consider it reasonable to do so because—
>
> (a) there is considerable doubt, even amongst the Department's own employees, in this regard and, in the absence of anything to suggest that (Mr A) is untruthful, I can see no reason why he should not be given the benefit of such doubt; and
>
> (b) all of his significant claims are supported by at least one of the Department's employees (and, in some cases, by more than one).
>
> Turning now to the views expressed in your letter of 18th November, it seems to me that you are clearly suggesting that the onus is always on the driver of a motor vehicle to drive his vehicle only where it is safe and there is no risk of damage occurring. I have noted, in this respect, the analogous examples referred to therein (the driver at traffic lights or at an intersection controlled by a policeman) and on which the Department appears largely to base or, at least, justify its views.
>
> With respect, I do not agree, for to accept this approach would countenance a proposition that the Department would never have any liability and that this would always rest with the motorist. In this regard, I cannot accept that the situation confronting a motorist at a set of traffic lights or at a police controlled intersection can reasonably be equated with the situation confronting him at a site where roadworks are in progress and which is controlled by the people carrying out such works. In the latter case, there is normally no question of avoiding other traffic or objects but of avoiding obstacles and dangers created by the work being carried out and by the presence of road plant working on the road.
>
> I am of the view that, having created by its works a situation of possible harm, the Department has some responsibility to ensure that traffic being controlled by its employees is directed safely through the hazards. The suggestion that a driver is not required to accept a direction to proceed, I believe, is somewhat trite. This may well be the legal position, strictly speaking, but its logical extension is to regard as irresponsible any motorist who accepts the direction, relying on the employee's indication that it is safe to proceed, without leaving his vehicle and surveying for himself the best route to take.
>
> The Department's oft repeated statement that (Mr A) has "admitted" that he was "proceeding too rapidly" to stop when he saw the stone appears to me to be taking out of context what (Mr A), in fact, said. He said that the stone was partly obscured by the loose material pushed aside by the grader and, by the time he was able to see it, he was unable to stop his vehicle in time to avoid hitting the stone, even though he applied the brake, because his vehicle had traction problems due to the loose material over which it was travelling. He was unable to swerve to avoid the stone because of the

position of the grader. He has not, at any time, admitted that he was travelling "too rapidly" and the Department's attempts to suggest otherwise are to be deplored.

It may well be that the glaring inconsistencies in the various reports belatedly obtained by the Department would not have been resolved even if reasonable attempts to do so had been made by the Department at the outset. This will never be known; but I am certain that the chance of resolving the inconsistencies was greater when (Mr A) made his claim and diminished proportionately the longer it was left. As it was, (Mr A's) claim, initially, was decided on the basis of what can only be regarded as an inaccurate, misleading and quite useless official Accident Report which indicated, quite wrongly, that there was a clear and unobstructed path available to (Mr A) straight down the left-hand carriageway and all he had to do was follow the car in front of him.

Even though the official report was in direct conflict with all that (Mr A) had said when he made his claim for reimbursement on the Department, no action was taken to clarify the position at the local Works Office, at the Divisional Office, or at the Department's Head Office. Thus, on 5th November, 1979, the Department wrote to (Mr A) rejecting his claim.

Yet the very next day, at least one officer of the Department apparently considered that (Mr A's) version of events ought to be looked at a little more carefully. That officer minuted the file as follows—

> "Ask D. E. to confirm *he agrees* with denial of liability in the circumstances and for comment on state of road as claimed in 3rd paragraph of (Mr A's) letter."

The response from the local Works Office makes it clear that, even then, no attempt was made to clarify the situation in the light of the conflicting stories told by (Mr A) on the one hand, and the official Accident Report on the other.

When (Mr A) made representations to the Minister, the Engineer-in-Chief, in a minute to the Divisional Engineer, expressed the view that ". . . perhaps (Mr A) would have a case against the Department". I note, however, that the Divisional Engineer was not asked whether (Mr A) might have "a case", but whether ". . . there is any further information available . . . which would *justify a refusal* of (Mr A's) claim." (my emphasis).

It was at this stage, over four months after the accident had occurred, that the Works Office finally obtained, from some of the employees involved, reports which did nothing to resolve the issues in dispute. Such reports appear to have been merely obtained and sent on and no effort was made, apparently, to try to establish with any certainty exactly what the position had been.

The Department's reasons for rejecting (Mr A's) claim for reimbursement have varied as the matter progressed and it almost appears that as one reason for rejection was refuted or called into question, another arose to replace it.

Such reasons can be summarized as follows—

Reason	*Comment*
(a) (Mr A) could have followed the path of the vehicle in front of him and, in any case, there was plenty of room for him to swerve to miss the stone (November, 1979).	This was based on incorrect information, in the official Accident Report, that (Mr A's) vehicle was second in a line of traffic and that the left-hand carriageway was clear of obstruction (i.e., the grader).
(b) There was a clear and unobstructed path available and other vehicles had used this route quite safely. (Mr A), however, chose to drive on the road shoulder (March, 1980).	Modified to account for acceptance of (Mr A's) claim that there was no vehicle in front of him but still based on conflicting information.
(c) (Mr A) was directed towards the centre of the road but chose instead to drive towards the side of the road. In any case, it was his responsibility to choose a safe path. (September, 1980.)	There appears to be not one scintilla of evidence to support the claim that (Mr A) was directed towards the centre of the road.
(d) It is always the motorist's responsibility to proceed only where it is safe to do so. (November, 1980.)	This appears to mean that once the motorist proceeds, it is always his fault if his vehicle sustains damage, irrespective of the circumstances.

After considering all of the material available to me in this matter, my present views can be summarized as follows—

1. that the Department failed to properly investigate (Mr A's) claim for reimbursement and, initially, improperly and unfairly rejected it relying on an incorrect report;
2. that the Department's failure to properly investigate the claim at the time it was made mitigated against any possibility of establishing the facts due to the simple effluxion of time. In fact, the first attempt to clarify the obvious inconsistencies occurred over four months after the accident happened;
3. that the Department's attempt to equate the position of a motorist confronted with hazards created by the Department due to roadworks with that of a motorist proceeding through traffic lights or an intersection controlled by a policeman is erroneous and unreasonable;
4. that the Department appears to have mounted a continuing search for reasons to justify its initial rejection of (Mr A's) claim, rather than to have examined the claim on its merits; and
5. that there was and still is doubt regarding the location of the road plant and the Flagman, and about whether and/or which directions were given by the Flagman in relation to which way (Mr A) should cause his vehicle to go. In the absence of any evidence to suggest that (Mr A) is untruthful, the benefit of the doubt should, reasonably, be given to (Mr A).

Accordingly, I am now suggesting that the Department seriously reconsider (Mr A's) claim in the light of the views that I have expressed and, if necessary, the question of reimbursement as an act of grace be looked at."

Finally, in April, 1981, the Department wrote to me and, *inter alia*, said—

"While it is still maintained that the Department has no legal obligation to reimburse (Mr A) for the damage sustained to his vehicle, the Department is prepared in this instance, without admission of liability, to make an *ex gratia* payment of $388.45 to (Mr A) in view of the difficulties in determining the actual positioning of the Departmental road plant and flagman at the time the accident occurred. Payment will be in full satisfaction of (Mr A's) claim, and subject to his signing a release indemnifying the Department against any further claims in respect of the matter.

Advice in this regard will be forwarded to (Mr A) in the near future."

I was pleased, of course, to be able to pass on the good news to Mr A. However, I believe that this case is an excellent example of the need for public authorities to properly consider and fully investigate any claim made against them for compensation or reimbursement of expenses arising out of something the authority allegedly has done or has failed to do. In this regard, I believe that public authorities, representing government as they do, have a much higher responsibility to discharge than might attach to a non-government organization.

It is of paramount importance that a claimant be able to believe that justice has been done to his claim, even if it cannot be met. Quite often, this may involve more than reliance on legal principles and there will be a need to look at the moral considerations present in the claim. Be that as it may, the very least a claimant can or should be asked to expect is that his claim will be fully and properly investigated and considered.

ANNEXURE A

Interview with Mr A on 31st October, 1980

Q. Mr A, I've explained the current position in regard to your complaint to the Ombudsman about the Department of Main Roads and the accident you had in 1979 on the Pacific Highway and you understand the present position in this matter at the moment, I take it.

A. Yes.

Q. There are just a few questions I would like to ask you to clarify a number of things. First of all, on the day in question, when you arrived at the flagman, were you in a line of traffic?

A. No. There were no vehicles ahead of me that I could see. They no doubt were ahead but they weren't within sight.

Q. Were they any vehicles behind you?

A. Not immediately behind, but there must have been not too far because I remember some cars did go past us after we were stationary after the accident, so they may have been a quarter of a mile behind or something like that.

Q. Yes, that would indicate they were a fair way behind by the time you approached the flagman anyway.

A. No-one stopped behind me when I stopped. It was some minutes before they arrived.

Q. Now when you approached the flagman, I think you originally said that he changed his bat from "stop" to "go" as you approached. In other words you really didn't have to stop as such.

A. That's correct. I begun to slow down but then he changed to "go" and so I proceeded on.

Q. Right. Did he indicate by hand signals or any method which way you were to go in relation to the centre line of the road?

A. Yes, as he was facing me he had his flag in the left hand and with his right hand he pointed to the side of the road indicating the left hand shoulder as I approached . . . that I was to drive along the shoulder of the road.

Q. And, according to your letter to us and your letter to the Department—your several letters to the Department—towards the centre line of the road and further down the road in the direction that you were proceeding, there was a grader operating?

A. Yes, that's right.

Q. And that grader was on your side of the centre line, would that be right?

A. That's correct.

Q. How far from that grader would you say the flagman was? A rough estimate?

A. Oh (pause) of the order of 150–200 yards or metres.

Q. Right. Now, at the time that you hit this rock and did the damage, where did you stop? When your vehicle stopped where were you, in relation to the grader at that time? How far past it or were you alongside it, or whatever?

A. By the time I had come to a stop when the rock was under the back of my caravan at that stage, the grader was then just passing.

Q. So you hit this rock almost alongside the grader.

A. Oh, yes. The grader was just ahead of me and by the time I had stopped he was alongside me.

Q. Did the grader continue to operate or did he stop?

A. He didn't stop. He kept going.

Q. Now you mentioned before that you noticed that some cars came through after you had been stopped?

A. That's right.

Q. Now, did you notice what route they took to get through the work? I guess you wouldn't because you were probably preoccupied, but I thought you may have just noticed?

A. Yes, I think the grader having passed on, and was further up the road, they were then able to go around me down the track that the grader would have made.

Q. I see. Is there anything else you would like to say about the matter while we have got the recorder going? There's no further question I need to ask you at this stage, but if there is anything further you would like to say about the whole matter, now's your opportunity.

A. I think it is worth mentioning that there were 3 witnesses who were watching in the truck and may be that's one of the problems. One of them was the ganger, because I went over to the truck after I'd stopped or after we became stationary and I said "Who's in charge around here", and one of the fellows sitting in the truck admitted that he was in charge and I asked him to sign a piece of paper to the effect that the accident had occurred at that site and that the damage to my vehicle had been caused by the rock. He was rather reluctant to do that but he did agree to do it and

then he gave some assistance to help me bend the blades of the fan so that they would be clear of the radiator. But those 3 people were sitting in the truck and had a complete view of the whole scene.

Q. Would they have been in a position to have observed the actions of the flagman?

A. Ah, possibly not, because they were fairly close to the scene of the accident and the flagman was further back.

Q. I see.

A. They may not have been able to see the flagman. They probably wouldn't have been taking any notice anyway.

Q. I note (and I mentioned this to you in conversation prior to starting this interview) that the Department now claims that the flagman, when he motioned or changed his direction for you to go through the work, directed you to proceed towards the centre of the carriageway. You noticed that in the reply that we sent you. What's your comment about that?

A. That's just ridiculous and when I showed that letter to my wife she laughed. Ridiculous, because he was standing on the main part of the carriageway directing me to his right which was to my left hand side of the road. Had he wanted me to go to the middle of the road he should have been standing on the shoulder directing me to the middle, but it was the other way around.

Q. So he was standing approximately in the centreline of the road was he?

A. Yes.

Q. I see . . . facing you?

A. Facing me yes; or even slightly off-centre.

Q. And indicating with his right hand, which would be your left, for you to go that way?

A. That's right. Directing me down onto the shoulder. Well he should have been the other way around if he wanted me to go in the middle of the road. And anyway it's just ludicrous because if he had directed me to the middle of the road he would have been directing me to a head-on collision with the grader.

Q. It seems valid point!

A. Rather! If they suggest that I should have driven down the middle of the road, perhaps they should also suggest what the grader was supposed to do with the line of traffic that was proceeding down the same path in the opposite direction. It's just madness.

Q. Alright, well I don't think there is anything else we need to discuss at this stage. As I've told you, our inquiries are continuing to some degree in fact, and in due course we'll no doubt hear from the Department and we will be pursuing the matter as far as we possibly can. But I want to stress again what I've said to you that, even if our investigations show that the Department's conduct has been wrong in the way that they have dealt with your claim, this does not necessarily mean that your claim will be met by the Department. Now you understand that, don't you.

A. Yes, O.K.

METROPOLITAN WATER SEWERAGE AND DRAINAGE BOARD

Liability for Rates

Section 101 of the Metropolitan Water, Sewerage, and Drainage Act, 1924, provides in part:

"(1) Any person may apply for a certificate under this section as to the amount (if any) due or payable to the Board for rates or otherwise in respect of any land.

(2) The Board shall, upon payment of a fee prescribed by by-law for each certificate having reference to a parcel of land separately assessed, forthwith give or post to the applicant a certificate in writing, signed by the officer prescribed by the by-laws, and stating what (if any) rates, charges, or sums of money are due or payable to the Board in respect of the land with the particulars thereof, and when the same became due or payable, or that no such rates or charges or sums are then due or payable, as the case may be.

(4) The production of the certificate shall for all purposes be deemed conclusive proof in favour of a bona fide purchaser for value that at the date thereof no rates, charges, or sums other than those stated in the certificate were due or payable to the Board in respect of the land.

. . ."

The complainants in purchasing a block of land, which was part of a larger subdivided block, had made an application to the Board, through their solicitors, for a Certificate under section 101 so that their contribution in respect of the Board's rates could be allowed for in the amount payable to the vendor on settlement.

The Certificate issued by the Board on 2nd November, 1979, showed that for the year commencing 1st July, 1979, rates were $240.64 but that payment of $240.64 had been made leaving no balance outstanding. The amount paid out on settlement by the complainants included $151.63 as their proportion of $240.64 water rates paid to 30th June, 1980.

However, the Board belatedly recognized the subdivision and advised the complainants on 18th August, 1980, that the property which they had purchased was part of a subdivision operative for the Board's rating purposes from 1st July, 1979. It sent an account for rates levied as follows:

	$
1st July, 1979 to 30th June, 1980	184.32
1st July, 1980 to 30th June, 1981	206.64
	$390.96

The complainants' solicitors queried this account in the light of the section 101 Certificate previously issued.

The Board in reply indicated that at the time of issue of the section 101 Certificate (2nd November, 1979) it had no authority to treat the property as subdivided.

Accordingly the section 101 Certificate was issued in respect of the original rating but showed the complainants' lot as the subject of the inquiry. Following receipt of authority to subdivide, the rates shown on the section 101 Certificate for the original lot were cancelled. The Board also indicated that the amount of $240.64 shown as a payment on the section 101 Certificate for the original lot represented $120.00 credited, due to a pension rebate and the balance of $120.64 was transferred to that part of the original property retained by the initial owner following the subdivision.

Rates were then raised by the Board for the period 1st July, 1980, to 30th June, 1981, on each of the three new ratings created by the subdivision.

The Board informed the complainants' solicitors that as they had applied for a section 101 Certificate it had amended the rates payable from $390.96 to $328.50 being rates from the day following the issue of the Certificate, i.e., from 3rd November, 1979, to 30th June, 1981.

This comprised rates as follows—

	$
1st November, 1979, to 30th June, 1980	121.86
1st July, 1980, to 30th June, 1981	206.64
	$328.50

The complainants' solicitors suggested that the complainants seek a refund from the vendors, of the amount overpaid on settlement, as the calculations did not provide for the pensioner rebate of $120.00 on the 1979–80 rates as subsequently advised by the Board.

The complainants also sought my help in having the Board write off the further amount of $121.86 sought for the period from 1st November, 1979, to 30th June, 1980. By that time the matter had reached a final notice stage and despite personal attendance by the complainants at the Board's Office no headway was made.

On my taking the matter up, the Board held action on the final notice. Following a careful investigation of the matter raised by me the Board reported that it had cancelled the rates levied for the period from 3rd November, 1979, to 30th June, 1980, as these had been raised after a Certificate of Rates had been issued to the complainants' solicitor and indeed after settlement of purchase had been effected.

Although I found the complaint to be sustained, as the matter had been rectified I decided to conclude my investigation.

METROPOLITAN WATER SEWERAGE AND DRAINAGE BOARD

A "No Win" Situation

I received a complaint from a man who had built his home in such a way that it encroached upon a watermain easement on his property. He felt that, as his building plans had been submitted to the Water Board in the usual way and had been "approved" (to use his term), the Board should agree to accept liability for any damage which might in the future occur to his home as a result of problems with the watermain. The Board had refused to do so.

In his letter to me, however, the complainant had said, *inter alia*:

> "During 1974 my wife and I purchased a block of land at Castle Hill knowing of an easement on the eastern side of the block.
>
> This did not concern us as the block was 84 feet wide and still left plenty of area to build the house we had planned. We had allowed 16 feet on the eastern side knowing that the M.W.S. & D.B. would advise of any change that had to be made if it was necessary."

I took up the matter with the Board and, during the course of my investigation obtained and perused the Board's file. As well, I asked the complainant to provide me with a copy of his Certificate of Title. The Board reported to me on two occasions and the terms of those reports were to the effect that—

(a) it was the property owner's responsibility to ensure that any proposed building was located so that it did not encroach on adjacent property, whether such property be land held under separate title or under an easement.

(b) the Board required that building plans, after approval by the local Council, be submitted to it to ensure that the proposed structure complied with the Board's By-laws relating to the location of sanitary fittings and the relationship of the building to watermains, sewers and stormwater channels.

(c) the complainant's plans bore three Board stamps:

(i) that the plans had been submitted;

(ii) that the disposition of sanitary fittings was satisfactory and the building would drain to the Board's sewer; and

(iii) that the building's location in relation to the sewer had been "noted".

The President did not consider that a reasonable person would construe that the plans had been "approved" by the Board.

(d) There were three options open to the complainant—

1. Accept the Board's offer that it take no action in regard to the building encroachment subject to acceptance by the owner of the conditions laid down in the Board's letter of 25th January, 1979.

2. Arrange for the Board to relocate the watermain and easement so that the easement is free from encroachment at an estimated cost of $1,510 (determined 12th July, 1978). This cost is escalating as time passes and final settlement would be on an actual cost basis.

3. Demolish that part of the building that encroaches on the easement.

(e) The Board did not see itself as having any primary responsibility to ensure that proposed buildings did not encroach on its easements.

(f) The complainant was aware of the existence of the easement.

The facts disclosed by my investigation were interesting. In 1973, in connection with the subdivision of an area of land in Showground Road, Baulkham Hills, the Board by agreement with the subdivider provided a watermain to serve further subdivision in the area. The subdivider created an easement for the benefit of the Board, pursuant to section 88B of the Conveyancing Act. The easement affected the complainant's property, and was registered and clearly shown on the Certificate of Title in respect of the property. The Certificate of Title made clear reference to the easement document itself. The complainant and his wife purchased the property in September, 1974.

There was no doubt that the complainant was aware of the easement on his property. In his letter to me, he had said—

> "During 1974 my wife and I purchased a block of land at Castle Hill *knowing of an easement* on the eastern side of the block". (my emphasis)

In June, 1977, he submitted his Building Plans to the Board. The plans were stamped by the Assessing and Receiving Branch, the House Services Sub-Branch and the Building over Sewers Section of the Board, but were not referred to the Distribu-

tion Sub-Branch which, apparently, looks after the Board's watermain easements. The Board did not discover that the proposed building would encroach on the easement—in fact, the Board's officers did not discover the existence of the easement at all.

The complainant did not draw the Board's attention to the easement's existence, either by showing or referring to it on his plans or by mentioning it when his plans were being stamped and examined at the Board. His attitude was clearly expressed in his letter to me where he said—

> "We had allowed 16 feet on the eastern side *knowing that the M.W.S. & D.B. would advise of any change that had to be made* if it was necessary." (my emphasis)

This, as it turned out, was a dangerous presumption on his part.

Construction of the dwelling proceeded with the inevitable encroachment resulting. The matter did not come to notice until May, 1978, when the Bank of New South Wales, having been provided with a copy of a survey report required by the Building Society, wrote to the complainant informing him of the encroachment. He delivered the Bank's letter and his stamped plans to the Board in June, 1978, and sought the Board's advice.

The main was exposed and it was found that the easternmost corner of the house, which encroached on the Board's easement, was only 0.5 metres from the centreline of the watermain. The Board's Assistant Distribution Engineer reported that, if a mainbreak occurred in the vicinity, undermining and/or damage to the foundations and the house could result. The eaves of the house were, in fact, over the main itself.

The Board's file made it clear that the building plans had not been referred to the Distribution Sub-Branch regarding the easement when dealt with in the Board's office. The Assistant Distribution Engineer pointed out that the building plans had not shown the easement and that its existence was clearly shown on the relevant Certificate of Title. He recommended that the Board, in lieu of requiring demolition of that part of the house encroaching on the easement, offer to relocate the watermain, to provide sufficient clearance for maintenance purposes from the wall and eaves of the house, subject to the cost being borne by the complainant. He also proposed that the easement boundary be changed to coincide with the line of the eaves of the house (i.e., to remove the encroachment by altering the easement boundary). Costs, including survey and legal costs, were estimated at that time at $1,510.

On 24th November, 1978, the Board's Acting Senior Negotiations Officer, in a covering submission supporting the Assistant Distribution Engineer's basic recommendations, said, *inter alia*, the following—

> "In the present case the relevant Sewerage Reference Sheet Index clearly showed the subject property as affected by a Board's watermain. In the instruction to searchers displayed on a sign in the public area of the 1st floor the colour coding is identified as referring to a watermain. The notice reads, in part:
>
> (a) Inform the attendant at this counter of your intention to search and the location of the land. He will produce a Reference Sheet Index board of the municipality or shire. He will then identify from this board and produce the Sewer Reference Sheet relating to the subject land.
>
> (b) Locate the land on this index board.
>
> (c) Note whether any blue line (stormwater channel) or green line (watermain) is in the vicinity of your land. If such a line is in the vicinity of your land, ask the attendant where you can get further information as to whether your land is affected.
>
> The Reference Sheet also clearly showed the Board's "Easement for Water Supply Works 3.05 metres and variable width" within the property. The relevant Sewerage Service Sheet delineates the easement boundaries but does not identify the easement as being in favour of the Board.
>
> The indications are that the owners (or whoever submitted building plans to the Board on their behalf) were not alerted to the existence of the Board's 300 mm C.I.C.L. watermain and associated easement within the subject property. As I see it the fact that the owners' building plans conflicted with the Board's watermain and associated easement could, and should, have been detected by Board's staff (and clearly drawn to the applicant's attention) on at least one of two separate stages:
>
> (i) *At the inquiry desk 1st Floor*—when the applicant should have been clearly advised that the building plans as submitted are likely to conflict with a Board's watermain and easement within the

property and that further inquiries, as necessary, should be made at the Board's Survey Branch (Land and Easement Inquiries Section), Watermains Sub-Branch and Distribution Sub-Branch.

(ii) *At Building-over-Sewers*—(the applicant's building plans were stamped by B.O.S. in connection with a 150 mm sewer main also within the property)—when the existence of the Board's watermain easement on the sewer reference sheet should have been noticed and the implications discussed with the applicant.

However, the Board's position seems clear, i.e., that it has no legal liability in the matter, that its records were properly kept and clearly showed the existence of the affected easement and watermain, and that this information was readily available to the applicant at the time of his search. Further the Board's easement is clearly delineated on the relevant Certificate of Title and subdivision plan, and the owner or his representative should have been aware of this and avoided building on the easement."

The following course of action was submitted for approval—

(i) a section of the watermain become "disused" and be replaced by a new section of watermain;

(ii) the Board's easement boundaries be adjusted to eliminate the building encroachment. This would involve surrender to the complainant of part of the easement (a nominal cost of $1.00 was suggested) with the latter to meet all legal costs; and

(iii) watermain relocation be paid for by the complainant.

The Acting Senior Clerk, Real Estate Section, minuted the file and pointed out that the stamp affixed to the complainant's plans by the local council, prior to submission of the plans to the Board had clearly drawn the complainant's (or his builder's) attention to his responsibility to ". . . ensure that buildings including eaves and gutters are not erected on easements or watercourses unless with the permission of the authority having right to the easement. This includes easements under the control of the Council, Metropolitan Water Sewerage and Drainage Board and various electricity authorities, etc."

The Acting Senior Clerk went on to express the view that there was ". . . no excuse for an owner pleading ignorance to a registered easement affecting his property. If he had been unaware of it in the past the owners (sic) attention was drawn to the question of an easement by the Council's building permit. It would have been an easy matter to have "searched" this at the same time as his plans were stamped at the Board, or to have especially raised the matter with Board's staff." I tended to agree with this. He went on to say—

"Notwithstanding the fact that it was possible for Board's staff to have detected the encroachment, the overriding fact remains that under the system which operates when building plans are presented to the Board, the onus for the detection of Board's various interests rests with the property owner or his representative."

I certainly did not entirely agree with this viewpoint. If this approach had been maintained (and it was not), I would have had to raise issues relating to the Board's responsibilities to protect its own property (easement) and the need to change a "system" that was obviously quite deficient.

Fortunately, the Board's Real Estate Officer suggested that the matter should be referred to the Board's Solicitor. *En route* thereto, the Board's Administrative Assistant suggested that the complainant's failure to show the easement on his site plan would be ". . . an incorrect or not a true representation of plan of the site".

On 10th January, 1979, the Board's Assistant Solicitor minuted the file as follows—

"In the first instance in view of the terms of the 'restriction on use' in relation to liability for damage to buildings on the easement area (see section 88B instrument—5th item) why does the Board wish to move the pipe or alter the easement area?

Having approved the plans the Board has lost its right under the easement to require the building to be moved."

"The absence of any reference to the easement on the plan is *not* a 'material misrepresentation'.

If relocation and or amendment of easement is insisted upon then it must be at Board's cost."

On the same day, the matter was returned to the Distribution Engineer for advice whether, from an operational point of view, it was imperative that the watermain be relocated. The minute doing so said—

> "Both the Board's Solicitor and Assistant Solicitor informed me during a lengthy discussion this morning about this matter, that even though the easement conditions prevent building on the easement area, the fact that the Board stamped and approved of the building on the property when building plans were submitted to the Board condones the present building encroachment. The important fact to remember is that whether the watermain is moved or not the owner indemnifies the Board by another easement condition (5.2 of the 88B instrument) as follows:
>
> '. . . and will at all times bear all risk of and responsibility in connection with damage to any building or other structure for the time being in existence upon the said land.'
>
> If there is no essential reason from an operational point of view for the watermain to be adjusted, there now appears to be no reason why a letter cannot issue to the owner simply saying that the Board has no objection to the building encroachment conditions which affect the subject property."

The Distribution Engineer subsequently recommended that no further action be taken about relocating the watermain or altering the boundary of the easement and that the encroachment be allowed to remain subject to written acceptance from the complainant of the following conditions:

> " (i) That the consent of the Board to the encroachment must not be deemed to be a waiver of the Board's rights or any extinguishment of the easement or rights of the Board.
>
> (ii) That the Board accepts no responsibility for any damage that may be caused now or hereafter to that part of the building which encroaches upon the site of the easement and that the owner has no claim for any such damage.
>
> (iii) That the owner acknowledge that the consent of the Board does not extinguish in any way the easement and the rights of the Board and that he undertakes to use his best endeavours to obtain a like acknowledgement and undertaking from any successor in title."

A letter in these terms but omitting condition (iii) as above was sent to the complainant on 25th January, 1979.

On 2nd February, 1979, the Distribution Engineer was asked to follow up ". . . arrangements for improvements in procedures to stamping or approval of building plans".

On 28th February, 1979, the complainant's Solicitors took issue with the Board on the basis that it was unfair for the Board to expect him to accept responsibility for any damage which might in future be caused to that part of the building encroaching on the easement because, if the Board had told him of the encroachment, he would have been able to alter his plans and relocate the building. Unfortunately, this letter did not reach the Board and it was not until July, 1979, after a copy of it had been supplied, that action to deal with the Solicitor's approach was taken.

A reply was sent to the complainant's Solicitors on 6th September, 1979, and it is worth reproducing the relevant terms of that reply—

> "The position is that your clients were or ought to have been aware of the existence of the watermain easement on the property and have knowledge of the terms of that easement document. Accordingly, they should not have prepared building plans which contravene the terms of the easement or encroach upon the easement area.
>
> The Board is not liable for all damage which may occur as a result of a watermain break. Indeed, it is unusual for it to have any liability at all and the Board is not prepared to waive its statutory and Common Law rights in relation to this matter by accepting liability.
>
> You point out that the plans have been stamped by the Engineer, Building-over-Sewers. This obviously is no assistance to your clients as the building is built near or over a watermain. The characteristics and the consequences are entirely different. A sewer is generally a gravitational main not under pressure. A watermain is not generally purely gravitational and is under considerable pressure.
>
> As you will appreciate from this, a break of a sewer main or, indeed the development of a leak would be of much less significance than the same occurrence in a watermain. It is for this reason that the Board holds to the principle that approval to a building being placed over a watermain is never to be given and that building close to a watermain would only be satisfactory

to the Board upon the clear understanding that the owner of the building has the full liability for any consequences of the building being so sited. This is the position where no easement has been granted in favour of the Board and the Board is relying purely upon its statutory rights to have constructed the watermain within the land.

In this case, of course, the position is entirely different in that there has been granted to the Board an easement for the watermain and that the terms and conditions of that easement are available for all the world by way of search to become aware of. Certainly an intending purchaser would or should be aware of the full terms and conditions of that easement having been put on notice by a search that such a document exists. It is, therefore, not for the Board to tell your clients that the building plans should be altered, it is rather for the owner and/or builder to be aware that the plans in the first instance should make allowance for the existence of the easement.

While the Board in its operation of its water reticulation system endeavours to maintain a safe working pressure within its mains, you will appreciate that because of the demands of users, the pressure is not maintained at a constant figure and it is frankly the variation in pressure that can cause a main to break or fracture. There are other reasons, of course, external to the operation of the water reticulation system which can cause the fracture of a watermain. These include a shift in the soil supporting the watermain, the passage of traffic nearby or across a watermain or physical contact with the main by some person carrying out excavation or building operations. None of these are within the control of the Board and consequently the Board would have no liability in respect of any damage caused should a main burst or break.

As stated in the earlier letter, the Board has carefully considered the situation and it is not prepared to accept responsibility for any damage which may occur to the building by virtue of its position adjacent to the watermain and in fact encroaching upon the easement."

I must say that I had no major argument with the terms of the Board's reply, except that it attempted to place all the responsibility on the complainant. I certainly agreed that the existence of the easement and the terms and conditions of it were ". . . available for all the world . . ." to know by way of search and, without doubt, he had a responsibility in this regard.

However, I took issue with the statement that it was ". . . not for the Board to tell your clients that the building plans should be altered, it is rather for the owner and/or builder to be aware that the plans in the first instance should make allowance for the existence of the easement". In my view, it was "for the Board to tell" people that their plans should be altered, where such people had not made "allowance for the existence of (an) easement". In other words, the Board also had a responsibility to discharge.

In a minute prepared on 25th July, 1979, the Board's Assistant Solicitor clearly set out the alternatives available, namely—

"1. To take no further action other than the continuing to refuse to accept any liability for damage to the building or at least that part of it which encroaches upon the easement should the main break or the Board damage the building during maintenance or renewal operations.

2. The other alternative is to suggest to the owners that for their own protection they may care to arrange by payment to the Board of any necessary costs for the main to be re-routed and the site of the easement adjusted."

At a later stage, a third course was added—demolition of that part of the building encroaching on the easement.

Following a letter from me to the Board, wherein I raised the issue of the Board's responsibility to identify potential encroachments upon its easements, the Inspecting Engineer (Operations) prepared a submission wherein, *inter alia*, he said:

"The owner has the responsibility for ensuring that proposed buildings are located in such a way as not to encroach in any way on adjacent property whether it be land held under a separate title or under an easement."

"The Board's easement however was not shown on the site plan prepared for (the complainant) which was presented to the Board for consideration and stamping. Had it been shown on the site plan, the encroachment would have been indicated clearly, and (the complainant) would have been able to amend his plans early in their preparation.

All the relevant plans used by the Board show the easement and Board's staff should have noted its existence. That they did not do so is probably due partly to the fact that the standard method of indicating such easements was

changed some seven years ago and that staff were unfamiliar with the new method, because the incidence of such easements on land on which new buildings are to be erected is very small. Steps have been taken to reinforce instructions in this regard and also to make the existence of such agreements more apparent on the relevant plans.

While the Board has adopted certain procedures to assist in ensuring that building proposals comply with its By-laws, they assist the landowner, but do not absolve him of the responsibility of ensuring that his proposals comply with those By-laws."

In determining what my attitude in the matter should be, I had to analyse the facts of the case as best I could. In my view, the following considerations were relevant:

(i) the complainant knew about the easement at the times he—

prepared his plans;
submitted them to the Board.

(ii) the Board failed to ascertain the potential encroachment on the easement or, even, that the property was so burdened.

This being the case, I felt it proper to consider the responsibilities attached to the complainant on the one hand and the Board on the other—

(a) (i) *The complainant* was aware of the easement on his property. In my view he had a responsibility to ensure that any building erected did not encroach thereon. He had a further responsibility to discover for himself the terms of the easement (if he did not know them) by means of the normal search. There seems little doubt that, at least, he knew he should not build over the easement, for he admitted that he had made allowance in the plans for its existence. He assumed that the Board would tell him of any alteration needed if such allowance was insufficient.

(ii) In addition, his responsibilities, as the property owner, in relation to the easement, were specifically drawn to his attention on two occasions after his plans had been prepared:

in the stamp affixed to the plans by the local Shire Council, before the plans were submitted to the Board; and

in the Board's office, when his plans were submitted, in the sign displayed in the public area of the 1st Floor. (The existence of such sign had been confirmed by one of my officers.)

(iii) In the complainant's case, I believed that his failure to discharge his responsibilities in the face of these "warnings" was all the more significant because *he already knew* that there was an easement on his property. His duty was not merely to seek "approval" of building plans, but to seek, as well, permission to erect over the Board's easement.

(b) (i) *The Board* was the "owner" of the easement and, as such, ought to be expected to take all action necessary to protect the land comprised therein (i.e., to protect what belonged to it).

(ii) I could not accept that the onus to ensure non-encroachment rested *solely* on the property owner. The Board had a responsibility to ensure that none of its easements were going to be interfered with.

(iii) In fact, the Board appeared to recognize that it did have a responsibility to identify potential encroachments, etc., in those instances where an owner/builder did not bring to notice the existence of a Board sewer line or easement, and was apparently taking action administratively to discharge that responsibility.

In my view, both the complainant and the Board were at fault—*the former* for for not, at least, having brought the easement to notice when his plans were being dealt with at the Board. He knew the easement existed and knew (by virtue of the Council stamp) what his responsibilities were. *The Board* was at fault for not detect- that the easement existed and was likely to be encroached to enable the matter to be brought to notice.

In this regard, I found somewhat strange the reason given by the Board for the failure of its officers to note the existence of the easement, namely that "the standard method of indicating such easements was changed some seven years ago and that staff were unfamiliar with the new method . . ." I wondered how long it would be before the "new" method achieved the status of being "old".

I took the view that, because of the complainant's failure to fulfil his responsibilities in relation to the easement (of which he was always aware) he could not, reasonbly, attempt to rely on the proposition that, as the Board did not tell him of the encroachment and, consequently, he did not alter his plans, the Board should agree to be responsible for any damage which might in future occur to the building encroaching on the easement. In this regard, I agreed with the view expressed by the Board that, whilst the Board should have detected the likely encroachment, its failure to do so did not absolve the complainant from discharging his own responsibilities.

I was further of the view that the Board's eventual decision to allow the encroachment to remain, subject to the conditions already outlined, was a reasonable decision and, quite frankly, the best the complainant could reasonably hope for.

If the Board had been insisting still on watermain relocation and easement boundary adjustment, I would have been inclined to think that the costs of such work ought to be shared 50–50 between the Board and the complainant, notwithstanding the view that had been expressed by the Assistant Solicitor. The Board was not so insisting—neither was it requiring demolition of that part of the building constituting the encroachment (even though it might attempt to do so). I could not see that the Board should be expected to deliver up its rights by agreeing to accept liability for anything which might happen in the future.

In all the circumstances, I informed the complainant that I considered the Board's refusal to accept responsibility for any damage that may occur to his building by virtue of its position adjacent to the watermain and upon the easement should not be found to be wrong in terms of the Ombudsman Act and that I should take his complaint no further. I accorded him an opportunity to make further comments which might persuade me to adopt a different view but I did not hear from him again.

At the same time, I wrote to the Board and said, *inter alia*—

> "In conclusion, my views can be summarized as follows:
>
> (a) (The complainant), being aware, of his own knowledge, of the existence of the easement and, further, having been alerted by Council to his responsibilities in this respect, should have at least raised the matter with the Board at the time he presented his plans;
>
> (b) The Board, requiring the submission of plans to it to check, among other things, the relationship of a building to watermains, should have detected the existence of the easement and the proposed encroachment upon it and should have brought the matter to notice.
>
> Therefore, so far as (this) complaint is concerned, I am of the view that the Board's refusal to accept liability for any damage which might in future be sustained to (the complainant's) building as a result of the encroachment cannot be regarded as unreasonable in terms of the Ombudsman Act.
>
> So far as the Board is concerned, I would like to know whether the Board's present procedures are now such as to ensure that the existence of an easement can be readily ascertained by Board staff and, if necessary, will be brought to the attention of the person presenting building plans for approval (even where such person is either not aware or does not disclose the existence of the easement). This course appears reasonable, particularly in view of the comments made by various of the Board's officers and to which I have already specifically referred.
>
> I would also appreciate your views about the desirability and possibility of displaying another sign in the public area of the Board's office (1st Floor), drawing to attention the responsibility of an owner/builder to ensure that buildings do not encroach the Board's easements, etc., and the availability of search facilities in this respect."

In raising these issues with the Board, I was particularly concerned about the member of the public who, unlike the complainant, might not be aware of the existence of a Board easement or service on his land.

The Board subsequently informed me that its procedures had been examined very thoroughly and action was being taken to—

(a) clearly identify all Board easements on Sewer Reference Sheets;

(b) produce a leaflet, for distribution from the counter area, explaining the procedure to be followed in searching land and the significance of the various markings on the Sewer Reference Sheets; and

(c) make some minor changes to the existing signs displayed on the First Floor area of the Board's office, where building plans are submitted, and to suspend a new sign over the Building Plans counter. This new sign will draw attention to the Board's requirements regarding obstructions to its watermains, sewer mains and stormwater pipes and channels.

The Board expressed the hope, as do I, that the action proposed would ensure that every possible precaution had been taken to convey all necessary information to the public and to ensure that each inquirer is made fully aware of his/her responsibility so far as building plans and the Board's services are concerned.

MUSIC EXAMINATIONS ADVISORY BOARD

Music Examinations

Our complainant was a music teacher who complained that an examiner of the Music Examinations Advisory Board had unfairly failed some of his pupils because they had used photocopies (instead of original scores) in their examinations. After protest to the Board, these pupils were re-examined, but the Board said it was merely "a review", and this review confirmed the first examiner's decision. There was disputed evidence as to the way in which the original examination was conducted, including a pupil's allegation that the photocopy (which led to penalty) had been provided by the examiner.

Correspondence with the Ministry of Education revealed that the holding of a "review" was not the normal policy, as candidates can soon sit for the examination again. Evidence of "quality control" of the examination process was presented. The rationale for the photocopy rule was twofold: the protection of copyright material and the promotion of the sale of the Board's publications.

Due to the protracted nature of the inquiry and the contradictory evidence it was not possible to decide whether or not the examiner had behaved improperly in the examination of this group of students. The investigation therefore focussed on the "photocopy rule".

The suggestion that this rule protected copyright material was fairly quickly dispensed with. While little in the way of substantial justification for the rule could be seen in the Board's need to protect its revenues, I decided that this could not be considered to be wrong conduct. However, the way in which the rule was applied did cause me great concern. What happened was that a candidate who produced a photocopy for any section had his/her mark sheet endorsed "NOT ABLE TO BE ASSESSED", whole their playing was heard and the examiner apparently went through the motions of marking.

I duly advised the Ministry of Education that I saw this procedure as wrong. After consultation between this Office and the Ministry it was agreed that the photocopy rule would be widely advertised and where infringed the candidate advised that the rule was being broken. In due course the Board changed its procedures accordingly.

The inquiry was concluded with the view that the complaint as to the photocopy rule's application was sustained and that no conclusion could be reached about the other circumstances of the examination complained of.

DEPARTMENT OF PUBLIC WORKS/DEPARTMENT OF AGRICULTURE

Unwarranted Resumption by a Government Department

During the year I received a complaint through a Member of the Legislative Assembly against the Department of Public Works. The issue related to the resumption of a part of the complainant's property which had previously been leased to the Department of Agriculture as a dip site for the control of ticks.

The complainant alleged that the action of resumption was unreasonable and unfair, and an unnecessary expenditure of public money as—

1. The Board of Tick Control had a 12 year lease of the site with the option of renewal;
2. At no time prior to the resumption was the complainant notified of the pending resumption;
3. The lease was prepared by and was satisfactory to the inspector in charge of the Murwillumbah office of the Board of Tick Control; and
4. At no time was any officer of the Board of Tick Control refused access to the subject land.

Preliminary inquiries into this matter revealed that the Department of Public Works had acted to implement the resumption for the Department of Agriculture as that Department does not have the necessary resumptive powers. Additionally the

impression was gained that the Department of Public Works had not been completely happy with the circumstances of the resumption. The file of the Department of Public Works relating to this matter was perused and following this action the complaint was found to be not sustained against the Department of Public Works. The matter was however then taken up as a complaint against the Department of Agriculture.

In my initial letter to the then Director-General, Mr Watts, I set out the complaint and made mention of my inquiries to the Department of Public Works. I also expressed my concern that from a study of the file I had formed the opinion that sufficient negotiations were not pursued with the complainant, nor was he given adequate advice, prior to the resumption of his land.

In due course I received a reply from the Department of Agriculture which set out in detail the history of the matter and highlighted the difficulties which had occurred in negotiations between the Department and the complainant over a period of some years. It appeared that in this somewhat stormy relationship the Department was responsbile for some errors which would not have added to the cordiality of the relationship and stated *inter alia*. "Apparently at no stage was Mr . . . advised that the property was to be resumed . . ." In conclusion the opinion was offered that the land had been resumed "for good reason and with due and proper regard to the rights of the complainant". It was further stated that whilst the land could be returned to the complainant, it was feared that in such circumstances it could be expected that further difficulties would occur between the Department and the complainant.

My reply to the Director-General of Agriculture did not agree with his letter. In point of fact I wrote that basically the errors appeared to be on the part of the Department and that I considered the resumption of the land was conduct which could be seen to be wrong in terms of the Ombudsman Act. I suggested that the Department might well consider the return of title to resolve the matter and that in the event of this decision being reached the complainant should not be liable for any associated costs.

Following my reply the new Director-General, Mr Knowles concurred with the return of the subject land, but expressed the view that this return should be conditional upon a lease being offered to the Department by the complainant. I did not agree to this and stated—

> "In my letter to you of 1st July, I stated that I was of the opinion that the actions of the Department in this matter could form the basis of a report of wrong conduct in terms of the Ombudsman Act. It was as a rectification of this conduct that I suggested that you might like to consider transferring the land back to Mr . . . In the circumstances I do not consider it reasonable that a transfer of the subject site for the specified purpose should be in any way conditional. I am of the opinion that the title of the subject land should be returned to the complainant with no liability for costs associated with the matter nor with any provisos attached. In my letter to you I set out what I consider to be the reasons for the resumption, and stated that I did not consider that this was sufficient justification for the manner in which the land was resumed. I am still of the same opinion and I would not consider that the return of title, subject to conditions by the complainant, did constitute a sufficient rectification to absolve the wrong conduct.
>
> The matter of release and indemnity and conditions of any lease appear to me to be matters for negotiation between your Department and Mr . . . and should not intrude into the foregoing matter."

Mr Knowles graciously acknowledged this letter by stating in part—

> "I acknowledge your comments concerning the manner in which this matter should be dealt with and you may be assured that the Crown Solicitor will be instructed to return the site free of any conditions precedent and with no liability for costs."

The matter of release and indemnity and conditions of any lease appear to me principle that where a Government Department has the power to initiate or carry out certain actions, that authority must be exercised with meticulous care to ensure that the freedom and rights of the individual are fully and completely protected.

STATE RAIL AUTHORITY

Failure of Oilicer to Produce Identification

A lad attending high school was questioned by a Special Officer of the State Rail Authority when he (the lad) was found with his feet on the seat. The officer took

the boy's name and other particulars and the Authority subsequently wrote to his father and said, *inter alia*—

> "I desire to point out that your son's action was an offence for which a penalty is provided. However, in view of his age, it is not proposed to proceed further on this occasion as it is felt you will appreciate the opportunity of pointing out to him the seriousness thereof."

The boy's father wrote to me and, while making it clear that he in no way condoned his son's conduct, raised the matter of the officer's refusal to identify himself. The father put his complaint this way—

> "From Michael's earliest years his mother and I have warned him to be wary of strangers.
>
> During my questioning of Michael about the offence under comment, Michael was interviewed on the train as to his name, age, school, etc., by a gentleman casually dressed and who did not provide or wear any identification. When Michael asked the gentleman who he was he was told "not to be cheeky". The interview, details of which were written on a newspaper, and the lack of identification were witnessed by three of his school acquaintances.
>
> I have also ascertained that some days previous to Michael's offence the same gentleman interviewed another of his school acquaintances about a similar occurrence. In this case, when asked, the gentleman refused to provide any identification. The name of the student in this case can be provided if necessary."
>
> "I would appreciate, therefore, if you could take the matter up with the Commission. That is, to always show proper identification especially when speaking to school children."

I took up the matter with the Authority and also sought from my complainant the name of the other boy to whom he had referred in his letter.

The terms of the report I received from the Authority made it plain that there was conflict between the stores told by my complainant's son on the one hand and the Special Officer on the other. The officer claimed to have produced his identification card when he spoke to the boy and, further, claimed that the boy had not asked him to produce identification at any time.

In an effort to ascertain what had hapened, I sought from my complainant's son and from theother boy referred to above, written statements of what had happened. Both lads claimed that their requests for identification had gone unheeded by the Authority's officer. (My inquiries subsequently established that two officers were involved).

I then sought and perused the relevant Authority files. It was apparent that Special Officers were instructed by the Chief Ticket Officer to conduct periodical checks on the particular train involved (one in which large numbers of schoolchildren habitually travelled) as a result of a letter complaining of bad behaviour being published in the local press.

At the same time, I had sought from my complaint's son the names of his friends who had been travelling with him on the day in question and one of my officers subsequently interviewed each of the boys in the presence of one or other of their parents. My officer felt that the boys had obviously "gotten together" to some extent on their stories; this was probably unavoidable as prior arrangements had to be made with their parents for the boys to be seen. Nevertheless, all of the boys were quite sure that the officer—

> did not show identification at any time;
>
> did not give his name when asked for it.

Mr officer then had discussions with the Commercial Superintendent, the Chief Ticket Inspector and the Planning Services Manager, State Rail Authority, where concern was expressed regarding the need for Authority officers to properly identify themselves. My officer was referred to "Rule 6" contained in a book of rules issued to all Authority employees and the view was expressed that, perhaps, "Rule 6" would cover the situation. My officer asked that a copy of "Rule 6" be made available and this was done some days later.

Rule 6 states—

> "Employees must be prompt, civil and obliging. They must afford appropriate assistance in the transaction of business, be careful to give correct information and, when asked, give their names and numbers without hesitation. Employees must not use improper language, or enter into an altercation with the public or their fellow employees whatever provocation may be given."

I, therefore, wrote to the Authority and said—

> "I have carefully noted the terms of Rule 6 contained in the book issued to all employees but, quite frankly, I do not think the instructions therein are explicit enough or go far enough, bearing in mind that my investigation has to do with the question of proper identification of an officer questioning a child or young person.
>
> In this particular case involving Michael . . ., one of my officers interviewed three lads who were travelling on the train in the company of Michael . . . on the day in question. All of the boys were adamant that the Special Officer concerned did not give his name when asked to do so and did not show his identification at any time.
>
> I am aware, of course, of the distinct possibility that the four boys might have 'gotten together' so far as their stories are concerned. This was probably unavoidable in a situation where prior arrangements to see the boys had to be made with their parents. In any event, the situation is that I have conflicting statements from the Special Officer on the one hand and the four boys on the other. I cannot see any purpose in attempting to pursue this aspect as it would be impossible for me to determine exactly what did happen.
>
> I am more concerned to ensure that officer on the Authority, particularly those who do not wear a uniform or openly display their authority (e.g., a badge), should properly identify themselves, as a matter of course, particularly in a 'questioning' or interview situation.
>
> In this regard, I think it would be sufficient for an officer to say, for example—
>
> 'My name is Jones. I am a Special Officer of the State Rail Authority'.
>
> before commencing to ask questions or seek information. Of course, if the officer is asked to produce his authority, he should do so immediately.
>
> My views apply to *any* interview situation but, I feel, are particularly relevant when the person to be interviewed or questioned is a child or young person.
>
> In this connection, therefore, I would appreciate your comments regarding the desirability of the Chief Ticket Officer issuing a clear, written instruction, to appropriate officers under his control, incorporating the views that I have expressed."

I was pleased, therefore, when the Authority later informed me that the Chief Ticket Officer had issued instructions to Special Officers and Ticket Examiners under his control to the effect that, should it be necessary to question or interview any person for any reason whatsoever, the officer is to introduce and identify himself in the manner that I had suggested and, at the same time, produce his badge or authority for sighting by the person being questioned or interviewed.

I informed my complainant of this and said that I felt I had taken his complaint as far as I could. I expressed the hope that, in the light of the instructions issued by the Chief Ticket Officer, cause for complaints such as his would not again arise.

STATE RAIL AUTHORITY

Different Booking Periods

My complainant wanted to travel from Coffs Harbour to Sydney at Easter. She asked at the station when she would be able to book and was told "one month". At that time prior to her trip she booked a seat down on the North Coast Daylight, and wanted to return on the North Coast Motorail but was told it was completely booked out. She discovered that "people at Murwillumbah and Sydney are capable of booking further in advance than we are".

The State Rail Authority responded as follows—

> "Bookings on intrastate trains may be arranged one month in advance of the intended date of travel on the forward journey and up to two months ahead on the return trip. However, reservations on the Gold Coast Motorail Express, for passengers travelling to Casino and beyond may be made up to twelve months in advance of the intended date of travel on the forward journey and thirteen months ahead on the return trip. This arrangement of prior booking it availed of frequently by passengers who will be travelling at holiday weekends, Christmas, New Year, Easter and the school vacations, and during these busy periods all accommodation is soon fully booked.
>
> The Gold Coast Motorail Express is primarily provided for travellers to destinations north of Grafton City, where no other alternative service is

available and for this reason the reservation of seats and sleeping berths for travel between Sydney and Grafton City or vice versa is restricted to one month in advance. Passengers travelling between Sydney and Coffs Harbour may avail themselves of alternative services such as the North Coast Mail and the air-conditioned North Coast Daylight Express which services are specifically provided for persons residing on the North Coast as far as Grafton City. Bookings on these services may be arranged one month ahead on the forward trip and two months ahead for the return journey.

Because of the constant demand for seats and berths on the Gold Coast Motorail Express and the alternative services available to passengers travelling only as far as Grafton City, it is considered necessary for the present practice to be maintained in order that longer-distance travellers are given the opportunity to reserve accommodation."

I replied in the following terms—

"I conclude from your letter and from Ms X's account that she was not clearly advised of the options available to her nor of the reasons why passengers from Casino and places north have eleven months' priority? I would be grateful for your advice on what information about bookings is placed in notices at stations, and what information is given to customers on this in printed form. I would also be interested to know what reasons support a 12–13 month booking period for the Gold Coast Motorail which would not also apply to, say, the North Coast Daylight Express."

Which evoked the following response—

"The advance booking facilities available on the Gold Coast Motorail Express are in line with those provided on the Brisbane Limited Express and all other long distance interstate services. While the Gold Coast Motorail Express is not an interstate service these extended advance booking facilities were applied to this train from its inception as it replaced the previous Brisbane express which provided a second service between Sydney and South Brisbane on which passengers for intrastate stations north of Grafton City were able to obtain reservations two months prior to the date of travel and interstate passengers could book twelve months in advance. Another reason is that the majority of passengers travelling to Murwillumbah continue by connecting road coaches or other means of transport to Queensland destinations, particularly to the Gold Coast and many of these passengers travel by train from Victorian stations, particularly during the winter months. These circumstances do not apply to trains such as the North Coast Daylight Express or North Coast Mail, which convey only intrastate passengers."

To which I responded—

"While your letter does indicate . . . that the booking period for the Gold Coast Motorail follows the long-established practice for interstate bookings however, it does not explain why there is a difference (12 months as compared with one month) between the booking periods, except for the possibility of occasional Victorian bookings."

The Authority replied, saying (in part)—

"The running of the Gold Coast Motorail is considered equivalent to an interstate service, and an extension of vehicle carriage facilities for interstate passengers, off the Southern Aurora, and New South Wales passengers travelling to and from the Gold Coast or stations Casino to Murwillumbah inclusive, and it is felt only fair that these passengers should receive preference over passengers travelling to and from stations short of Casino which are also served by the North Coast Daylight Express and the North Coast Mail trains."

and

"Turning now to the matter of extending the period for intrastate bookings, it is felt that at present these arrangements are satisfactory and that there is no need to vary the procedure. Furthermore, the facilities at the Central Reservations Centre are fully taxed, which precludes the extension of the reservation system at the present time."

I pursued the matter further, saying—

"While I accept that interstate and far north coast passengers, who do not have the option of travelling on the North Coast Daylight Express and the North Coast Mail, should have some priority, I would like to know why, in the face of complaints like those of Ms X, who raised this matter, you can say 'it is felt that at present these arrangements are satisfactory and that

there is no need to vary the procedure', apart from the admission that 'the facilities at the Central Reservations Centre are fully taxed, which precludes the extension of the reservation system at the present time'."

And the Authority replied—

"The present arrangement whereby passengers travelling to stations Casino and beyond are permitted to book 12 months ahead, helps to ensure that these clients are not deprived of using a service primarily designed for their convenience, which could occur if passengers travelling shorter distances, with alternative train services available, were given equal opportunity to travel on the Gold Coast Motorail Express. It is also economically more attractive to the State Rail Authority for trains to operate to capacity with both passengers and motor vehicles, for their entire journey.

It is considered that the present booking limitation or intrastate trains of one month in advance for the forward journey and two months in advance for the returned journey meets the requirements for the short distance travellers . . ."

I refined my question as follows—

"Your assertion . . . that 'the present booking limitation on intrastate trains of one month in advance for the forward journey and two months in advance for the return journey meets the requirements for the short distance travellers' is not borne out by Ms X's complaint (and others received here). The gist of her complaint was that she wanted to go to Sydney by the Daylight and return by Motorail and the different booking periods defeated her. It seems clear that the Motorail is regularly booked out some months before the trip concerned.

The point of my inquiries remains simply this: 'Why the difference of 12 to 17'"

and the response was (in part)—

"The policy adopted by the State Rail Authority from the very inception of the Gold Coast Motorail and other long distance trains is that bookings can be made by intending intrastate passengers one month ahead for a forward journey and up to two months in advance for the return trip, as against the interstate travellers being able to book seats twelve months and thirteen months in advance for the forward and return journeys respectively."

and

"However, it must be stated once again that the Gold Coast Motorail Express is primarily provided for travellers to destinations north of Grafton City, where no other alternative service is available and for this reason the reservation of seats and sleeping berths for travel between Sydney and Grafton City or vice versa is restricted to one month ahead on the forward trip and two months ahead for the return journey."

At this stage I concluded the inquiry as follows—

"I believe that Ms X was inadequately advised and that her complaint is therefore sustained. While there is some justification for the difference in booking periods, the reason for such a large difference still eludes me."

CANTERBURY MUNICIPAL COUNCIL

Unreasonable Refusal to Compensate for Cost of Repairs

I have mentioned in my previous annual reports my concern regarding the manner in which many Councils deal with claims from members of the public by simply referring the claims to Council's insurers instead of dealing properly with the claim themselves. I receive a number of complaints in this regard each year but there is little I can do apart from looking to see whether the Council has itself considered the claim involved and whether, in doing so, all relevant facts and circumstances have been taken into account.

In practical terms, of course, even where I find the Council to have acted wrongly in terms of the Ombudsman Act, I cannot force Council to accept legal liability or to meet the complainant's claim.

My investigation of one such complaint well illustrated, I feel, my fear that claims of this nature are not always properly considered by Councils.

The complainant (who I shall shall "Mr A"), while driving along Punchbowl Road at Lakemba, had his windscreen broken by a cricket ball hit from one of three

cricket pitches at Parry Park. The incident occurred on a Sunday afternoon and was witnessed by at least two people (presumably cricketers) who signed a statement to that effect. Mr A, of course, wrote to Council seeking reimbursement of the cost of repairs ($126.00).

Council forwarded to its insurers (GIO) a copy of Mr A's letter and other documentation, including the statement signed by the two witnesses. The insurers, naturally and as is invariably the case, declined liability on behalf of the Council on the basis that Council had not been negligent. Mr A then wrote to Council and in his letter said—

> "As I consider there is some negligence on the Council's part in erecting a playing field so close to a main road as it may be (and evidently is) dangerous to passing motorists, I am reluctant to accept the GIO's ruling. As I am not covered by insurance for this damage, I feel it is unjust that I should have to pay for this damage out of my own pocket, and therefore I ask that you submit this claim to Council for their reconsideration."

Mr A was subsequently informed by the Town Clerk that Council had considered his claim but did not accept liability for the damage and, therefore, was unable to grant his request for payment. Mr A then wrote to me and reiterated his beliefs that there was some negligence on Council's part in allowing a playing field "to be erected so close to a main road" and that Council was acting unfairly in refusing to accept some responsibility for the damage caused to his vehicle.

I decided to investigate Mr A's complaint but I clearly warned him of the difficulties I face in such cases. In due course, I received a report from the Town Clerk which simply told me what I already knew based on what Mr A had said. I therefore obtained and perused Council's file in the matter and one of my officers inspected Parry Park and, in particular, that area from where the offending cricket ball had been hit.

My perusal of Council's file revealed that, following Mr A's approach requesting that Council itself consider his claim, an officer of Council, in a minute addressed to the Town Clerk, said—

> "The Common Law case Bolton *v.* Stone (a short extract from which is attached to the cardboard backing sheet hereunder) is still good authority for disclaiming liability in the circumstances of (Mr A's) accident.
>
> Shall I prepare a draft agenda item to go to Council as requested by (Mr A)?"

The Town Clerk directed the preparation of an agenda item, and at its next meeting, Council considered the Town Clerk's report and refused Mr A's request for payment.

I think it worth recording the terms of the "short extract" to which Council's officer referred—

> "In Bolton *v.* Stone the facts were as follows:
>
> During a cricket match a batsman hit a ball which struck and injured the respondent who was standing on a highway adjoining the ground. The ball was hit out of the ground at a point at which there was a protective fence rising to seventeen feet above the cricket pitch. The distance from the striker to the fence was some seventy-eight yards and that to the place where the respondent was hit about one hundred yards. The ground had been occupied and used as a cricket ground for about ninety years, and there was evidence that on some six occasions in a period of over thirty years a ball had been hit into the highway, but no one had been injured. The respondent claimed damages for negligence from the appellants, as occupiers of the ground.
>
> It was held unanimously by the House of Lords that for an act to be actionable in negligence there must be both a reasonable possibility of the happening of such an act and a reasonable likelihood of the injury occasioned by it; on the facts the risk of injury to a person on the highway resulting from the hitting of a cricket ball out of the ground was so unlikely that it could not have been reasonably anticipated and, consequently, the appellants were not liable in negligence.
>
> In the course of his judgment Lord Porter said:
>
> > 'It is not enough that the event should be such as can reasonably be foreseen. The further result that injury is likely to follow must also be such as a reasonable man would contemplate before he can be convicted of actionable negligence. Nor is the remote possibility of injury occurring enough. There must be sufficient probability to lead a reasonable man to anticipate it. The existence of some risk is an ordinary incident of life, even when all due care has been, as it must be, taken.' "

I was unable to identify the author of the text from which the extract was taken but for reasons which will be evident, I did not regard it as important to do so. (For those who wish to read for themselves the various cases referred to in these notes, references have been conventionally shown.)

The material on Council's file made it reasonably clear that Council's consideration of the matter did not take into account all of the relevant facts and circumstances and that its decision not to make any payment (*ex gratia*) was determined solely by the advice contained in the agenda item prepared by the Town Clerk, namely that ". . . Common Law precedents in similar cases have decided (1) that for an act to be negligent there must be a reasonable likelihood of damage being occasioned by it and (2) *that the risk of damage on a highway resulting from the hitting of a cricket ball is so unlikely that it could not have been reasonably anticipated*". (My emphasis.)

This advice to Council, which was said to be based on the judgment in *Bolton* v. *Stone*[1], tended to be a little misleading in my opinion. The words used in the agenda time (as emphasized above) conveyed an entirely different sense to the sense conveyed by the article or extract on which the former were based. By reference to the extract, it will be noted that what the author therein said was—

> "*On the facts* the risk of injury to a person on *the* highway resulting from the hitting of a cricket ball out of *the* ground was so unlikely that it could not have been reasonably anticipated . . ." (my emphasis)

Clearly, such comments were restricted to the particular situation that existed in *Bolton* v. *Stone*.

In any case, not all that was said in *Bolton* v. *Stone* had been conveyed to Council and the fact that the circumstances in that case were quite different to those in Mr A's case had not been mentioned at all.

The terms of the minute to the Town Clerk quoted above appeared to suggest that Council could seek to rely on *Bolton* v. *Stone* in every case where damage or injury was caused as a result of a cricket ball being hit out of a ground on to a road; but the Courts, in my view, had made it plain that this could not be so.

The decision in *Bolton* v. *Stone* had been considered/explained in several subsequent cases, perhaps the most significant being *The Wagon Mound* (No. 2)[2] where Lord Reid, in discussing *Bolton v. Stone* said—

> "But it does not follow that, no matter what the circumstances may be, it is justifiable to neglect a risk of such a small magnitude. A reasonable man would only neglect such a risk if he had some valid reason for doing so, e.g., that it would involve considerable expense to eliminate the risk. He would weigh the risk against the difficulty of eliminating it."

and

> ". . . *Bolton* v. *Stone* did not alter the general principle that a person must be regarded as negligent if he does not take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man. What that decision did was to recognize and give effect to the qualification that it is justifiable not to take steps to eliminate a real risk if it is small and if the circumstances are such that a reasonable man, careful of the safety of his neighbour, would think it right to neglect it."

Lord Thomson applied Lord Reid's view in awarding damages to a man struck by a golf ball hit over the fence surrounding a golf course[3] and, in his judgment, referred to the "classic words" of Lord Atkin in *Donoghue* v. *Stevenson*[4]—

> "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."

Lord Denning in *Morton* v. *Wheeler* (1956) (unreported)[5] said—

> "But how are we to determine whether a state of affairs in or near a highway is a danger? This depends, I think, on whether injury may reasonably be foreseen. If you take all the cases in the books you will find that, if the state of affairs is such that injury may reasonably be anticipated to persons using the highway, it is a public nuisance."

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[1] (1951) All E.R. 1078.
[2] (1966) All E.R. 709.
(1966) 3 W.L.R. 498.
[3] Lamond v. Glasgow Corporation—(1968) S.L.T. 291.
[4] (1932) S.S. (H.L.) 31.
[5] Applied in The Wagon Mound No. 2 (1966) All E.R. 709.

The decision in *Bolton* v. *Stone* attracted fairly strong criticism in the Law Quarterly Review (67 LQR 460) and, perhaps, the final paragraph of that article was the most significant. It said—

> "As the present case has given rise to some misunderstanding in the popular press, it is to be hoped that it will be made clear to those responsible for cricket clubs, whether these are situated in a town or in the country, that they are under a duty to take reasonable care not to injure those persons who may be passing outside their grounds, and that the degree of care must depend on the facts of each particular case."

It seemed to me to be reasonably clear from all of this that the circumstances in each case must be considered; or, put more correctly, perhaps, that the principles laid down by the Courts, and particularly in *Bolton* v. *Stone*, must be considered in relation to the circumstances of each case. Even Lord Reid in *Bolton* v. *Stone* said that "Statements of law must be read in light of the facts of the particular case".[6] His remarks in *The Wagon Mound No.* 2 reinforced this.

Lord Porter in *Bolton* v. *Stone* said—

> "The existence of some risk is an ordinary incident of life *even when all due care has been, as it must be, taken*". (my emphasis)

I thought that this was relevant to Mr A's case for, in my view, Council had not taken "all due care".

More importantly, perhaps, the circumstances in *Bolton* v. *Stone* were quite different to those in Mr A's case. In the former, there was a protective fence, some 78 yards from the pitch, rising to 17 feet above the level of the pitch. In addition, it seemed clear that the highway did not immediately adjoin the ground but was something like a further 22 yards away. As well, the highway was described by Lord Radcliffe as being "not . . . a crowded thoroughfare" and by Lord Reid in *The Wagon Mound No.* 2 as an "unfrequented public road". At Parry Park, Lakemba, on the other hand—

there was no protective fence;

the ground immediately adjoined the Punchbowl Road, a very busy main thoroughfare;

the pitch concerned was only approximately 65 yards from the edge of the roadway.

It seemed to me that, as Council had control over the land comprising Parry Park and control over the use to which such land is put, Council was in a particularly strategic position to prevent accidents and might reasonably be expected to take affirmative action to prevent harm which may result from activities creating risks of harm. In this regard, the public should be able to depend on Council's co-operation for their effective protection for, it seems to me, occupation and control are entitled to be recognized as a positive source of responsibility.

In the light of all of the circumstances in Mr A's case, I was not convinced that the risk of damage being caused by cricket balls being hit on to Punchbowl Road from Parry Park was "so unlikely that it could not have been reasonably anticipated". On the contrary, I regarded the risk as being quite likely and capable of reasonable anticipation bearing in mind:

(a) the distance from the pitch to Punchbowl Road;

(b) the heavy traffic usage of Punchbowl Road; and

(c) the lack of any protective fence between the cricket grounds and Punchbowl Road, or other means of precaution, to prevent cricket balls being hit onto the roadway.

Neither did it appear to me that Council, in dealing with Mr A's request for reimbursement of the cost of repairs to his windscreen, had properly considered the circumstances of his accident. Rather, based on the terms of the Town Clerk's report to Council, the view appeared to have been adopted that, no matter what the circumstances might be, Council could avoid responsibility by relying on *Bolton* v. *Stone*. In my view, Council should have considered the markedly different facts in the two cases but had failed to do so.

I took the view, and so informed the Mayor, that Council—

(i) had not taken sufficient action to prevent the risk of harm created by permitting cricket to be played in an area close to a busy main road; and

(ii) in considering Mr A's claim, had not considered the particular circumstances of his case but merely relied on a decision reached on entirely different facts and in entirely different circumstances.

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[6] Op. Cit.—pp. 1084.

I said that, in my view, Council should reconsider Mr A's request for reimbursement as an act of grace on the grounds that it was at least open to question that Council had no legal liability in the matter and, in any case, Council clearly appeared to have some moral responsibility.

I added that Council might also wish to consider whether it should take some action to prevent similar accidents in the future.

The Town Clerk later informed me that Council's insurers had agreed to meet Mr A's claim as an act of grace. I have no idea whether that decision was taken because my arguments proved to be compellingly persuasive or whether it was taken for some other, less flattering reason. Additionally, whilst the insurance company had suggested that Council, in future, might insist that all users of the playing fields take out their own Public Liability insurance, the Town Clerk said nothing about any action proposed by Council for the future. However, I felt that I had to leave to Council the resolution of that problem.

GOSFORD CITY COUNCIL

1. Failure to Prevent Discharge of Water onto Property
2. Delay in Replying to Ombudsman

It is not unusual, during an investigation of a complaint, for me to decide, pursuant to section 13 (1) of the Ombudsman Act, to take up, of my own volition, with the authority involved an issue or matter that has come to light as a result of my inquiries. It is most unusual for such an issue to be concerned with inordinate delay in replying to me, but such was the situation in this case.

As a matter of record, subsection 1 of section 13 provides—

> "Where it appears to the Ombudsman that any conduct of a public authority about which a complaint may be made under section 12 may be wrong, the Ombudsman may, whether or not any person has complained to him about the conduct, make the conduct the subject of an investigation under this Act."

In this particular case, in early May, 1980, I received a complaint that Gosford City Council had failed to take action to prevent the discharge of water onto the complainant's property from his neighbour's property. I will hereafter refer to the complainant as "Mr X".

Mr X in writing to me, said that he had been corresponding with the Council since March, 1977, with a view to having the situation rectified but water from his neighbour's property was regularly being discharged onto his land. Copies of correspondence provided by Mr X disclosed that—

(i) he had written to Council on 4th March, 1977, alleging that his neighbour was discharging stormwater and septic tank effluent onto his land and that this had caused structural affectation to the foundations of the dwelling he had built.

(ii) Council, on 17th March, 1977, had replied that a recent inspection of his premises had failed to disclose the nuisance alleged. Council said that the premises would be kept under surveillance particularly during periods of rain.

(iii) on 28th March, 1977, Mr X had written to Council again, drawing attention to the fact that water was being discharged via an earthenware pipe from his neighbour's property onto a driveway on the south-eastern boundary of Mr X's property.

(iv) on 6th April, Council had replied and said—

> "The neighbouring premises have already been inspected on a number of occasions but, to date, there has been no evidence that effluent or sullage is being discharged into the drain you have excavated along the eastern side of the drive.
>
> Regular inspections will continue to be carried out but the nuisance you refer to must be evident at the time of inspection for Council to commence any action to abate this nuisance."

(v) In October, 1978, Mr X had again raised the problem with Council, after his neighbour had constructed an in-ground swimming pool adjacent to the property boundary, expressing concern about possible discharge of water from the pool in addition to the water he claimed was already being directed on to his property.

(vi) Council had acknowledged his letter on 1st November and on 23rd November, 1978, had written informing him that an inspection by Council's Health Inspector had revealed "no nuisance at the time of inspection". Council's letter went on to say—

> "The installation of the swimming pool should not provide any drainage nuisance to your property.
>
> Should any nuisance be created by sullage water or the overflow from the swimming pool your advice at the time the nuisance is taking place would enable Council to inspect the property and take any appropriate action that may be deemed necessary."

(vii) Mr X wrote to Council on 29th November, 1978, and, *inter alia*, said—

> "Obviously there was no nuisance occurring at the time of the inspection because the swimming pool was still being constructed and there was no water in it.
>
> Secondly, you obviously recognize the fact that there is a possibility of nuisance because you state that I should contact you if a nuisance occurs. If you inspect the installation of pipes leading from the pool, you will notice that the discharge from the filter and pool is intended to flow directly on to my land, just as the discharge from the 4" EWP pipe near the side of the pool was directing rainwater directly on to my land.
>
> From past experience, I have found that your inspectors are unavailable except early in the morning and late in the afternoon, so I fail to see how I could contact you or your inspectors as you suggest so that you can inspect the nuisance when it occurs, that is, so that you could drive from your office to the site *at that time* to inspect the nuisance.
>
> Obviously, unless you can see the water being discharged on to my land, you will continue to allow the earthenware pipes to remain directed on to my land."

(viii) In its reply on 7th December, 1978, Council had said—

> "The 100 mm earthenware pipe mentioned in your correspondence appears to have been disconnected as the pool has been constructed through the pipeline.
>
> All applications for the erection of swimming pools in the Shire of Gosford are approved conditional that no nuisance is caused by the backwashing process of the filtration system."

(ix) On 2nd April, 1979, Mr X again wrote to Council and said—

> "I assure you that both myself and my (other) neighbour in Lot 23, have both been subject to problems caused because of the above installation. Firstly, one 100 mm earthenware pipe discharges rainwater directly on to my property (I have a photograph to illustrate this), and the excessive water discharge from the pool backwash discharges directly on to my site and flows at the full depth of the protective drain I have had to dig to protect my cottage and divert any possibility of a slide occurring."

He went on to say that his neighbour in Lot 28 was threatening legal action against him and that he proposed to take legal action against the Council. Council, on 27th April, had replied to the effect that his letter was acknowledged and the contents had been noted.

On 13th May, 1980, I wrote to the Mayor of Gosford seeking his comments about Mr X's complaint which I delineated as Council's alleged failure to take action to prevent the discharge of water on to his property. In accordance with well established procedure, I sent a copy of my letter to the Town Clerk.

On 27th June and 15th July, having heard nothing from either the Mayor or the Town Clerk, I sent reminder letters, the first requesting a reply within ten (10) days and the second within seven (7) days. On 31st July, I was forced to write and say—

> "I have received no reply to any of my letters, not even a formal acknowledgement.
>
> In view of this, I am now arranging for one of my officers to attend at Council's office to investigate the complaint.
>
> My officer will require access to the relevant Council files and will probably need to interview the appropriate Council officer dealing with the alleged drainage nuisance."

On 7th August, the Town Clerk wrote to me and I reproduce hereunder the terms of his letter—

> "Several inspections have been carried out by Council's Inspector, however, at the time there has been no evidence of discharge on to the above property.
>
> The property will be inspected periodically and in the event of action being taken by Council, your office will be advised."

On the same day, in response to my letter of 31st July, one of Council's officers, a Health and Building Inspector (I will call him "Mr A"), contacted my office and one of my officers arranged to visit the Council on 18th August, 1980.

On 18th August, my officer visited the Council's premises, interviewed the Health and Building Inspector, Mr A, and called for the production of all relevant files, which he examined. Later in the day, in the company of Mr A, he carried out an inspection of Mr X's property and the neighbouring properties. My officer reported to me that, upon his arrival at the Council and before the inspection was carried out, Mr A had informed him that Mr X's neighbour, indeed, had connected his pool backwash system to the earthenware pipe mentioned by Mr X.

After considering my officer's report to me, I wrote to the Mayor, on 5th September, 1980, in the following terms—

> "I refer to the Town Clerk's letter of 7th August (your reference 3330, 35) concerning the complaint made to me by (Mr X) about the discharge of water on to his property . . .
>
> At the outset, I must say that I consider the Town Clerk's response in this case to be totally inadequate and to reflect a disregard for my function and role as Ombudsman.
>
> As I foreshadowed in my letter of 31st July, I arranged for one of my officers to attend at Council and peruse the file relating to (Mr X's) dealings with Council. My officer also interviewed Health and Building Inspector (Mr A), and carried out an inspection of the two properties involved in (Mr A's) company.
>
> As a result of my officer's inquiries, in respect of which he has reported to me, the significant issues in this matter, it seems to me, can be summarized as follows:
>
> (a) It has been ascertained that (Mr X) has taken action, in the Supreme Court, against the (offending neighbour) seeking relief from nuisance which he alleges is being caused. Notwithstanding this, my investigation is concerned with whether Council acted reasonably in dealing with Mr X's complaints about the alleged discharge of water onto his property.
>
> (b) Inspection of the properties and discussion with (Mr A) revealed that the (neighbour) discharges water through a small earthenware pipe, when backwashing his pool, into a small, rather overgrown, drain which (Mr X) has dug. This drain, it is said, is not on (Mr X's) property but on an access road which separates the two properties; the drain takes away from the rear boundary of Mr X's) land and deposits it on the road at the rear of a vacant block, next door to (the neighbour's property).
>
> (c) (Mr A) told my officer that, the pool owner, really, should not be discharging his pool water in this way, but expressed the view that, in practical terms, the water discharged was not affecting (Mr X) and the only other means of disposal would be for the pool owner to install a collection well and pump in order to pump out the water—'a very expensive exercise', in (Mr A's) view.
>
> (d) (Mr A) said that a condition of approval for the pool was that pool water be disposed of 'in a manner satisfactory to Council'. The pool owner claimed that he only backwashes the pool about once a month in the summer months and, then, would discharge 'only about 100 gallons'.
>
> (e) (Mr X's) property would receive a considerable amount of surface run-off in wet weather, due to the topography of the area. As far as can be ascertained, apart from the rough drain on the access road, he has made little provision for drainage on his land.
>
> (f) My officer's perusal of Council's file revealed that reports relating to inspections and investigations carried out by Council's officers and referred to in Council's correspondence with (Mr X), and in the Town Clerk's letter to me, do not exist (or, at least were not on the file).

When questioned in this regard, (Mr A) said that Council's officers do not have time to make reports, because they are too busy, but that letters sent to complainants by Council reflect the results of inspections made.

I have looked carefully at the terms of Council's letters to (Mr X) from March, 1977, to April, 1979, and I have reached the conclusion that the advice given by Council in those letters was inadequate and, possibly, misleading, particularly after construction of the pool (on the neighbouring property). On 7th December, 1978, for example, Council told (Mr X) that the 100 mm earthenware pipe appeared "to have been disconnected as the pool has been constructed through the pipeline". This does not appear to have been the case, as the pool owner freely admits that he is discharging water when backwashing the pool through the pipe referred to and this information should have been readily ascertainable by Council's officers. In addition, the reference to disconnection infers that the pipe had previously been connected to something but no information was given in this respect.

(Mr X), in his letter of 2nd April, 1979, made reference to photographic evidence of the discharge of rainwater through this pipe and mentioned pool water discharge as well, but Council merely replied to the effect that the contents of his letter had been "noted". Council's whole approach appears to have been one of being unable to take action unless the discharge of water could actually be observed at time of inspection. No consideration appears to have been given to dye testing or any other action to establish the actual position in respect of the discharge of water from (the neighbouring property).

The Town Clerk's letter of 7th August to me made no mention of the fact that it was known to Council that pool water was being discharged via the earthenware pipe. Whilst it was claimed, on inspection, that no water would flow onto (Mr X's) land, the question still remains as to whether such method of disposal complies with the conditions attached to the building approval for the pool and, if not, whether Council should take action in this respect.

On the material available, I am of the view that Council's actions in this matter might be made the subject of adverse comment in terms of the Ombudsman Act. However, pursuant to section 24 of that Act, I now afford you an opportunity to make submissions before I reach a final decision in the matter. In this regard, I would particularly appreciate your comments about the following aspects—

(i) the absence, on Council's file, of any reports made as a result of inspections carried out by Council's officers;

(ii) the inadequate and possibly misleading nature of the letters sent by Council, both to (Mr X) and to me;

(iii) in the absence of evidence to indicate otherwise, Council's apparent failure to take meaningful action to establish whether the owner at (the neighbouring property) was discharging water from his roof, his pool, or from elsewhere, through the earthenware pipe and whether such water was flowing or could flow onto other properties, including (Mr X's);

(iv) Council's apparent acceptance of the present method of discharging pool water as a method 'satisfactory to Council' in terms of the conditions of building approval.

In addition, pursuant to section 13 (1) of the Ombudsman Act, I propose to investigate, of my own volition, and as a separate matter, the delay on Council's part in replying to me about the complaint made to me by (Mr X). In this regard, I wrote to you (and sent a copy to the Town Clerk) about the matter on 13th May, 1980; I sent reminder letters on 27th June and 15th July, 1980, but heard absolutely nothing. My letter of 31st July, at least, evoked a response but, as I have already said, I consider such response to be inadequate in the extreme.

I, therefore, request your comments about this matter as soon as possible. When forwarding your reply, please outline for my information the administrative procedures presently in operation to deal with complaints referred by me to Council.

I would be pleased to receive your reply in both matters as soon as possible and, in any case, within six (6) weeks of the date of this letter. In this regard, might I express the hope that there will be no repetition of the delay experienced in respect of (Mr X's) complaint."

On the same date, I wrote to Mr X informing him of the present position of my investigation and of the fact that I was seeking further comments from the Mayor before I reached a final decision.

On 20th October, Mr X wrote to me pointing out that—

the drain (referred to in (b) in my letter to the Mayor) was in fact on his property. His neighbours to the north had a right of way across that section of the property to gain access to their properties.

the pool water discharged onto his land was contaminated water containing algae, body fats, urine, etc. He expressed the view that as the Council had required that he install a collection well on his property, a similar requirement should be imposed on his neighbour.

his property could cope with surface run-off from his neighbour's property if it was discharged over the whole width of his block (i.e., naturally) and not concentrated in one spot (i.e., through the pipe).

On 31st October, the Town Clerk wrote to me in the following terms—

"The following comment is made on the issues raised in your letter dated 5th September last:

(a) No nuisance has been apparent at any inspection made by a Council officer which is evident from previous letters sent to (Mr X) and yourself.

(b) The owner of (the neighbouring property) was interviewed on 19th September, 1980, and has agreed to provide an absorption trench for the earthenware pipe at the rear of the property.

(c) With the volume of water anticipated from backwashing a swimming pool it is considered that the dangers expressed by (Mr X) are overstated and there is no evidence of damage to (Mr X's) property from any water flow.

(e) It is true that there would be a considerable amount of surface run-off in wet weather and Council does not consider that it is an owner's responsibility to prevent surface water from natural land surface from running over another property.

(f) Council's officers do not make comprehensive reports on every complaint investigated and would only do so if they contemplated taking legal action.

Your questions are answered in the following manner:

(i) See paragraph (f) above.

(ii) At no time has any nuisance been observed by Council's officers and there is no doubt that action would have been taken had any nuisance been apparent.

(iii) The septic tank installation and stormwater drainage lines were dye tested during the construction of the swimming pool and the tests proved negative.

A dye test of the stormwater drainage on 19th September, 1980 revealed that the stormwater and backwash water are discharging through the earthenware pipe at the rear of the lot.

(iv) The owner of (the neighbouring property) has agreed to provide an absorption trench for the discharge of waste waters. It is not Council practice to ask owners to pump stormwaters or backwash water to a higher road level, particularly in this case where no kerbing and guttering is available."

On 29th October, I wrote to the Mayor again, pointing out that I had afforded him, as head of the authority concerned (i.e., the Council) an opportunity to make submissions to me before I reached any final decision whether I should make adverse comment about Council's actions. I said that, whilst the Town Clerk's reply had dealt with the issues raised in respect of the complaint made by Mr X, it had not dealt with the delay on Council's part in replying to me, and which I was investigating of my own volition. I went on to say—

"I must say that I am concerned that you have not seen fit to reply to me personally, particularly in the light of the serious issues raised. In fact, I would have thought that mere courtesy dictated that I should receive some form of response from you as the head of the authority. I say this, of course, on the assumption that you actually see the letters that I address to you.

In this particular case, I am still waiting on your comments in respect of the delay in replying to me about (Mr X's) complaint after I had referred it to Council on 13th May, 1980. Reference to my letter on 5th September will reveal that I asked, as well, for information about the administrative procedures presently in operation to deal with complaints referred by me to

Council. In the light of the present situation, such information appears more important than ever and, consequently, I must ask that you let me have your reply in respect of the matter as soon as possible and with twenty-one (21) days of the date hereof.

Whilst I regret having to do so, I must draw your attention to the provisions of sections 18, 21 and 37 of the Ombudsman Act.

Turning now to the matter of (Mr X's) complaint, there are a number of comments that I must make regarding the reply forwarded to me by the Town Clerk—

(a) (i) the Town Clerk's reply still speaks of 'no nuisance being apparent at any inspection made by a Council officer'. It does not explain why the complaints made by (Mr X) in his letter of 2nd April, 1979, were not investigated. In this regard, I note that dye testing (with negative results) was carried out during the construction of the pool . . . but not afterwards, despite (Mr X's) continuing complaints, until 19th September, 1980, following my last letter to you;

(ii) in my view, it was not sufficient, in the light of the claims that (Mr X) was making, to simply do nothing because 'a nuisance' was not actually seen;

(b) Council was aware some time before September, 1980, that pool water was being discharged through the earthenware pipe but this was never conveyed to (Mr X). The only advise he ever received was to the effect that the pipe 'appeared to have been disconnected' and that no nuisance was apparent;

(c) (i) in fact, as is now clear, the situation is even worse than Council thought, for not only is pool water being discharged through the pipe, but stormwater as well. One wonders how long this situation has existed and the only evidence available (namely, the claims made by (Mr X) in his letter of 2nd April, 1979) indicates that it has existed at least since late 1978 or early 1979. In the light of this, I cannot agree with the Town Clerk's statement that (Mr X) has 'overstated' the dangers for it is not only the water from pool backwashing that is involved;

(ii) it seems quite evident that, even in the face of (Mr X's) complaints and his claims regarding the disposal of rainwater and pool water, Council appears to have done absolutely nothing to ascertain the position. In fact, as I remarked in my last letter, (Mr X's) letter of 2nd April, 1979 was merely 'noted';

(iii) whilst I have noted the Town Clerk's comments about surface run-off (subparagraph (e) of his letter), (Mr X) has made the point that his property can cope with normal surface run-off from his neighbour's property as this is discharged over the entire width of the block. However, he does object to stormwater, etc., being concentrated in one spot (i.e., discharged through the pipe);

(d) Despite the condition attached by Council itself to the approval for the pool at (the neighbouring property) relating to the satisfactory disposal of pool water and, again, in the fact of (Mr X's) complaints, Council appears to have taken no action whatsoever to satisfy itself as to compliance with the relevant condition of approval.

As a matter of interest (Mr X) has informed me that the access road, referred to in subparagraph (b) of my letter of 5th September and on to which the earthenware pipe discharges, is his property. Access is provided across this section of his property to his two neighbours on the northern side.

I note the Town Clerk's advice that Council's officers do not make comprehensive reports on every complaint investigated and would only do so if they contemplated taking legal action. With respect, I suggest that it is not a question of making 'comprehensive' reports, but one of making any reports at all. One wonders how Council's officers can adequately inform Council, should a matter need to be considered by Council itself, in the absence of some record of what has been done in the field, particularly when, as is not unusual, staff may leave Council's employ, retire, etc., and might not be available to recall the action they took.

In addition, it is not inconceivable that legal action might have been necessary in this case in relation to the failure of the pool owner to comply with the

conditions of building approval in respect of the discharge of pool water, yet there were no reports on the file. In any case, I am intrigued as to how Council's officers determine with absolute certainty which cases might result in legal action and therefore be deserving of report.

I would be interested in having your views about this particular aspect.

In conclusion, I am not persuaded by anything the Town Clerk has said, that I should not find Council's conduct in this matter to have been wrong, and report accordingly in terms of the Ombudsman Act. However, as I have not had the benefit of your views in the matter, I again afford you an opportunity, pursuant to section 24 of the Act, to let me have your submissions. I would be pleased if such submissions reached me within twenty-one (21) days of the date hereof."

On 3rd November, the Mayor telephoned my Office. He indicated that he thought that a reply from the Town Clerk was all that I had required and, in any case, he rested on the terms of the Town Clerk's reply. He added that a further letter regarding the delay in replying to me about Mr X's complaint was on the way to me.

I subsequently received the Town Clerk's letter, which he had written on 28th October, and which said—

"The following information is supplied in response to your criticism of the delay in replying to correspondence concerning the above complaint.

(1) Upon receipt of the letter from your office dated 13th May last, it was referred to the Engineer's Department for preparation of a draft reply.

(2) Inquiries made from that Department following receipt of the letter dated 27th June indicated that it had been misdirected and forwarded to the Health and Building Department for drafting of the reply.

(3) The Health and Building Department was reminded about the matter following receipt of your letter of 15th July, 1980.

(4) A copy of your letter dated 31st July, 1980 (received on 6th August), was sent to the Health and Building Department as a further reminder and in response a draft reply dated 6th August was prepared. (It is recalled that about this time (Mr A) of the Health and Building Department reported that arrangements were being made with an officer of your office to inspect the subject of the complaint."

After carefully considering the material available to me, I wrote to the Mayor on 11th November in the following terms—

"I wish to confirm that I have now received the Town Clerk's letter of 28th October concerning the delay that occurred in replying to my letters regarding (Mr X's) complaint and I have carefully noted all that he has had to say in this regard. However, you will recall that, in notifying you of my decision to investigate this particular matter (my letter of 5th September), I asked that I be informed of the administrative procedures presently in operation to deal with complaints referred by me to Council. I regret to say that this information was not included in the Town Clerk's letter of 28th October which was not before me or my officer when we spoke to you on the telephone.

In the circumstances, you might now let me know—

(a) the way in which letters from this office are referred to the appropriate Department of Council for preparation of draft reply (e.g., is a copy of my letter referred while the original is placed on the general correspondence file pending receipt of the draft reply?);

(b) whether any system of follow-up is employed in the Town Clerk's Department to ensure that draft replies are prepared within the time constraints imposed in my letters pursuant to section 18 of the Ombudsman Act; and

(c) whether any system of follow-up or oversight is employed within other Departments to ensure that—

(i) the request has been referred to the correct Department; and

(ii) the draft reply is prepared promptly.

It seems to me that the information requested is pertinent in the light of the Town Clerk's advice, which indicates that no inquiries were made or reminder action was taken within Council, in the matter of (Mr X's) complaint, until my various reminder letters were actually received.

The other issue raised in my letter of 5th September, and which was overlooked during our telephone discussions, relates to the present practice whereby Council's

officers do not make reports on every complaint investigated. My comments in this respect appear on pages 2 and 3 of my letter under reference and I would appreciate your views about the matter before I decide whether I should pursue it.

So far as Council's actions in respect of (Mr X's) complaint are concerned, I confirm that your views are represented by the terms of the Town Clerk's letter of 21st October."

On 28th November, the Mayor wrote to me and said—

"It is to be regretted that the Town Clerk's reply of 28th October, 1980, relating to the complaint by (Mr X) did not satisfy your inquiry regarding the administrative procedures presently in operation to deal with complaints referred by me to Council. It was assumed that this statement related to the subject of the letter only. In response to your general inquiry re procedures, the following information is supplied:

(a) There is a delay unfortunately sometimes appreciable, before the letter reaches the Town Clerk. A copy of your letter is forwarded to the appropriate senior officer of the Council and the original retained by the Town Clerk. The Council does not maintain a general correspondence file.

(b) A system of follow-up is employed in the Town Clerk's Department, but is not always effective.

(c) Each Department is provided with a monthly report of outstanding correspondence which has been referred to that Department. Monthly reports would include letters from your office which were unanswered at that date of the report. It should be appreciated that it is more the rule than the exception for a field inspection to be carried out in order to draft a reply, and that the Council deals with 1 000 letters per month requiring replies. Furthermore, occasions arise where a technical officer who is familiar with the subject is absent on leave.

(d) It is unusual for a report, in some form or another, not to be made when an investigation is carried out—even if that report is recorded in a reply to a letter. It is not the practice of the Council to insist that reports be made of conversations with residents, as such a practice would unnecessarily add to the workload of the Council's staff."

Bearing in mind the factors that I had raised in my letters of 5th September and 29th October, 1980, to the Mayor and, in particular, that:

(a) no effective investigation incorporating the use of dye tests had been carried out in respect of Mr X's complaints, following the construction of the swimming pool, until after I had raised the matter in my letter of 5th September;

(b) Council had been aware for some time that pool water was being discharged through the earthenware pipe onto Mr X's land;

(c) dye testing, eventually, had established that stormwater was also being discharged through the pipe onto Mr X's land and the only evidence available suggested that this situation had existed since late 1978; and

(d) even in the face of Mr X's continued complaints and claims, Council had done nothing to ascertain the true position (no period here).

I formally found the conduct of the Council to be wrong in terms of the Ombudsman Act in that Council had failed to take sufficient action to deal with Mr X's complaints about the discharge of water onto his property and, moreover, the terms of Council's letters to Mr X between March, 1977, and April, 1979, had been inadequate and misleading. Might I add that the same had to be said for the letter of 7th August, 1980, addressed to me.

This left the matters of Council's practice in relation to making reports about field inspections and the general issue of the procedures adopted to deal with complaints referred to Council by me.

So far as the first matter was concerned, I adhered to the views I expressed in my letter of 29th October to the Mayor. I did not suggest that, in every case where an inspection is made, a detailed report be prepared. However, I was of the view that, at least, a brief report should be made and retained on Council's file to indicate—

who carried out the inspection;
when the inspection was made;
the result of the inspection.

So far as the second matter was concerned, I considered it relevant that, of 11 matters which I had referred to the Council between 1st January and 30th September, 1980 (not including Mr X's complaint), delay in furnishing a reply had occurred in 8 cases (or 72.7 per cent). Such delay had ranged from a mere 2 days to 30 days and had averaged a not inconsiderable 19 days. I could but agree with the Mayor's statement that the system of follow-up employed in the Town Clerk's Department "is not always effective".

In accordance with the provisions of sections 25 and 26 of the Ombudsman Act, I informed the Minister for Local Government of my intention to publish a report in the matter and offered to consult with him if he wished me to do so. I provided a copy of a draft of the report I proposed to make to the Minister and to the Mayor.

The Minister subsequently indicated that he did not wish to consult with me and I, therefore, made my report and published it. Copies of my report were given to the Minister, the Mayor and Mr X.

In my report, in the light of Council's belated action to have Mr X's neighbour install an absorption trench, I made no recommendation in relation to Mr X's specific complaint.

However, I did recommend—

(a) that Council's practice whereby officers are not required to make reports following field inspections be changed; and

(b) that the administrative procedures in effect for dealing with matters referred to Council by the Ombudsman be carefully reviewed with a view to ensuring that replies are prepared and forwarded expeditiously and within the time constraints imposed pursuant to section 18 of the Ombudsman Act.

I asked the Mayor to let me know what action Council intended to take in respect of my recommendations and he subsequently wrote saying that he had referred the matter to the Town Clerk for attention and investigation. The Town Clerk, he said, would advise me as soon as he (the Town Clerk) had completed his investigations.

The Mayor himself, however, subsequently informed me in the following terms—

"Arrangements have been made for officers to make written reports on the subject of complaints and attach them to the relevant file.

A procedure will be introduced in an endeavour to ensure that matters referred to the Council by the Ombudsman are replied to within the time required."

I then concluded my investigation.

PENRITH CITY COUNCIL

Drainage Problems

I received a complaint concerning Council's charges relating to the kerbing and guttering of a street bordering the complainant's land, and alleging that the Council had dug an open drainage channel on to his land into which it had directed run-off from a public road.

I raised these matters with Council and was advised that the subject drain had been in existence for some time and that Council had only cleansed and maintained the drain in its recent operations. Further, I was advised that Council's charges for kerb and gutter work were reasonable and based on a detailed examination of the performance of Council's staff on similar work in the previous year.

On the basis of statutory declarations and photographs supplied by the complainant, and maps and diagrams supplied by Council, I was able to take the matter up with Council again on the basis that:

(1) Council had not issued the complainant with a notice of entry prior to Council workers entering on to his land to undertake work on the subject drain.

(2) The work undertaken to the subject drain was far in excess of that required just to cleanse the drain. The information that had been supplied to me indicated that a mechanical digger had been used to significantly deepen, lengthen and restructure the drain.

(3) The information available to me further indicated that the Council had constructed a culvert under the adjoining road (and a gully pit as part of the subject kerb and guttering of the road) which had the effect of concentrating the run-off of water from the public road into the drain located on the complainant's land.

(4) The only attempt made by Council to deal with or minimize the effect of this redirection of flow on to the complainant's land appeared to have been the digging of the drain. No attempt had been made to purchase land, acquire a drainage easement, or to pay compensation for any nuisance caused by the culvert and drain.

(5) It appeared that the extension of the subject culvert, plus the construction of the necessary gully pit tying the culvert into the kerb and gutter, did not fall within Council's powers under section 243 of the Local Government Act, 1919.

(6) The decisions of the Supreme Court in *Rudd* v. *Hornsby Shire Council* (31 LGRA 120) and *Stevens* v. *Bowral Municipal Council* (Helsham C.J. in Eq. unreported 5/8/77) were relevant in that they were primarily concerned with Council actions which resulted in a nuisance being created in a situation where a Council had not purchased land, acquired an easement, or paid compensation. These cases dealt extensively with Council's responsibility and liability for maintenance of drainage easements and watercourses free from nuisance.

(7) In the complainant's case the road water directed on to his land by Council had detrimentally affected the drainage of his property and had resulted in significant erosion.

In the circumstances I advised Council that I was of the opinion that it had gone beyond its powers under section 241 of the Local Government Act, 1919, and had incorrectly tried to charge the complainant a percentage of the cost of certain works under section 243 of the Act.

I recommended to the Council that steps be taken to remove the drainage nuisance through piping of the subject drain and that the cost of extending the culvert and constructing the gully pit be deleted from the bill given to the complainant.

In response I was advised that Council was prepared to resolve the problem by:

(a) piping the subject drain; and

(b) reducing the outstanding kerb and gutter account by deduction of the estimated cost of the subject culvert and gully pit.

As I was of the opinion that Council's offers were generally acceptable and would provide the basis for satisfactory resolution of the complaint, I decided not to take the matter any further.

SUTHERLAND SHIRE COUNCIL

Refusal of Application for Fence and Erection of a Different Fence without Consultation

A young couple (my complainants) purchased a home and land at the rear of which was some unfenced Council-owned land. Council later subdivided its land for sale as building blocks and, by virtue of agreements entered into with its original neighbours, arranged for rear boundary fences to be built at Council expense.

My complainants who had purchased their property from one of Council's original neighbours heard about the fence proposals from other neighbours and, after making inquiries and on the advice of a Council officer, submitted an application to have a particular style of fence erected rather than an ordinary paling fence. They claimed that they were told by the Council officer concerned that there should be no problems about the fence they wanted (an open picket style fence, probably much cheaper to erect than a paling fence). Almost a month later, they received a brief letter of acknowledgement from Council which indicated that their application had been referred to Council's Engineering Department "for the appropriate action to be taken".

My complainants related subsequent events in the following terms—

"Two months later, on Friday, 9th November, posts had been erected and set in concrete on our back boundary which did not conform with our requested plans.

I rang (the Council officer) on Monday, 12th November, and he became evasive about the posts and told me that the council had decided that the original agreement was now void and the council would erect a standard five foot paling fence that was said be 'pleasing to the eye and blending in with surrounding fences and bushland'.

No reason was given for the rejection of our original plan. As the plans were submitted in September we felt they had plenty of time to notify us ot the rejection and a substitute fence could have been decided upon, example, a lap and cap design.

Upon asking (the Council officer) was it a waste of our time going through this procedure of drawing and submitting the plans he said 'no it wasn't'. He would try to stop the private contractors employed erecting the fence on our boundary and the Council would give us the money it would cost them to erect the paling fence allowing us to put up our own fence. Approaching the second point of interest, that is, why do we have a six foot lap and cap continuing six foot into our land, this question was also evaded. (The Council officer) told me he would visit the site and try to stop the contractors proceeding and would contact me about future development. He did not.

On 14th November. Wednesday evening, I returned from work to find a five foot paling fence erected. The fence was shabbily constructed with paling widths varying and gaps between the ground and bottom of the fence. Also there was a lot of damage to our fruit trees close to the boundary. The lap and cap fence, erected on adjoining properties, appearance was very pleasing.

Of our neighbours (directly next door) effected also in this way, were not original owners from whom the council purchased the land, so one would think that if one agreement was void theirs would be also. Yet a six foot lap and cap fence has been erected across both their boundaries and six foot into ours. One of the neighbours verbally asked for a lap and cap and the other had not done anything expecting a paling fence to be erected.

We are most upset that we have been singled out for this treatment. Also that the fence consists of two designs, lap and cap, and paling, because the council are following the boundaries of the new blocks which are narrower than ours."

I asked Council for its comments about the matter and, at the same time, one of my officers inspected the fence and interviewed the complainant husband. My officer reported that the basis of complaint was that Council had failed to contact the complainants in any way about the fence even though they had been given a verbal indication that there should be no problem about their application. Other aspects concerning them were—

(i) the apparent failure of (the Council officer) to stop the erection of the fence after indicating he would do so and arrange for them to be given the cost of the paling fence to apply towards cost of whatever sort of fence they wished to build.

(ii) the current situation whereby their rear boundary boasts two completely different styles of fence (ordinary paling and lap and cap).

The Shire Clerk subsequently reported to me that the fence constructed along the rear boundary of the complainants' property was without cost to them and, although Council had no legal liability to construct the fence, it was built to honour an agreement with the former owner of the property. That agreement was for a 5 foot paling fence, the posts of such fence to be set in concrete. The agreements with the other property owners were different in that the type of fence was not specified in them. In two instances, the fence was to be a suitable dividing fence and in the third, a dividing fence of materials approved by the owner.

The Shire Clerk said that the open picket style fence requested by the complainants had not been considered suitable fencing for a rear boundary. He added that, when the fencing was erected, the lapped and capped fence, along the boundary was carried about two metres across the complainants' property as the side boundary of the Council owned lot was used as the transition point. The side boundary of the complainants' property was not defined by any fencing at this point.

Council considered that the standard of fencing constructed was satisfactory. No serious damage was evident to any fruit trees on the property (my officer's inspection had already confirmed this).

The Shire Clerk went on to say—

"With reference to the telephone call to a member of Council staff at his home, it is suffice to say that the telephone in question is not a Council telephone (the officer) was not on duty at the time and his private telephone number had not been given to the complainants.

However, for your information (the officer) is a Senior Engineer employed by this Council and is not the type of person to give abuse. He states the telephone call was made to him at about 7.30 p.m. on the 14th November and after listening to about ten minutes of attack on Council and himself, during which on no less than four occasions he asked them to contact him at work the next day, the telephone call was terminated. (He admits that during a conversation with (the complainants), he did inform them the decision to erect the fence had been made and that at that stage, Council did not intend to remove a newly constructed fence in lieu of their proposal.

Council has now sold the property adjoining (the complainants' property). However, subject to agreement being reached with the new owner and (the complainants) paying a contribution of $100 in advance to Council, arrangements will be made to convert the existing 1.5 metre paling fence to a lapped and capped design by placing 50 mm wide palings between the existing palings and providing capping to the whole fence. The reduced height should not worry the owners as their original proposal was for a 1.2 metre open type fence.

The above proposal is made without prejudice as Council considers its legal responsibilities have been carried out."

I was not entirely happy with Council's report but, before pursuing the matter I told the complainants of what Council had had to say and asked for their comments. The complainants responded as follows:

"Regarding ....., the council's legal responsibilities to an agreement of former owners, about the erection of a five foot paling fence, is the first time we have been notified of such an agreement.

As explained in our last letter, the council advised us that if we wished to have a specific designed fence we should notify them, which we did, in writing.

As far as legal responsibilities are concerned, this agreement to former owners would surely have become void on the selling of the property to us. And if not, why were we not told in July, 1979, to avoid prolonging this predicament.

We still emphasize the fact, that on submission of our plans for a specifically designed fence, their rejection was not notified to us until after the completion of the paling fence.

It is true that our side boundary has no defined fencing, but there was, and still remains a white boundary peg, originally placed, and only recently checked by the council. In our opinion, the continuation of the six foot lap and capped design 6' into our boundary was definitely more suited to the council in the auctioneering of their land.

We know the blocks are of minimum building size, so with the addition of mixed fencing across their blocks they would have been more difficult to sell for the price wanted. We feel, as we have been longer standing members of the municipality, the council would have agreed to our boundary marking.

To conclude, we are definitely not in agreeance to the council's proposal to the conversion of the five foot paling fence to a lap and capped design (without the altering of the 6' lap and capped design) on our expense."

I wrote again to Council and relayed the complainants' comments. In my letter, I said that I could understand the complainants' feelings and, bearing in mind that the Shire Clerk's reply had not dealt with several of the major aspects of their complaint, was of the view that the matter required further consideration.

I referred to my initial letter wherein I had set out the sequence of events which, according to the complainants had occurred and which had given rise to their complaint, namely—

(i) that they had submitted a design of the fence they wished erected to the Senior Engineer in September, 1979, and were allegedly told that the proposed fence was satisfactory and that there would be no problems.

(ii) when they saw the posts set in concrete on 9th November and realised that the fence they wanted was not being built, the complainant wife had telephone the Senior Engineer, on 12th November, and, after discussion he allegedly undertook to try to stop construction of the fence pro-

ceeding and, further, indicated that Council would give them an amount equal to the cost of the proposed paling fence so they could apply this towards the cost of erecting a fence themselves. When the complainants arrived home from work on 14th November, the paling fence had been erected.

I said that Council's offer to convert the existing paling fence to a lapped and capped design, subject to an advance contribution of $100.00 from the complainants, did not appear to me to represent a realistic solution to the problems. Quite apart from the aspect of now seeking a contribution towards the conversion of the fence, such conversion of a 1.5 metre paling fence to a lapped and capped design would not overcome the original complaint made by the complainants that their rear boundary fence consisted of a fence two distinct heights.

I went on to say—

"There are several matters arising from this complaint about which I would like further information—

(a) Was a plan of the fence (the complainants) wanted delivered to Council in September, 1979, as they claim?

(b) Were they told that the desired fence appeared satisfactory?

(c) (i) Was Council's decision, that the (desired) fence was considered unsuitable ever conveyed to (the complainants) *before* construction of the paling fence commenced (apparently on 9th November)?

(ii) If this was done, when and in what manner was it done?

(iii) If this was not done, why was some attempt not made to discuss the matter with them with a view to finding a satisfactory alternative?

(d) Was any attempt made by (the Senior Engineer) to stop construction of the paling fence?

I note from the Shire Clerk's letter that the paling fence was constructed along the rear boundary of (the complainants') property to honour an agreement with the former owner of the property. Apparently such agreement covered a five foot paling fence. However, I note that in respect of other owners in the locality, types of fencing were not specified. It seems to me that, when Council decided to put the lap and cap design fence on the rear boundaries of adjoining properties, the appropriate course to have adopted would have been to continue the lap and capped design across the rear boundary of (the complainants') property. Indeed it seems to me that it was most inappropriate to bring a lapped and capped design fence some two metres past the boundary of (their) property and then commence construction of an entirely different design of fence.

I note, too, the Shire Clerk's advice that Council had no legal liability to construct a fence at all; but the fact remains that Council did construct a fence with the result that, not only is the fence not what the complainants sought, but there are now two different styles of fence, of different height, on their property.

I find it somewhat contradictory to say on the one hand (as the Shire Clerk appears to in his letter) that a 5' paling fence was erected because this was the type of fence stipulated in the agreement with the former owner and, on the other hand, that the agreement was no longer valid nor binding on Council in relation to (the complainants).

It is true, as the Shire Clerk says, that, had the complainants erected the fence they wanted originally, it would have been lower even than the existing paling fence. However, I feel the major point is being overlooked in that there are two types of fence on their property. No doubt, their original proposal envisaged that the fence would commence at their property boundary and not at a point approximately 2 metres inside their property.

It seems to me that it would be appropriate for Council to reconsider the whole matter with a view to a uniform fence being erected along the whole of the rear boundary lines."

The Shire Clerk's reply, in response to the specific questions I asked, can be summarized as follows:

(a) *Design of Fence*—The proposal for alternative type or design or fencing was delivered to Council with a letter from the complainants dated 24th September, 1979.

(b) *Was the design satisfactory?*—Council admitted that the complainants were told the proposed alternative fence design appeared to be satis-

factory. Prior to receipt of the letter of 24th September, a member of Council's staff interviewed them at the Administration Centre, and the fencing was discussed. They were told to make a formal application to Council. Council claimed that it was not indicated to the complainants that Council would construct the alternative fencing without some cost to themselves.

(c) *When was Council's decision conveyed to them?*

(d) *Was an attempt made to stop construction?*

The file on this matter was needed in various sections of Council's Office. It was referred to the Engineer's Section on 28th September, was in the hands of the reporting officer on 15th October, taken by the Administration Section on 17th October, returned to Engineer's Section on 24th October, taken by Treasury on 31st October, returned to Engineer's Section on 2nd November and again taken by Admiinstration Section on 6th November. For these reasons, the complainant's proposal was not formally considered. The matter was taken up with both the Shire Engineer and his Deputy on 13th November but it was then considered that the fencing contractor had reached a stage when no change could be made to substitute a different design of fencing.

The Shire Clerk went on to say—

"A major point of conflict appears to be the fact that the rear fence of (the complainants') property consists of two types of fence, consisting of approximately 2 metres of 1.8 metres high lapped and capped fencing and 1.5 metres high paling fencing for the balance of the boundary. Council, in constructing the fence with the 1.8 metres lapped and capped fencing extending 2 metres from the adjoining property onto the subject property, had no motives other than to ensure that the fencing specification changed at a known side boundary.

The side boundary of the new allotment created by Council's subdivision had been pegged by Council's surveyors a short time before and, in choosing this location, it would not have been apparent that changing the fence specification at this location would have had any effect on (the complainants') property, particularly in view of the topography and the fact that a side fence did not exist on their property.

To assess what effect, if any, the step in the fence has had on the amenity of the property, it is considered necessary that a site inspection be held by the Ombudsman or one of his officers, so that account can be taken of the topography of the site. If required, an officer of the Shire Engineer's Department could be made available to be present at the site inspection."

In analysing all of the information available, it seemed clear to me that the story told by the complainants was true in all major respects—

(a) (i) They had submitted to Council a design for an alternative style of fence under cover of a letter on 24th September, 1979, and had been told that the proposed style of fence apeared to be satisfactory;

(ii) the only advice they had ever received from Council was a letter dated 16th October, 1979 (almost a month later), which indicated that their application had been referred to the Engineering Department for "the appropriate action to be taken".

(b) Council's "rejection" of the proposed fence had never been conveyed to the complainants because the proposal was not formally considered (for the reasons set out in the Shire Clerk's letter). In other words, the complainants' proposal was "rejected" by default. The matter was not taken up within Council until 13th November, the day after the complainant wife 'phoned to complain about the posts erected on the property.

(c) Even then, according to the complainants (and Council did not deny it), the Senior Engineer, in undertaking to try and stop the contractor, said he would contact them, but he did not. They were *not* told that the contractor could not be stopped. In other words, they were *not* told that they could not have the fence they wanted and were, thus, denied the opportunity to elect to have the same style of fence as their neighbours. By the time the matter was looked at, the contractor had reached the stage where no substitution of a different design of fencing (even lap and cap) could be made.

(d) The whole point in my view was that, had the complainants been properly and reasonably informed that—

they could not have the fence they wanted; and

it was proposed to erect an ordinary paling fence

they would probably have elected to have the same fence as their neighbours (1.8 m lap and cap) and, thus, the problem of two styles of fence on their property would not have arisen. They said that this was what they would have settled for and I saw no reason to disbelieve them.

(e) Council, in my view, had a responsibility to satisfy itself on property boundaries, particularly as Council had decided to erect a different type of fence at the rear of that particular property.

(f) All of the problems had arisen, quite clearly, because of a total failure on Council's part to communicate at all with the complainants. All of the meaningful communication initiatives had come from them, not from Council, and Council's failure to act on their application had led to a situation developing where it was impossible, because of inaction, to correct what the complainants, with some justification, regarded as an absurdity.

(g) Council had said that the fence was constructed along the rear boundary of the complainants' property to "honour an agreement" with the former owner. I imagined that such agreement, in spirit if not in letter, required the fence to be along the former owner's (i.e., now the complainants) and not some other boundary. Council's use of their own subdivision side boundary, I felt, was, probably unreasonable in the circumstances.

(h) I still could not understand, if the agreement had no force (as Council claimed) why the lap and cap style fence was simply not continued right through. Why a different fence had been built on the property had not been satisfactorily explained. The fact that a 5 feet paling fence was stipulated in the original agreement by Council's own admission, was irrelevant in the complainants' case.

Whilst one of my officers had already had a look at the site, I felt that further inspection might afford an opportunity for my views to be put in a face-to-face situation and that this might prove more helpful than a "war of words" by correspondence. For this reason, I arranged for my officer to carry out a site inspection in company with Council's officer and the complainant husband.

My officer, following on-site discussions, reported to me in the following terms (his report has been edited for obvious reasons):

"A site inspection and conference was held on 7th August, 1980. Mr A (the complainant) and Mr B of Council were present.

The discussion which occurred was fruitful and was conducted without animosity and in a spirit of reasonableness. The major points arising therefrom were as follows:

(a) Mr B explained why Council had had regard to the terms of the agreements entered into with the original owners of the complainant's and adjoining properties and it was *agreed* that it was reasonable for Council, in looking for a "starting point", to have done so. It was unfortunate that the original owner of Mr A's property had settled for a 5 feet paling fence, whereas his neighbours had held out for a fence "to the satisfaction of the owner". Even though the agreement had no legal force in Mr A's case, Council felt it reasonable to proceed in terms of the original agreement.

(b) (i) The problem was that Mr and Mrs A's application for a different fence was not dealt with by Council and they were not told that Council would not approve it.

(ii) Council claims that, even if Mr A had been told and negotiations had then taken place, Council would have expected a contribution for any type of fence costing more than a 5 feet paling fence. Thus, if Mr A had decided on a 6 feet lap and cap, like his neighbours, he would have been required to pay the extra cost involved.

(c) I pointed out that, whilst this might be so, Mr A had been denied the opportunity to negotiate anything, due to Council's failure to deal with his application or to communicate in any way with him (no matter how valid were the reasons for such failure). Mr B conceded this.

(d) All agreed that it would be ridiculous to demolish the existing paling fence and that such a course would represent a waste of ratepayers' money.

(e) (i) Mr B agreed that the original agreements, which Council used as "starting points", related to the rear boundaries of the blocks

concerned and not to the boundaries of the Council blocks (all of which have now been sold) abutting them. He said that Council had no ulterior motive in commencing the paling fence at the Council property boundary rather than Mr A's boundary; it was simply that the former was readily identifiable whilst the latter was not.

(ii) All agreed that there was no question of Council using their own boundary merely to make the block at the rear of Mr A a more attractive sale proposition. Mr B conceded my point, however, that, as Council elected to use the old agreement as a base of the operation, Council had some responsibility to ascertain where Mr A's fence should start.

(f) Mr A said that he was no longer terribly worried about the fact that there will be a fence of two heights on his rear boundary line and he would be happy if Council lapped and capped the existing 5-foot fence. His decision was probably influenced by the fact that the block at the rear has been sold and any modification of the piece of 6-foot lap and cap fence on his property would necessarily involve consultation with and the agreement of the new owner. This would take more time, with no guarantee of success in any case. Notwithstanding that, I think his decision was both reasonable and realistic.

(g) Negotiations then ensued in respect of the basis on which Council would be prepared to carry out the remedial work on the paling fence. It was clear that Council's original offer to carry out the work, if Mr A paid $100, represented nothing in that Council estimated the work to cost approximately $100. I made it clear that this office would expect some retreat from this position on Council's part.

(h) Mr B pointed out that the paling fence had been erected at no cost to Mr A when, strictly speaking, he could have been asked to contribute 50 per cent of the cost. He agreed, however, that Council had failed to deal with Mr A's application and, on that basis, suggested a contribution from Mr A of $50.00. After a lot of discussion, Mr A offered to contribute $25.00 and Mr B agreed to refer such offer to Council for approval. I have confirmed by 'phone with Mr B (on 11/8/80) that Mr A's offer has been accepted.

(j) I am of the view that the conclusion reached is a reasonable one, bearing in mind that—

(i) the existing fence cost Mr A nothing;

(ii) modification will cost only $25.00 instead of the full cost of the work (estimated at $100 or more);

(iii) the existing fence blends in fairly well with the topography of the area and the aesthetic problems will be largely overcome with time as Mr A's trees and shrubs grow;

(iv) Council's acceptance of Mr A's offer reflects an admission on Council's part that it must bear a large part of the blame for the situation which arose."

I agreed with the view expressed by my officer. I concluded my inquiries on the basis that, whilst I regarded the complaint to have been sustained, in view of the action taken by Council, I took no further action in terms of the Ombudsman Act.

SYDNEY COUNTY COUNCIL

Proposed Position of Power Pole

My complainant said that he was not satisfied with the method that Council proposed to adopt in order to supply power to his proposed new residence located at the end of a "dead-end" street where the terrain could only be described as difficult.

Council proposed to erect a 5 metre high service pole, at the end and on the corner of his driveway on the street boundary and the complainant contended that this would render access to his property most difficult and somewhat dangerous, not only for him but for his neighbour as well. He had approached Council suggesting that the supply cables be placed underground (he offered to pay the cost of undergrounding supply) but Council had replied in the following terms:

". . . a further inspection has since been completed. This second inspection has verified that the method of supply—by aerial service—indicated to you previously . . . is correct and in accordance with current Council policy.

I would point out that Council's policy in reference to underground services is that they are generally only installed in areas where the street mains are already underground and in your particular case, this is not so. Therefore, in order to be consistent with such policy, I am unable to accept your offer to pay the cost of undergrounding a supply cable from Council's mains pole to your premises and an aerial service will be provided.

However, it may be advantageous to discuss the use of a common service post with the owner of Lot No. 3 to reduce the number of service posts on the street alignment as this would enhance the aesthetic appearance of the subdivision."

The complainant then wrote to me as he felt that Council was being quite inflexible in its approach and was not properly taking into account the special circumstances that existed, namely—

narrow driveway;

non-existent footpaths;

narrow street;

lack of adequate turning area at the end of the street.

He suggested, in his letter to me, that another alternative might be to set back the service pole from the street boundary onto his property, in order to get it away from the corner of his and his neighbours' driveways. This would mean the overhead wires would have to cross his neighbour's driveway but, he said, his neighbour was willing to agree to this order to make access easier.

I referred the matter to the General Manager of the County Council, outlining all that the complainant had said.

The General Manager subsequently wrote to me and, *inter alia*, said—

"The matter was further discussed by (the complainant) and an officer of this Council but no other suitable alternative could be agreed upon.

One alternative, namely setting back the service post, was not in the original complaint (to Council) and was not suggested to (the complainant) for the following reasons:

If the private service post was set back from the front alignment it would be necessary for the service wires to cross private property which would require the agreement of the owners of such property.

It has been this Council's experience that such methods of supply have been a constant source of disagreement between the parties concerned involving each in unnecessary expense to resolve and is not to be recommended. An overall review is to be carried out on the policy of undergrounding existing overhead mains and should this review affect the method of supply to (the complainant's) residence then he will be immediately notified."

I was not entirely convinced by the General Manager's reply and, therefore, arranged for the site to be inspected. Following the inspection, I wrote to the General Manager and said—

"(The complainant) claims that erection of a service post in the position proposed by Council will render access difficult, particularly as, in due course, a home is to be built directly at the end of (the street). Having viewed the locale, it seems to me that his claims have some validity.

He claims that his neighbours . . . are prepared to give him permission in writing to allow the power lines to cross their property if the service post is set back from the street frontage and, whilst the views you have expressed in this regard have been noted, it seems to me that the matter is essentially one between the residents and ought not be a major concern of Council's, provided there are no technical factors rendering the requested relocation of the service post impractical. I am informed that the (neighbours) are not keen to have the service post located in the position that Council proposes.

Similarly, I note that (the complainant) is prepared to pay the cost involved in undergrounding a supply cable from Council's mains pole in order to avoid aerial supply at all. I note, too, that Council's reason for rejecting this proposition is because policy dictates that underground services "are generally only installed in areas where the street mains are already underground" and Council desires to be "consistent with such policy".

This seems to me to indicate that on occasion, Council's policy is departed from. As (the complainant) is prepared to meet the cost involved, I am somewhat at a loss to understand why it is so important for Council to be "consistent" with its policy in this case, unless, of course, there are technical considerations which militate against the undergrounding of the supply cable.

In the absence of any such considerations, I would be concerned that Council's decision appears to be based entirely on being "consistent" and has not properly taken account of the potential difficulties in respect of access that the complainant will face.

In all the circumstances, I am of the view that the alternatives put forward by (the complainant) should receive further consideration, particularly the question of underground supply. . . ."

Shortly thereafter, and as a result of a request I made, the complainant forwarded to me a letter from his neighbours across whose driveway the wires would have to go if the service post was set back from the street boundary. That letter said—

"This is to confirm that we have no objection to the crossing of power transmission lines over our property. We concur with a location of a pole approximately 4 metres from the street boundary and on the property of (the complainant), resulting in the above line crossing. The pole should be of such a height to give a minimum clearance of 4 metres and preferably 5 metres clearance above ground at any point over our property.

We in fact prefer the above location to a pole at the street boundary adjacent to our property, due to the danger of vehicle collision with the latter location."

I sent that letter on to the General Manager who later wrote to me and said—

"I wish to advise that the problem is now resolved.

Generally I am reluctant to agree to service lines crossing adjacent properties as even though the owner may give consent in writing, it has been found that the agreement is not binding on any subsequent owners. For this reason registered easements are generally required. However, in some difficult situations a property crossing is the best solution and as the owners of the adjacent property . . . have given such permission the work will proceed on this basis.

The conditions imposed by (the neighbours), that a pole be erected on (the complainant's) property approximately 4 metres from the street boundary and that a minimum ground clearance of 4 metres, preferably 5 metres, be maintained, are satisfactory."

I informed the complainant that, whilst I regarded his complaint to have been sustained, in view of Council's agreement to set back the service post, I proposed taking the matter no further and I concluded my inquiries.

SYDNEY COUNTY COUNCIL

Failure to Inform Affected Residents of Proposals

I received a complaint about the erection of an electricity distribution kiosk in the vicinity of the complainant's home. He contended that the kiosk could have been located further along the street in a recreation reserve or, even, underground. My investigation satisfied me that those contentions were simply not practicable.

However, during my investigation it became apparent that, as claimed by the complainant, no effort had been made to notify local residents affected by the kiosk of the proposal to erect it. Only the local council had been informed and, after initially raising objections, that Council had eventually agreed to the location proposed by Sydney County Council.

Shortly after the kiosk was erected, several residents, including the complainant, objected to the local Council. The latter, apparently fortified by the views expressed by the local residents, renewed its objections to the proposed location of the kiosk. There followed inspections of the site by representatives of the local Council and Sydney County Council with the result that the kiosk was moved 90 degrees so that it no longer stood parallel to the street but at right angles to it, was moved slightly, the area was landscaped and shrubs were planted.

I was concerned that there had been no attempt to involve the local residents in discussions regarding the kiosk's location, particularly in view of the advice I had received from the Chief Engineer of the Council Council that it was ". . . not practicable to involve local residents in these discussions other than through their elected representatives and Council always endeavours to co-operative fully with the local council".

I wrote to the General Manager and said that I found it difficult to accept that this was so. I went on to say—

"In this case, following objections having been received from the local residents by (the) Council about the original siting of the kiosk, the kiosk was turned through 90 degrees and moved closer to the public pathway (in other

words, it was relocated). I cannot see why local affected residents cannot be informed of proposals of this nature and be given the opportunity to state any objections they might have. In this case, the kiosk was installed and then had to be relocated because local residents were not told of the proposal and consulted beforehand. Had they been notified of the proposal to erect the kiosk, it does not appear to be beyond the realm of possibility that, as a result of consideration of their objections *before* the kiosk was erected, the compromise solution later found (following Council's approach to you) might have been found and acted upon, rendering eventual relocation unnecessary.

I do not know how much extra it cost to relocate the kiosk; however, not only might this cost have been saved, but the cost, as well of the further investigations and inspections that had to be carried out."

The General Manager replied and said—

". . . it is central to all of this Council's policies, as a trading undertaking, to endeavour to establish and maintain the best possible relations with its customers. Accordingly, it would certainly be the practice to discuss matters such as the siting of distribution substations with local residents if this had been found to be helpful in avoiding disputes. Unfortunately, whatever merits such a procedure may appear to have in theory, it is simply unworkable in practice.

It is for this reason that the existing procedure has been developed whereby the local council is advised of all substation proposals and invited to participate in the selection of the site so that the matter can then be considered by the council's works committee and a preference expressed taking into account the overall interests of the whole local community. At various times over the years different councils have sought to involve residents in these discussions and deliberations either in particular cases or as a matter of general policy. All such attempts have been short-lived since it is found in practice that with rare exceptions all property owners strongly oppose any site adjacent to their own premises and press for a site as remote from them as possible. This also applies, but to a lesser extent, to poles, street lights, traffic signs, bus stops and all other street furniture.

The result in practice is that vehement dissent rapidly develops between the residents themselves; objective discussion becomes impossible; opposing pressures are exerted on aldermen with the result that the local council becomes unwilling to deal with the matter thus defeating the whole purpose of consultation. This is also the experience of local councils in a wide range of other matters and I am firmly of the opinion that it is best left to local councils to determine the cases in which substation proposals, of which they are notified, should be discussed with residents.

You suggested in your letter that in the case of (this) complaint any problem may have been avoided had the local residents been informed of the proposal and consulted beforehand. The whole of this Council's experience in dealing with this matter over many years is to the contrary.

The site originally selected in conjunction with (the local) Council was entirely suitable. The position was later improved by turning the kiosk through 90° but this involved removing existing shrubs and I can recall no previous case in which a local council has been willing to have shrubs removed from a footway for this purpose. It seems to me more than likely than had the final orientation of the kiosk been the one originally suggested it would still have been necessary to make some change to satisfy the complaint. As far as costs are concerned, the cabling of the kiosk had not been installed so that the cost of re-orientation was of a minor amount."

After considering all that he had had to say, I wrote to the General Manager again and said—

"I turn now to the question of notifying local affected residents of substation siting proposals. I have noted, but must confess that I find some difficulty in agreeing with, all that you have had to say in this regard. I concede that telling people about proposals of this nature can generate opposition. This is not uncommon where other public authorities and local government authorities notify people of their various proposals (e.g., Main Roads) but the authorities do not cease to do so simply because opposition to their proposals is generated.

I am firmly of the view that where it is possible to do so, people should be told by public authorities about proposals which will or might affect them. They should be entitled to state their views, to have their views properly

considered, and, where their views cannot prevail, to be told why this is the case, unless there are overwhelming reasons which indicate that this should not occur.

You will forgive me if I say that the tenor of your argument appears to be one of 'telling people causes problems and, therefore, people should not be told'. You say that it is best left to local councils to determine the cases in which substation proposals, of which they are notified, should be discussed with residents. I cannot entirely agree, even though I see value in continuing to involve the local council; the proposal, after all is yours, not councils, and so is the responsibility to inform.

Perhaps the solution lies somewhere between the approaches that you and I have advocated. In this regard, I can see that the local council may be in a much better position to quickly determine which local residents are most affected and should, therefore, be notified. The weakness in this approach, of course, is that some councils might not notify anyone. This weakness might be removed, to a large extent, if the County Council, as well as notifying the local council, gave general notice of its proposals, for example, by advertisement in a local newspaper circulating in the area concerned. Another suggestion which might deserve consideration, would be to place a notice on the site selected.

Despite what you say about the original location of this particular substation, you clearly say that the present position is an improvement on the original and this was achieved *because* a local resident raised objections and the matter was looked at again. It is not merely a question of finding a location 'entirely suitable' to the County Council, but one of finding the most suitable location, bearing in mind the needs and views of the County Council, the local council and the local residents. Similarly, you have not denied that some extra cost was incurred ('a minor amount'), cost which might have been avoided if the matter had been looked at again before construction.

In this case, you have explained quite clearly, in my view, why the substation could not be located elsewhere or underground. Had this explanation been given to local residents, including the complainant, in a process of notification such as I am suggesting, (the complainant) may not have been moved to complain at all. Even if he had still complained, his complaint would certainly have been disposed of much more quickly than has been the case because, in my view, whilst he may not have been happy with the eventual decision, at least he would have been notified of the proposal and been able to raise his objections and have them considered. No citizen can reasonably expect more but he should not be asked to expect less."

The General Manager replied—

"I certainly agree with your contention that, to use your words, 'people should be told by public authorities about proposals which will or might affect them. They should be entitled to state their views, to have their views properly considered, and, where their views cannot prevail, to be told why this is the case'.

It seems to me that the only essential difference between the opinions we have each expressed is confined to the means by which people can best be advised of projects in their locality.

The Sydney County Council's present practice stems from its special relationship with its constituent councils, which is somewhat different from the relationship between those councils and other public authorities.

The fact that the councillors of the Sydney County Council are elected by the aldermen of the constituent councils has given the latter a strong voice in all matters affecting their areas and has made councillors more willing to leave consultation with residents to aldermen, as the directly elected local representatives, than might otherwise have been the case. Nevertheless, it is certainly true that the ultimate responsibility for the siting of distribution substations rests with this Council.

As I indicated in my last letter to you, the comparatively small number of complaints received in relation to the Council's very extensive works programme is a measure of the effectiveness of present procedures. Nevertheless, any practicable measure which may reduce the incidence of public objections to an even lower level is certainly worth a trial and your proposal that the Council should give general notice of substation projects seems to me to be a reasonable one.

On a matter of detail, an advertisement in a local newspaper would be unlikely to come to the attention of non-resident property owners who may have a greater interest than resident tenants. Furthermore, Council's general experience with advertisements in local newspapers has been far from

satisfactory. Circulation is unreliable in many cases. Also the frequency of publication and the extent to which local newspapers are read both vary considerably throughout the Sydney County District. For this reason it is established practice to publish all public notices in the Sydney Morning Herald and I believe that this would be the more effective way of bringing new projects to public attention.

I propose to adopt your proposal with this modification on an extended trial for twelve months and I trust that experience over that period will prove it to be worthwhile.

Local councils and other interested public authorities will, of course, continue to receive direct advice of projects as in the past."

I was pleased to note that a system of notification was to be adopted on a trial basis and I concluded my inquiries.

APPENDIX B

STATISTICAL SUMMARY OF COMPLAINTS

APPENDIX B

STATISTICAL SUMMARY OF COMPLAINTS FOR THE PERIOD ENDING 30TH JUNE, 1981

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. In sufficient 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 inquiries or following investigation.

SUSTAINED—

9. Sustained as a result of investigation.

10. Partially sustained as a 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, 1981	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
Agriculture Department	..	1	2	..	..	..	..	1	1	..	..	3	8
Albury-Wodonga Development Corporation	..	..	..	..	..	..	..	1	..	..	..	1	2
Ambulance Contribution Fund	..	..	..	1	..	..	..	..	..	..	..	..	1
Anti-Discrimination Board	..	..	..	..	..	..	..	1	..	..	..	..	1
Apprenticeship Directorate	..	..	..	..	..	..	..	..	1	1	1	1	4
Arakoon State Recreation Area Trust	..	..	..	..	1	..	..	..	..	..	..	..	1
Armidale Hospital	..	..	..	..	..	..	..	..	..	..	..	1	1
Armidale Pastures Protection Board	..	..	..	..	..	..	..	..	..	..	..	1	1
Attorney-General and Justice—Department of	..	23	..	2	..	..	..	4	..	1	4	5	40
Australian Gas Light Company	..	..	..	..	..	..	..	2	..	..	..	1	5
Australian Music Examination Board	..	..	..	1	..	..	..	..	2	..	4	..	7
Balmain Hospital	..	..	..	..	..	..	..	1	..	..	..	..	1
Bathurst-Orange Development Corporation	..	..	..	1	..	..	..	..	..	..	..	1	2
Blue Mountains Reserve Trust	..	..	..	1	..	..	..	..	..	..	..	..	1
Board of Tick Control	..	..	..	..	..	..	..	..	..	..	..	5	5
Broken Hill Hospital	..	..	..	..	..	..	..	..	..	..	..	1	1
Builders Licensing Board	..	..	..	3	1	..	1	32	4	5	5	19	70
Bush Fire Council of New South Wales	..	..	..	..	..	..	..	1	..	..	..	..	1
Chiropractice Registration Board	..	..	..	..	..	..	..	..	..	..	..	8	8
Clerk of the Peace	..	..	..	..	..	..	..	..	..	..	1	1	2
Coal and Oil Shale Mine Workers Superannuation and Long Service Leave Branch	..	..	..	..	..	..	..	..	..	..	..	3	3
Coal and Oil Shale Mines Mineworkers Tribunal	..	1	..	..	1	..	..	..	..	..	..	..	2
College of Law	..	..	..	..	..	..	1	..	..	..	..	..	1
Conservatorium of Music	..	..	..	..	..	..	..	..	..	..	1	..	1
Consumer Affairs Department	..	2	..	7	..	..	1	9	4	1	4	8	36

Public Authority	No Jurisdiction			Declined			Withdrawn	Not Sustained	Sustained		Discontinued	Under Investigation as at 30th June, 1981.	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
Consumer Claims Tribunal	1	3	..	7	..	..	..	5	1	..	..	..	17
Corporate Affairs Commission	..	1	..	5	..	..	..	9	1	..	1	..	17
Corrective Services	3	4	..	7	7	..	11	95	29	4	79	243	482
Council of Auctioneers and Agents	..	..	..	..	..	..	..	..	2	..	..	2	4
Counsellor for Equal Opportunity	..	..	..	1	..	..	1	..	..	..	..	1	3
Crown Lands Office	..	1	..	..	..	..	1	..	..	..	..	..	2
Cumberland College of Health Sciences	..	..	..	..	..	..	..	1	..	..	..	1	2
Dairy Industry Marketing Authority of N.S.W.	..	..	..	..	3	..	..	3	..	..	..	6	12
Dental Technicians Registration Board	..	..	..	..	..	..	..	..	..	..	..	1	1
Drug and Alcohol Authority	..	..	..	..	..	..	..	2	..	..	..	..	2
Dust Disease Board	..	..	..	..	..	..	..	..	..	..	..	1	1
Education Department	1	7	..	3	..	..	3	31	1	..	8	32	86
Electricity Commission	..	..	..	1	..	..	..	3	1	..	1	3	9
Energy Authority	..	..	..	..	..	..	..	2	..	..	..	..	2
Environment and Planning—Department of	..	..	..	2	..	1	2	11	..	..	3	29	48
Ethnic Affairs Commission of N.S.W.	..	..	..	..	..	..	..	..	..	..	1	..	1
Fire Commissioners—Board of	..	..	..	1	..	..	..	..	..	..	..	1	2
Fish Marketing Authority	..	..	..	..	..	..	..	1	..	..	..	..	1
Fisheries—N.S.W. State	..	..	..	..	..	..	..	3	..	..	2	..	5
Forestry Commission of New South Wales	..	..	..	..	..	..	..	2	1	..	..	2	5
Geographical Names Board	..	..	..	..	..	..	..	..	..	..	..	1	1
Government Insurance Office	1	3	..	11	5	..	..	36	9	2	6	14	87
Government Stores Department	..	2	..	2	1	..	..	..	..	..	..	..	5
Greyhound Racing Control Board	..	..	..	..	..	..	..	2	..	..	1	1	4

Public Authority	No Jurisdiction			Declined			Withdrawn	Not Sustained	Sustained		Discontinued	Under Investigation as at 30th June, 1981	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
Hawkesbury Agricultural College	..	..	..	..	..	..	..	1	..	..	..	..	1
Health Commission	4	5	..	9	..	..	1	19	1	2	6	24	71
Health Commission—Prison Medical Service	..	..	..	..	..	..	..	1	..	..	..	13	14
Heritage Council	..	..	..	..	..	..	..	2	..	..	..	2	4
Higher Education Board	..	..	..	..	..	..	..	1	..	..	..	..	1
Hornsby Court of Petty Sessions	..	..	..	..	..	..	..	..	..	..	..	1	1
Housing Commission	..	..	..	7	1	..	2	45	1	..	3	18	77
Housing and Co-operatives	..	..	..	..	..	..	..	1	..	..	..	..	1
Hunter District Water Board	..	..	..	..	..	..	..	7	..	1	..	1	9
Hunter Valley Conservation Trust	..	..	..	..	..	..	..	..	..	..	..	1	1
Industrial Development and Decentralization	..	..	..	1	..	..	..	1	..	..	..	..	2
Industrial Relations—Department of	..	..	..	5	..	..	2	15	3	1	5	6	39
Joint Examinations Board	..	..	..	..	..	..	..	..	..	..	..	..	1
Land and Environment Court	..	..	..	..	..	..	..	..	..	..	..	..	1
Land Board Office	..	..	..	..	..	..	..	2	1	..	..	2	5
Land Commission	..	..	..	1	..	..	..	1	..	..	..	..	2
Lands—Department of	..	1	..	4	..	..	..	10	3	1	1	14	34
Land Tax Office	..	..	..	..	1	..	..	3	2	..	3	1	10
Law Society of New South Wales	1	..	..	..	..	..	..	..	..	..	..	..	1
Legal Services Commission	2	..	..	1	1	..	..	2	..	..	..	5	11
Local Government Authorities	1	4	2	105	7	16	16	548	40	39	92	436	1 306
Local Government Boundaries Commission	..	..	..	..	..	..	..	..	..	..	9	..	9
Local Government—Department of	..	1	..	1	..	..	..	..	2	..	1	2	7
Local Government Superannuation Board	1	..	..	..	..	..	..	9	1	..	4	6	21
Lord Howe Island Board	..	..	..	..	..	..	..	..	..	..	1	..	1

Public Authority	No Jurisdiction			Declined			Withdrawn	Not Sustained	Sustained		Discontinued	Under Investigation as at 30th June, 1981	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
Macquarie Hospital	..	..	..	..	..	..	..	1	..	..	..	..	1
Macquarie University	..	..	..	..	..	..	..	..	..	..	..	1	1
Main Roads—Department of	..	..	..	2	..	..	1	25	5	2	9	15	59
Manly District Hospital	..	..	..	..	..	..	..	..	..	..	..	1	1
Maritime Services Board	..	..	..	4	1	..	..	4	1	1	1	4	16
Medical Board of N.S.W.	..	..	..	1	..	..	..	..	..	..	..	4	5
Metropolitan Water Sewerage and Drainage Board	..	..	..	17	..	..	1	94	7	9	8	35	171
Mineral Resources—Department of	..	..	..	..	..	..	..	5	..	1	1	5	12
Mines Subsidence Board	..	..	..	..	..	..	..	1	..	..	1	1	3
Mitchell College of Advanced Education	..	..	..	..	..	..	..	1	..	..	..	..	1
Motor Transport—Department of	..	1	..	3	2	..	..	31	5	4	7	19	72
Music Examinations Advisory Board	..	..	..	..	..	..	..	2	1	..	1	1	5
National Parks and Wildlife	..	1	..	..	..	..	..	9	2	2	1	5	20
Nepean District Hospital	..	..	..	..	..	..	..	..	..	..	..	1	1
Newcastle College of Advanced Education	..	2	..	..	..	..	..	..	..	..	..	..	2
Newcastle Psychiatric Centre	..	..	..	1	..	..	..	..	..	..	..	..	1
New South Wales Council of Social Services	..	..	..	..	..	..	..	1	..	..	..	..	1
New South Wales Institute of Technology	..	..	..	..	..	..	..	1	..	..	..	1	2
New South Wales Nurses Registration Board	..	..	..	..	..	..	..	1	..	..	..	1	2
New South Wales Retirement Board	..	..	..	2	..	..	..	1	1	..	3	..	7
New South Wales Trotting Authority	..	..	..	..	1	..	..	1	..	..	..	..	2
New South Wales Women's Advisory Council	..	1	..	..	..	..	..	..	..	..	..	..	1
North Shore Gas Co. Ltd.	..	..	..	1	..	..	..	1	..	..	..	1	3
Parkes Technical College	..	..	..	..	..	..	..	1	..	..	..	..	1
Parole Board	..	1	..	..	..	..	..	..	..	..	..	7	8
Pastures Protection Board	..	..	..	..	..	..	..	5	..	..	..	1	6

Public Authority	No Jurisdiction			Declined			Withdrawn	Not Sustained	Sustained		Discontinued	Under Investigation as at 30th June, 1981.	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
Pay Roll Tax—Commissioner	..	..	..	..	..	..	..	1	..	..	..	..	1
Plumbers, Gasfitters and Drainers Examining Board	..	..	..	1	..	..	..	2	..	..	..	..	3
Police Department	1	1	..	16	..	..	1	23	12	1	17	38	110
Privacy Committee	..	1	..	..	..	..	..	..	..	..	..	..	1
Protective Commissioner	..	..	..	1	..	..	..	7	..	..	3	..	11
Public Accountants Registration Board	..	..	..	..	..	1	..	..	..	..	..	..	1
Public Service Board	..	1	..	1	..	..	..	..	..	..	..	..	2
Public Solicitor	..	1	..	2	..	..	..	6	..	1	1	6	17
Public Trust Office	1	..	..	1	..	..	..	8	2	2	..	2	16
Public Works—Department of	..	2	..	1	..	..	..	8	1	..	4	11	27
Railway Service Superannuation Board	..	..	..	..	..	..	..	1	..	..	..	..	1
Randwick Technical College	..	1	..	..	..	..	..	..	..	..	..	1	2
Real Estate Valuers Registration Board	..	..	..	..	..	..	..	2	..	..	..	..	2
Registrar General's Department	..	..	..	..	..	..	..	5	3	1	3	3	15
Registrar of Credit Unions	..	..	..	..	..	..	..	..	..	..	..	1	1
Registrar of Permanent Building Societies	..	..	..	..	..	..	..	..	..	1	..	..	1
Registry of Births, Deaths and Marriages	..	..	..	..	..	..	..	2	..	..	..	2	4
Registry of Co-operative Societies	..	..	..	..	..	..	..	4	..	..	..	..	4
Rental Bond Board	..	..	..	1	1	..	..	4	2	3	1	3	15
Riverina College of Advanced Education	..	..	..	..	..	..	..	..	..	..	2	1	3
Royal North Shore Hospital	..	..	..	..	..	..	..	1	..	..	..	..	1
Rural Assistance Board	..	..	..	..	..	..	..	..	..	..	..	3	3
Rural Bank	..	..	1	..	2	..	1	..	..	1	1	1	7
Rural Reconstruction Agency, Bathurst	..	..	..	..	..	..	..	..	..	..	..	1	1
Rydalmere Hospital	..	..	..	1	..	..	..	..	..	..	..	..	1

Public Authority	No Jurisdiction			Declined			Withdrawn	Not Sustained	Sustained		Discontinued	Under Investigation as at 30th June, 1981	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
Services—Department of	..	..	..	..	..	..	..	3	1	..	..	..	4
Sheriff's Office	..	..	..	..	..	..	..	4	1	..	..	..	5
Soil Conservation Service	..	..	..	..	..	..	..	1	..	..	..	2	3
Sport and Recreation	..	..	..	..	..	..	..	..	..	1	..	..	1
Sporting Injuries Committee	..	..	..	..	..	..	..	..	..	..	..	1	1
Stamp Duties Office	1	..	..	3	..	..	..	17	..	..	3	5	29
State Contracts Control Board	..	..	..	..	..	..	1	2	..	..	..	..	3
State Electoral Office	..	..	..	..	..	..	..	1	..	..	..	..	1
State Library of New South Wales	..	..	..	..	..	..	..	..	..	..	..	2	2
State Lotteries Office	..	..	..	1	..	..	..	5	..	1	..	..	7
State Pollution Control Commission	..	..	..	4	..	..	..	11	..	..	3	8	26
State Rail Authority	1	2	1	12	..	..	..	16	6	..	3	44	85
State Superannuation Board	..	..	1	..	..	..	..	2	..	..	..	6	9
Strata Titles Board	1	1	..	..	..	..	..	3	1	..	3	..	9
Supreme Court	..	1	..	..	..	..	..	..	..	..	1	..	2
Sutherland District Hospital	..	..	..	..	..	..	..	..	..	1	..	1	2
Sydney College of the Arts	..	..	..	..	..	..	..	..	..	..	..	1	1
Sydney Cove Re-Development Authority	..	..	..	..	..	..	..	1	..	..	..	..	1
Sydney Farm Produce Market Authority	..	..	..	..	..	..	..	1	..	..	1	1	3
Sydney Home Nursing Service	..	..	..	..	..	..	..	1	..	..	..	..	1
Sydney Hospital	..	..	..	1	..	..	..	..	..	..	..	..	1
Sydney Opera House Trust	..	..	..	..	..	..	..	1	..	..	..	..	1
Sydney Teachers' College	..	..	..	..	..	..	..	3	1	..	..	..	4
Sydney Technical College	..	..	..	..	..	..	..	2	..	..	..	..	2
Teacher Housing Authority	..	..	..	..	..	..	..	1	2	..	1	2	6
Technical and Further Education—Department of	..	2	..	1	..	..	..	1	1	..	1	4	10
Totalizator Agency Board	..	..	..	2	..	..	1	4	..	2	..	..	9
Tourism—Department of	..	..	..	..	..	..	..	2	..	..	..	..	2
Treasury	..	..	..	..	..	..	..	1	..	..	..	..	1

Public Authority	No Jurisdiction			Declined			Withdrawn	Not Sustained	Sustained		Discontinued	Under Investigation as at 30th June, 1981.	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
University of Newcastle	..	..	..	..	..	..	..	1	..	..	..	..	1
University of New South Wales	..	..	..	..	..	..	..	3	..	..	..	1	4
University of New England	..	..	..	1	..	..	..	..	..	..	..	..	1
University of Sydney	..	..	..	..	..	..	..	..	..	..	..	4	4
University of Wollongong	..	..	..	..	..	..	..	..	..	..	..	1	1
Urban Transit Authority	..	1	..	4	..	..	1	1	..	..	2	4	13
Valuer-General	..	..	..	4	4	..	..	4	1	1	..	5	19
Veterinary Surgeons Board of N.S.W.	..	..	..	..	..	..	..	..	..	..	..	2	2
Wallsend Hospital	..	1	..	..	..	..	..	..	..	..	..	..	1
Water Resources Commission	..	2	..	..	..	..	..	3	..	1	1	16	23
Wellington District Hospital	..	..	..	..	..	..	..	..	..	..	1	..	1
Western Suburbs District Hospital	..	..	..	1	..	..	..	..	..	..	..	..	1
Westmead Hospital	..	..	..	..	..	..	..	..	..	..	..	1	1
Wilcannia Pastures Protection Board	..	..	..	..	..	..	..	..	..	..	..	2	2
Workers Compensation Commission	..	1	..	..	..	..	..	..	..	..	..	..	1
Workers Health Centre Lidcombe	..	..	..	..	..	..	..	..	..	..	..	1	1
Youth and Community Services—Department of	..	1	..	4	..	..	..	22	..	2	15	102	148
Total:	..	89	7	286	40	18	49	1 304	167	96	346	1 321	3 746
Unscheduled Bodies (Outside Jurisdiction)—													
Australian Government Departments	96	..	..	..	..	..	..	..	..	..	..	..	96
Private Organizations and Individuals	128	..	..	..	..	..	..	..	..	..	..	..	128
Total from all sources	247	89	7	286	40	18	49	1 304	167	96	346	1 321	3 970
Less: Under investigation as at 30th June, 1980													893
Total received for year ended 30th June, 1981													3 077

Public Authority (Councils)	No Jurisdiction			Declined			Withdrawn	Not sustained	Sustained		Discontinued	Under Investigation as at 30th June, 1981	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	..	..	..	1	..	..	..	3	..	..	..	4	8
Armidale City	..	..	..	1	..	..	1	2	..	..	1	5	10
Ashfield Municipal	..	..	..	..	..	..	..	7	..	..	1	2	10
Auburn Municipal	..	..	..	1	..	..	..	2	..	..	1	1	5
Ballina Shire	..	..	..	2	..	..	..	4	..	..	..	2	8
Balranald Shire	..	..	..	..	..	..	..	..	..	..	..	1	1
Bankstown City	..	..	..	1	..	..	..	6	..	1	2	7	17
Bathurst City	..	..	..	..	..	..	1	2	..	..	..	2	5
Baulkham Hills Shire	..	..	..	..	..	..	1	9	..	1	1	9	21
Bega Municipal (now Bega Valley Shire Council)	..	..	1	..	..	..	..	2	..	..	..	1	4
Bellingen Shire	..	..	..	..	..	..	..	1	..	..	1	7	9
Blacktown City	..	..	..	1	1	..	..	15	1	1	2	7	28
Bland Shire	..	..	..	..	..	..	..	..	..	..	..	1	1
Blue Mountains City	..	..	..	1	..	..	..	14	..	..	4	11	30
Botany Municipal	..	..	..	..	..	..	..	2	..	..	..	2	4
Broken Hill City	..	..	..	..	..	2	..	1	..	..	..	..	3
Burwood Municipal	..	..	..	..	..	..	..	5	..	..	1	1	7
Byron Shire	..	..	..	..	..	..	1	7	1	..	..	3	12
Cabonne Shire	..	..	..	..	..	..	..	1	..	..	..	..	1
Camden Shire	..	..	..	..	..	..	..	..	..	..	..	1	1
Campbelltown City	..	..	..	..	..	..	..	5	..	1	..	2	8
Canterbury Municipal	..	..	..	..	..	..	..	7	1	1	..	6	15
Casino Municipal	..	..	..	..	..	..	..	1	..	..	..	..	1
Central Darling Shire	..	..	..	1	..	..	..	..	..	..	..	..	1
Central West County	..	..	..	..	..	..	..	1	..	..	1	1	3
Cobar Shire	..	..	..	..	..	..	..	..	..	..	..	1	1
Coffs Harbour Shire	..	..	..	..	..	..	..	5	..	..	1	2	8

Public Authority (Councils)	No Jurisdiction			Declined			Withdrawn	Not Sustained	Sustained		Discontinued	Under Investigation as at 30th June, 1981	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
Concord Municipal	..	..	..	..	..	..	..	..	..	..	6	..	..	..	6
Coonabarabran Shire	..	..	..	..	..	..	..	..	..	..	1	..	..	1	2
Coonamble Shire	..	..	..	..	..	..	..	..	..	..	1	..	..	..	2
Copmanhurst Shire	..	..	..	..	..	..	..	..	..	..	1	..	..	1	2
Cowra Municipal	..	..	..	..	..	..	1	..	..	..	1	..	..	..	2
Crookwell Shire	..	..	..	..	..	..	..	..	..	..	..	..	1	..	1
Deniliquin Municipal	..	..	..	..	..	..	..	..	..	..	..	..	2	..	2
Drummoyne Municipal	..	..	..	..	..	..	..	..	..	..	..	..	..	1	1
Dubbo City	..	..	..	..	..	..	1	..	..	..	1	1	1	..	4
Dumaresq Shire	..	..	..	..	..	..	..	..	1	..	4	..	..	1	7
Dungog Shire	..	..	..	..	..	..	..	..	1	..	..	..	..	..	1
Eurobodalla Shire	..	..	..	..	..	..	..	..	..	..	..	..	..	1	1
Fairfield City	..	..	..	1	..	..	..	4	..	1	..	5	11		
Far North Coast County	..	..	..	2	..	..	..	10	..	..	1	3	16		
Forbes Municipal	..	..	..	..	..	..	..	..	..	..	..	1	1		
Gloucester Shire	..	..	..	..	1	1	..	..	..	..	..	..	2		
Gosford City	..	..	..	..	..	..	..	..	..	..	..	2	2		
Goulburn City	..	..	..	2	..	..	..	19	5	3	1	16	46		
Grafton City	..	..	..	..	..	..	..	1	1	..	..	1	3		
Great Lakes Shire	..	..	..	..	1	..	..	2	..	..	..	..	3		
Greater Cessnock City	..	..	..	1	..	..	..	7	..	..	..	4	12		
Greater Taree City	..	..	..	1	..	..	..	2	..	1	1	3	8		
Gunnedah Shire	..	..	..	..	..	..	..	4	..	..	..	4	8		
Gunning Shire	..	..	..	..	..	..	..	2	1	..	..	..	3		
Guyra Shire	..	..	..	..	..	..	..	1	..	..	..	..	1		
	..	..	..	..	1	..	..	1	..	..	..	4	6		

Public Authority (Councils)	No Jurisdiction			Declined			Withdrawn	Not Sustained	Sustained		Discontinued	Under Investigation as at 30th June, 1981.	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
Hastings Municipal	..	1	..	..	..	..	..	5	1	..	3	12	22
Hawkesbury Shire	..	..	..	1	1	1	..	6	..	..	..	3	12
Hay Shire	..	..	..	..	..	..	..	1	..	..	1	2	4
Holroyd Municipal	..	..	..	2	..	..	..	..	..	1	1	4	8
Hornsby Shire	..	..	..	3	..	..	..	20	1	3	7	7	41
Hume Shire	..	..	..	1	..	..	..	5	..	1	..	3	10
Hurstville Municipal	..	..	..	1	..	..	..	7	1	..	..	3	12
Illawarra County	..	1	..	..	..	..	..	2	..	..	..	2	5
Inverell Shire	..	..	..	..	..	..	..	..	..	..	..	1	1
Jerilderie Shire	..	..	..	..	..	..	..	..	..	..	1	..	1
Kempsey Shire	..	..	..	1	..	..	..	9	1	1	..	4	16
Kiama Municipal	..	..	..	..	..	..	..	1	..	..	..	1	2
Kogarah Municipal	..	..	..	..	..	..	..	4	..	1	..	..	5
Ku-ring-gai Municipal	..	..	..	3	..	..	1	10	..	1	2	8	25
Kyeamba Shire	..	..	..	..	..	..	..	1	..	..	..	..	1
Lachlan Shire	..	..	..	..	..	..	..	1	..	..	..	..	1
Lake Macquarie Municipal	..	..	..	1	..	2	..	10	1	..	1	15	30
Lane Cove Municipal	..	..	..	..	..	..	..	4	..	..	..	5	9
Leichhardt Municipal	..	..	..	2	..	..	..	5	2	1	2	5	17
Lismore City	..	..	..	1	..	..	..	4	..	..	2	3	10
Lithgow City	..	..	..	1	..	..	..	1	..	..	1	..	3
Liverpool City	..	..	..	..	..	1	..	2	..	..	..	6	9
Lockhart Shire	..	..	..	..	..	..	..	1	..	..	..	..	1
Mackellar County	..	..	..	..	..	..	..	..	1	..	..	..	1
Maclean Shire	..	..	..	..	..	..	..	3	1	..	1	..	5
Maitland City	..	..	..	1	..	..	..	..	..	..	..	1	2
Manilla Shire	..	..	..	..	..	..	..	1	..	1	..	..	2

Public Authority (Councils)	No Jurisdiction			Declined			Withdrawn	Not Sustained	Sustained		Discontinued	Under Investigation as at 30th June, 1981	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
Manly Municipal	..	..	..	4	..	..	..	5	1	..	..	1	11
Marrickville Municipal	..	..	..	4	..	..	..	5	..	..	..	5	14
Merriwa Shire	..	..	..	..	..	..	..	..	..	..	..	1	1
Monaro County	..	..	..	1	..	..	..	..	..	..	..	..	1
Moree Plains Shire	..	..	..	1	..	..	..	1	..	..	..	1	2
Mosman Municipal	..	..	..	..	..	..	..	6	..	..	2	4	12
Mudgee Shire	..	..	..	..	..	..	..	3	..	..	3	1	7
Mulwaree Shire	..	..	..	1	..	..	..	1	..	..	1	..	3
Mumbulla Shire	..	..	..	..	..	..	..	2	..	..	..	..	3
Murrumbidgee County	..	..	..	..	..	..	..	1	..	..	..	..	1
Murrurundi Shire	..	..	..	..	..	..	..	..	..	..	..	1	1
Muswellbrook Shire	..	..	..	..	..	..	..	3	..	..	..	1	4
Nambucca Shire	..	..	..	2	..	..	..	1	..	..	..	4	7
Namoi Valley County	..	..	..	..	..	..	..	2	..	..	..	1	3
Narrabri Shire	..	..	..	..	..	..	..	1	..	..	..	1	2
Newcastle City	..	..	..	1	..	..	..	8	..	2	1	5	18
North Sydney Municipal	..	..	..	1	..	1	..	9	6	..	2	6	25
North West County	..	..	..	2	..	..	..	2	..	..	..	..	4
Northern Riverina County	..	..	..	..	..	..	..	1	..	..	..	1	2
Northern Rivers County	..	..	..	..	..	..	..	5	..	..	1	3	9
Nundle Shire	..	..	..	1	..	..	..	..	..	..	..	..	1
Orange City	..	..	..	..	..	..	..	1	..	..	1	1	3
Oxley County	..	..	..	..	..	..	..	2	..	..	..	2	4
Parkes Municipal	..	..	..	..	..	..	..	..	..	..	1	1	2
Parramatta City	..	..	..	2	..	..	..	9	..	..	..	6	17
Peel Cunningham County	..	..	..	..	..	..	..	3	..	..	..	..	3
Penrith City	..	..	..	1	..	..	..	7	2	1	2	7	20
Port Stephens Shire	..	..	..	..	..	1	..	4	..	..	1	4	10
Prospect County	..	..	..	..	..	..	1	14	1	2	1	5	24

Public Authority (Councils)	No Jurisdiction			Declined			Withdrawn	Not Sustained	Sustained		Discontinued	Under Investigation as at 30th June, 1981	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
Queanbeyan City	..	..	..	..	..	..	..	1	..	1	..	1	3
Randwick Municipal	..	..	..	1	1	..	1	12	2	1	3	6	27
Richmond River Shire	..	..	..	1	..	..	..	1	..	..	..	3	5
Rockdale Municipal	..	..	..	2	..	..	1	3	..	..	..	9	15
Ryde Municipal	..	..	..	2	..	..	..	6	..	..	1	7	16
Rylstone Shire	..	..	..	..	..	..	..	1	..	..	1	..	2
Scone Shire	..	..	..	..	..	..	..	..	..	..	..	1	1
Shellharbour Municipal	..	..	..	..	..	..	..	3	..	..	1	..	4
Shoalhaven City	..	..	..	3	..	1	..	3	1	..	..	6	14
Shortland County	..	..	..	..	..	..	..	1	..	..	..	1	2
Singleton Shire	..	..	..	..	..	..	..	1	..	..	..	..	1
Snowy River Shire	..	..	..	..	..	..	..	1	..	..	..	..	1
Southern Mitchell County	..	..	..	..	..	..	..	1	..	..	..	..	1
Southren Riverina County	..	..	..	..	..	..	..	1	..	..	1	..	2
Southern Tablelands County	..	..	..	..	..	..	..	..	..	..	1	..	1
South Sydney Municipal	..	..	..	..	..	1	..	6	..	2	1	13	23
South West Slopes County	..	..	..	1	..	..	..	..	..	..	..	..	1
Strathfield Municipal	..	..	..	..	..	..	..	5	..	..	..	1	6
Sutherland Shire	..	..	..	6	..	2	..	15	1	1	1	17	43
Sydney City	..	..	..	4	..	..	1	8	2	..	2	4	21
Sydney County	..	..	..	6	1	..	1	27	2	4	2	10	53
Tamarang Shire	..	..	..	..	..	..	..	1	..	..	..	..	1
Tamworth City	..	..	..	..	..	1	..	1	..	..	..	6	8
Tenterfield Shire	..	..	..	..	..	..	..	..	..	..	..	2	2
Timbrebongie Shire	..	..	..	..	..	..	1	..	..	..	..	..	1
Tumut Shire	..	..	..	..	..	..	1	..	..	..	1	1	3
Tweed Shire	..	..	..	1	..	..	..	4	..	..	..	10	15

Public Authority (Councils)	No Jurisdiction			Declined			Withdrawn	Not Sustained	Sustained		Discontinued	Under Investigation as at 30th June, 1981.	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
Ulmarra Shire	..	..	..	..	..	..	..	..	..	..	..	1	1
Wade Shire	..	..	..	1	..	..	..	1	..	..	..	3	5
Wagga Wagga City	..	..	..	..	..	..	..	1	..	..	..	3	4
Wakool Shire	..	..	..	..	..	..	..	1	..	..	..	..	1
Walgett Shire	..	..	..	..	..	..	..	..	..	..	..	1	1
Warren Shire	..	..	..	..	..	..	..	..	..	..	..	1	1
Warringah Shire	..	..	..	6	..	2	1	28	..	..	6	12	55
Waverley Municipal	..	..	..	3	..	..	2	6	2	2	2	9	26
Wentworth Shire	..	..	..	..	..	..	..	1	..	..	..	2	3
Willoughby Municipal	..	..	..	1	..	..	..	6	..	..	1	6	14
Windsor Municipal	..	..	..	..	..	..	..	1	..	..	1	..	2
Wingecarribee Shire	..	1	..	1	..	..	..	1	..	..	1	1	5
Wollondilly Shire	..	..	1	1	..	..	..	3	..	..	..	2	7
Wollongong City	..	..	..	4	..	..	..	8	..	1	2	8	23
Woollahra Municipal	..	..	..	3	..	..	..	10	1	1	1	3	19
Wyong Shire	..	..	..	2	..	..	..	6	..	..	2	9	19
Yallardi Shire	..	..	..	..	..	..	..	1	..	..	..	..	1
Yarrowlumla Shire	..	..	..	..	..	..	..	2	..	..	..	..	2
Yass Shire	..	..	..	..	..	..	..	..	..	..	..	2	2
Young Municipal	..	..	..	..	..	..	..	1	..	..	..	..	1
	1	4	2	105	7	16	16	548	40	39	92	436	1 306
Less: Under investigation as at 30th June, 1980	..	..											315
Total Received	..	..	..	..	..	..	..						991

D 85438—5

PART II

POLICE REGULATION (ALLEGATIONS OF MISCONDUCT) ACT, 1978

PART II

POLICE REGULATION (ALLEGATIONS OF MISCONDUCT) ACT, 1978

Statistics

For the period 1st July, 1980, to the 30th June, 1981, I received a total of 830 complaints; this is an increase over the previous year. In addition 311 complaints were under investigation, having been received prior to the 30th June, 1980. Of this total of 1 141 complaints, 571 were still under investigation at the 30th June, 1981. The balance of 570 complaints represented 811 allegations and of these 32 were not within jurisdiction, 55 were declined and 79 were not proceeded with. Conciliation was effected in respect of 129 allegations, 456 allegations were not sustained and 60 were sustained.

Staff

The Assistant Ombudsman, a Senior Investigation Officer, two Investigation Officers, an Interviewing Officer and a Stenographer dealt with complaints under the Police Regulation (Allegations of Misconduct) Act, 1978.

Conciliation

There has been an increase in the use of conciliation to deal with complaints. In my last Report I referred to this and indicated that 42 complaints were conciliated up to the 30th June, 1980. In the period to the 30th June, 1981, conciliation has been achieved in 129 cases.

Public Mischief

In one case a complainant whose complaint was found not sustained was charged with public mischief and convicted. I understand that he has appealed against the conviction. I should like to express my concern at the use of this charge against a person who has brought a complaint to my Office.

General

Generally speaking, the matters which were the subject of comment by me in previous Reports were still of concern to me during this last year. In fact the position became more difficult in one respect, in that the Commissioner of Police during the year issued a direction to Police throughout the State that should members of the Ombudsman's staff communicate with them by telephone with respect to any matter then they should be advised that the inquiry should be conveyed in writing to the Commissioner. This direction did not assist in the completion of investigation of complaints.

Challenge to my Jurisdiction

During the year I successfully defended proceedings brought against me by two Police Officers. The matter was decided by Mr Justice Rogers in the Supreme Court of New South Wales Administrative Law Division on the 28th April, 1981. An appeal has been lodged against the decision. I have set out in full His Honour's reasons for judgment in Appendix C of this Report.

APPENDIX C

APPENDIX C

JUDGMENT OF MR JUSTICE ROGERS IN THE SUPREME COURT OF NEW SOUTH WALES ADMINISTRATIVE LAW DIVISION—28th APRIL, 1981

Boyd v. *The Ombudsman & Anor*

Judgment

HIS HONOUR: On the 4th December, 1979, Mr L. A. O'Hara interviewed Inspector Crawford of the New South Wales Police Force. He claimed that on that day he observed two officers of the Force travelling in a police car north in George Street, Sydney. The vehicle commenced to make a right hand turn east into Hay Street. At the time the traffic lights at the intersection were green to traffic travelling north and south in George Street, but not turning arrow was illuminated. According to Mr O'Hara the action of the police vehicle forced a Ford sedan travelling south in George Street to brake and swerve. After the two vehicles came to a stop, the police officers appeared to Mr O'Hara to book the driver of the Ford, presumably for an alleged infraction of the traffic laws. Mr O'Hara was of the view that there had been no offence committed by the driver of the Ford motor car.

Subsequent inquiry revealed that the driver of the police car was Constable First Class Boyd. He apparently issued a traffic infringement notice to the driver of the Ford, Mr J. L. Torrejon. The notice asserted to Mr Torrejon disobeyed a traffic control light signal which the Constable claimed had been red at the time when Mr Torrejon's vehicle entered the intersection.

Mr O'Hara's written statement to the Police was treated as a complaint within the meaning of the Police Regulation (Allegations of Misconduct) Act, 1978 ("the Act") and a copy forwarded to the Ombudsman.

Thereafter investigations were carried out on behalf of the Commissioner of Police and on the 30th April, 1980, its fruits were forwarded to the Ombudsman. Included in the material was a statement by Constable Boyd which stated, *inter alia*, that as he was executing his right hand turn into Hay Street, the lights were red with respect to traffic travelling north and south in George Street and that in obedience to the traffic signal, vehicles in the first and third south bound lane had come to a standstill. However, the Ford was travelling at speed and passed through the intersection in disobedience to the traffic signal and for that reason the driver was issued with a traffic infringement notice. Sergeant Wade who was the observer in the police vehicle also subscribed to a report to the same effect. His statement further contains an alleged admission by Mr Torrejon that the traffic light was red against him when he travelled through the intersection.

The inquiries disclosed that, as permitted by the relevant Act, the infringement notice was satisfied by Mr Torrejon making a payment of the prescribed penalty.

In his letter of the 30th April, 1980, the Commissioner expressed the view that—

> "It can be clearly seen that the complainant's allegations are incorrect. The police vehicle, at the time of turning right into Hay Street, was legally entitled to do so. The driver of the other vehicle concerned, Mr Torrejon, has admitted to disobeying a red traffic control light signal at this intersection. The penalty for this offence has been satisfied.
> From the information before me, I am satisfied that the allegations made by Mr O'Hara have not been substantiated and accordingly, I propose no further departmental action."

After considering the material that he received, the Ombudsman wrote to Mr O'Hara a letter dated 10th June, 1980, in which he said—

> "The information provided by the two policemen is at variance to your allegation. Based on the information supplied by the police, Constable Boyd was legally entitled to turn right into Hay Street when he did. Under the circumstances, I have decided that your complaint has not been sustained."

The Ombudsman further informed Sergeant Wade and Constable Boyd that he had decided that the complaint had not been sustained.

Mr O'Hara was not prepared to let the matter rest there and apparently contacted an officer in the service of the Ombudsman. As a result of the discussion Mr O'Hara had with this officer, the Ombudsman again wrote to the Commissioner on the 27th June, 1980, drawing attention to certain matters which Mr O'Hara had reported. In substance, attention was drawn to a claim that the police car made its right hand turn in violation of an illuminated sign forbidding the execution of right hand turns from George Street into Hay Street. The Ombudsman went on:

"Under the circumstances, Mr O'Hara's complaint should be further investigated, particularly in respect of the operation of the 'no right turn' sign. I consider that, in addition to any other inquiries you may wish to have carried out, the driver of the yellow Falcon sedan, registered number HFN–483, Mr J. L. Torrejon, as well as the complainant, Mr L. A. O'Hara, should be interviewed."

The Commissioner of Police did as he was bidden. In a statement he made to Inspector Gleeson, Mr Torrejon asserted that the lights were green in his favour when he went through the intersection of George and Hay Streets, and that he so informed the police in response to Sergeant Wade's claim that the light was red. He denied making the admission attributed to him by Sergeant Wade and asserted that he paid the fine only because he did not wish to become "involved in any hassles". There was other material brought to light which suggested that the police vehicle may have made its right hand turn into Hay Street contrary to the traffic rules obtaining at the relevant time.

On the 7th August, 1980, Constable Boyd was furnished with copies of the further statements which had been obtained by Inspector Gleeson, and instructed to submit a full report. The present proceedings were thereafter commenced for a declaration that the Ombudsman had no power to require or request the Commissioner of Police to make further investigations into the conduct of Constable Boyd, in the light of the Ombudsman's determination of the 10th June, 1980, that Mr O'Hara's complaint had not been made out.

In order to understand the competing submissions, it is necessary to look at the statutory framework within which the Ombudsman and Commissioner of Police were operating in relation to Mr O'Hara's complaint. The Ombudsman is a creature of statute, established by the Ombudsman Act, 1974. However his powers and functions for present purposes are to be found in the Act. Section 5 (1), requires that complaints made in accordance with Part II of the Act about the conduct of a member of the Police Force, should be dealt with in accordance with the provisions of the Act. Subsection (3) provides that—

"A person may not make a complaint in accordance with this Part about the conduct of a member of the police force if—

(a) he has already made another complaint about the same conduct and that other complaint (iii) has been adjudicated upon after investigation."

Section 9 requires the Commissioner to send any complaint that he receives to the Ombudsman. Section 17 permits the Commissioner to cause a complaint to be investigated and he is required to make an investigation if the Ombudsman so determines. In the present case, the decision to investigate was that of the Commissioner.

Section 19 indicates broadly the persons in the police force who should carry out the investigation and section 23 requires such investigator to make a report to the Commissioner, together with copies of all statements taken and all other documents upon which the report is based. It will be observed therefore, that certainly up to this point, the Ombudsman's role in the entire matter is restricted to the receipt of information as to the making of complaint and to the fact that the complaint is being investigated. In any case, the most that he can have done in other circumstances, is to instruct the Commissioner to have an investigation made.

Once an investigation has been concluded, the Commissioner is required to send a copy of the report and other documents to the Ombudsman, together with such comments as the Commissioner thinks fit and to specify what action should, in the opinion of the Commissioner, be taken with respect to the complaint. Power is conferred on the Ombudsman to require additional information which he considers necessary to enable him to determine whether the complaint had been properly investigated once he receives the information I have just mentioned. Section 25 nextly provides that—

"(1) Where, after receiving the information referred to in section 24, the Ombudsman is not satisfied that the complaint to which the information relates was properly investigated, he shall report to the Commissioner accordingly, specifying what are, in his opinion, the deficiencies in the investigation.

(2) Upon receipt of a report under subsection (1), the Commissioner shall cause a further investigation to be conducted in order to remedy the deficiencies referred to in the report.

(3) This Part (including this section) applies to and in respect of a further investigation under this section in the same way as it applies to an initial investigation."

Sections 17–26 are in Part IV of the Act headed "Investigations". Part V is headed "Reports" and section 27 provides—

> "Where, after consideration all the material and information provided for him under Part IV with respect to a complaint, the Ombudsman is satisfied that the complaint has not been sustained, he shall so report to—
>
> (a) the complainant;
>
> (b) the Commissioner; and
>
> (c) the member of the Police Force whose conduct was the subject of the complaint."

Where however the Ombudsman is satisfied that the complaint relates to an action which for one reason or another was improper or that the complaint was otherwise sustained, he shall compile a report giving reasons for his conclusions. He is further required to recommend what action should thereafter be taken. The Ombudsman is required to inform the Minister of what he is proposing to recommend and send a copy of his report to the Minister and to the Commissioner, whilst in turn the Commissioner is required to give a copy to the member of the Police Force affected. It is then for the Commissioner to notify the Ombudsman of any action proposed or taken, and the only resource to a dissatisfied Ombudsman is to make a report to the Minister for presentation to Parliament (section 30). Under section 33, where the Ombudsman is of the opinion that a member of the Police Force is or may be guilty of serious misconduct warranting his dismissal, removal or punishment he is required to report his opinion to the Minister and to the Commissioner, giving his reasons.

It may thus be observed that although in a given case it may be the Ombudsman who may decide to have a complaint investigated, the actual conduct of the investigation is in the hands of the Commissioner of Police, although the Ombudsman may request further steps to be taken in the course of or relating to the investigation. Further, when the investigation is completed the Ombudsman is in no position to take any action beyond the making of recommendations and reports. The implementation of those recommendations and reports is for the Minister and the Commissioner, respectively.

It is convenient to deal with the respective contention of the parties by referring to the three submissions of Counsel for the defendant for the dismissal of the Summons. Counsel submitted—

> (1) there was no justification to grant the relief sought because the plaintiff lacked standing;
>
> (2) the Ombudsman was the wrong and inappropriate defendant;
>
> (3) the Ombudsman had acted in proper exercise of his powers under section 25 of the Act in calling for a further investigation.

In support of the first submission, it was pointed out that the Ombudsman makes no determination of any rights, he does not investigate, he merely supervises the work done by the Commissioner of Police and his reports and recommendations lack any legal force or effect. Attention was drawn to the judgment of the Full Court of the Supreme Court of Western Australia in *R.* v. *Dixon* 1979 W.A.R. 116. Prohibition was there sought against the local variant of the Ombudsman, the Parliamentary Commissioner for Administrative Investigations. A submission in the same sense as the one presently under consideration succeeded. For relevant purposes, the Ombudsman's powers are substantially the same as those of the Commissioner and in the leading judgment, the Chief Justice expressed the view that the functions of the Commissioner can be likened to those of a Royal Commissioner. For this reason, he considered that the reasoning of Stephen, *J* in *R* v. *Collins ex parte ACTU—Solo Enterprises Pty Limited* (1976) 50 A:L:J:R 471, was applicable and the prerogative writ refused.

Stephen, *J.* in the decision referred to, said at p. 475—

> "With the situation in all these cases may be contrasted the position in the present case. Whatever may be the tenor of the Commission's Report, it will not legally affect the rights of the applicant; with or without such a report, and even, no doubt, in direct opposition to any recommendations in it, the Minister might, in his absolute discretion, take action affecting the applicant's crude oil entitlements, or might decide to take no action at all. Accordingly, the nature of the Commission's Report neither directly affects nor in any way subjects to a new hazard the rights of the applicant; the hazard of ministerial intervention has always been present and it is only the degree of likelihood of that intervention occurring in a sense adverse to the applicant's interests which is increased by the actual nature of the Commission's recommendation. That cannot, in my view, suffice to justify curial intervention, by means of *certiorari*, in the case of a Royal Com-

> mission whose sole function is to inquire and report to the Executive the result of its inquiries, whose mode of conducting its inquiry is entirely unfettered, either by statute or by executive direction, and whose report neither directly affects rights nor is a condition precedent to the affecting of them."

The fact that the Ombudsman's Report may not of its own force affect the rights of a member of the Police Force may in an analogous way affect the standing of the plaintiff in an application for a declaration (*Brettingham-Moore* v. *Municipality of St Leonards* (1969) 121 C.L.R. 509 @ 524.

It is undesirable that this question which is of critical consequence to the operation of the Ombudsman's Office, should be decided in the present case, having regard to the conclusion to which I have come in relation to the third submission.

As to the second submission, Counsel has drawn attention to the fact that there is no dispute as between the Commissioner of Police and the Ombudsman, further it is the Commissioner of Police who has called for a report from Constable Boyd. Although it is true that it was the Ombudsman who prompted the Commissioner to make further inquiries, there can be no doubt that in the light of the further information which has come to light, the Commissioner of Police would pursue his inquiries whether or not the Ombudsman had acted within power or not in instigating the further investigation. It is impossible to conceive that faced with such a serious situation, the Commissioner would not, in any event, conduct precisely the same inquiry and investigation which he had in train when the Summons issued. In other words, the remedy sought by the plaintiff is, in a sense, useless, because insofar as he may be desirous of bringing the investigation to an end, that must be a forlorn hope. However, it is unnecessary and undesirable that I should determine the matter on this basis, because I think it is important that the Ombudsman's powers and position be clarified.

It is beyond doubt, as was put by Counsel for the plaintiff, that the various steps to be taken in the investigation of a complaint are enumerated in a sequence which then culminate in the receipt by the Ombudsman of all the material and information and making of a report by him. In other words, provision for further investigation in section 25 precedes sequentially in the structure of the Act, the Ombudsman's report, which in the event that he considers the complaint unjustified, brings his activities to an end in relation to that complaint. However, there is nothing in the words of section 25 itself which deny the opportunity of further investigation after a report had been made pursuant to section 27. Counsel for the defendant submits that no such limitation exists.

It is important to consider the competing submissions in the light of two features of the Act. Firstly, the Act establishes a most elaborate system, the ultimate purpose of which must be to ensure that consistently, with fairness and due protection to police officers, complaints against them are fully and properly investigated under the supervision of an independent entity, the Ombudsman. The Court should be slow to construe the Act in such a way that the powers of investigation are circumscribed. There may be a multitude of reasons for wanting an investigation to re-open after a report is made under section 27. The deficiency in an investigation may not at once be apparent. A new witness may emerge, some other new evidence, say photographs, tapes, may come to light, one or more of the witnesses may decide to change their story. Bearing in mind the purpose of the Act, is the community to be denied the protection of full and complete investigation pursuant to the Act, merely because, perhaps erroneously, an initial report has been made under section 27 holding a complaint not to be justified? That the answer to this question should be in the negative is supported by the other feature of the Act. There is no *res judicata* or issue estoppel of any kind created by the decision of the Ombudsman. The prohibition contained in section 5 (iii) is directed only to the original complainant. There is nothing to preclude another person making a complaint in relation to the same incident. What policy advantage is to be perceived in holding that although another investigation may be instituted by the making of a fresh complaint by someone, even after a report under section 27 in relation to another person's complaint, the initial investigation cannot be re-opened. The filter which the Act prescribes for preventing improper harrassment of police officers by the making of fresh complaints by different members of the public in relation to the same incident is the discretion which the Commissioner and the Ombudsman have in determining whether an investigation should be carried out.

There is, as I have said, no time limit stated in section 25. The only temporal criteria set out is the prior receipt of the information referred to in section 24.

In my view, the Act is susceptible of the interpretation sought to be bestowed on it by Counsel for the Ombudsman and that interpretation is the one which properly gives effect to the evident purposes and requirements of the Legislation.

The Summons will be dismissed. The plaintiff will pay the defendant's costs. Exhibits may be handed out.