

SECTION

EVIDENCE

5

Efficiency and Effectiveness of the Corporate Body

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5.1 The Role Of The General Manager

5.1.1 The Separation of Powers: The Key Objects of the Act

5.1.1.1 In this Section, as in other Sections of this Report, reference is made to the separation of roles of the Elected Body and the Corporate Body. This separation is principally given effect to by Sections 232 and 335 of the Act.

5.1.1.2 Section 232 provides:

(1) The role of the Councillor is, as a member of the governing body of the Council:

- To direct and control the affairs of the council in accordance with this Act
- To participate in the optimum allocation of the council's resources for the benefit of the area
- To play a key role in the creation and review of the council's policies and objectives and criteria relating to the exercise of the council's regulatory functions.
- To review the performance of the council and its delivery of services, and the management plans and revenue policies of the council.

(2) The role of a Councillor is, as an elected person:

- To represent the interests of the residents and rate payers.
- To provide leadership and guidance to the community
- To facilitate communication between the community and the council

5.1.1.3 Section 335 provides:

(1) The General Manager is generally responsible for the efficient and effective operation of the council's organisation and for ensuring the implementation, without undue delay, of the decisions of the council.

(2) The General Manager has the following particular functions:

- The day-to-day management of the council.
- To exercise such of the functions of the council as are delegated by the council to the general manager
- To appoint staff in accordance with an organisational structure approved by the council.
- To direct and dismiss staff
- To implement the council's equal employment opportunity management plan.

(3) The General Manager has such other functions as may be conferred or imposed on the General Manager by or under this or any other Act.

5.1.1.4 It will be seen from the foregoing, that the Act creates an Elected Body, and a Corporate Body then separates their functions.

In so saying, the Act recognises that this separation may be blurred by the Elected Body delegating its functions to the General Manager.

Principally, the Act seeks to separate the functions, of the Elected Body from the Corporate Body, and vice versa.

5.1.2 The Concept of the Separation of Powers

5.1.2.1 The Separation of Powers is a concept which forms a fundamental tenet to our system of government.

It is applied with varying stricture in various levels of Government in Australia.

5.1.2.2 It is built upon a premise that different powers be exercised by different autonomous bodies. In the present context, this gives rise to three concepts:

(i) that the same person should not form part of both the Elected Body and the Corporate Body.

Section 275 (2) embodies this concept, providing that a person is disqualified from holding civic office if he or she is an employee of the Council.

(ii) that one organ should not control or interfere with the exercise of functions by the other.

(iii) that one organ should not exercise the functions of the other.

5.1.2.3 This principle should however be read in light of the power of the Elected Body to delegate, contained in Section 335 of the Act, which has been referred to previously.

5.1.2.4 During the Inquiry, the Council provided a copy of the delegations in place. It is not necessary to refer to these delegations. The Inquiry did not receive any Submissions and did not hear evidence which raised issues regarding the delegations as such. It did receive Submissions which raised issues over the manner in which the delegate carried out the functions which were the subject of a delegation.

5.1.2.5 The Inquiry regards the recognition of, and adoption of the concepts underlying the Separation of Powers doctrine, as outlined previously in the part, as fundamental to the efficiency and effectiveness of the governance of the Corporate Body.

- 5.1.2.6 Principal amongst these are that either body not control or interfere with the exercise of functions by the other nor exercise the functions of the other.
- 5.1.2.7 Having considered the Submissions, having heard the evidence of speakers at the Public Hearings, and having reviewed the material which has been made available to the Inquiry, the Inquiry is concerned that the principles set out above have not been totally observed.
- 5.1.2.8 The totality of the evidence which is available to the Inquiry suggests that members of both the Elected Body and the Corporate Body have during and prior to the term current Elected Body have not observed, and have taken positive steps to breach, the doctrine as it applies to the governance of the Corporate Body.
- 5.1.2.9 It is not intended in this part to explore fully all matters where the Inquiry regards the doctrine to have been breached, rather to highlight it at the outset, in order that when reviewing subsequent parts of the Section, it may also be considered as a part of an overall view of aspects relating to the governance of the Corporate Body.

It is sufficient to say that the doctrine is affected by those parts referring to councillor influence, the past General Manager, court cases, minutes and community consultation.

5.1.3 Influence of the Elected Representatives on the Corporate Body

- 5.1.3.1 One of the recurrent themes contained in Submissions which were received by the Inquiry was that of Councillor influence on the management of the Corporate Body.

As has been previously outlined in the introduction to this Section, the supervisory powers of the Councillors are explored.

A number of the Submissions which were received by the Inquiry explored the manner in which Councillors pursued these powers, viewing the exercise of such powers either as favourable or unfavourable.

5.1.3.2

The author of Submission 213 held a very favourable view of the conduct of the Councillors, expressing it in the following terms:

Submission 213

I HAVE BEEN REQUIRED TO DEAL WITH OUR ELECTED COUNCILLORS AND COUNCIL STAFF MANY TIMES AND FEEL IT NECESSARY TO SHOW MY SUPPORT FOR OUR ELECTED REPRESENTATIVES, IN PARTICULAR MR. DARREN JONES AND MR. GAVIN ANDERSON (NOW RETIRED), WHO HAVE ALWAYS BEEN RESPONSIVE TO THE NEEDS OF THE LOCAL COMMUNITY. I MIGHT ADD THAT I HAVE NOT ALWAYS RECEIVED A FAVOURABLE RESPONSE TO MY ENQUIRIES DUE TO WHAT I FEEL ARE UNREASONABLE LOCAL GOVERNMENT RULES AND REGULATIONS HOWEVER THESE CIRCUMSTANCES HAVE ALWAYS BEEN CLEARLY EXPLAINED TO ME AND ACCEPTED.

I HAVE ALWAYS FOUND COUNCILLOR DARREN JONES AVAILABLE AT ANY TIME TO RESPOND TO MY "COMPLAINTS" OVER LOCAL ISSUES SUCH AS EXCESSIVE NOISE FROM WARRINGAH MALL, PROBLEMS WITH TREES ENCRoACHING ON OUR PROPERTY AND OTHER (TO ME) MATERIAL MATTERS OF CONCERN, AND THE SUPPORT FOR OUR LOCAL SCHOOL COMMUNITY CENTRE AND THE NAMING OF THE MAIN HALL THE "JOHN HULME" ROOM. COUNCILLORS SUCH AS DARREN, JULIE SUTTON AND MR. MORRIS, HAVE MY COMPLETE CONFIDENCE IN BEING ABLE TO PROPERLY CONDUCT AND MANAGE COUNCIL AFFAIRS. IT WILL BE A SAD DAY FOR THE PEOPLE OF WARRINGAH WHEN HONEST, DEDICATED AND APPROACHABLE ELECTED COUNCILLORS ARE FORCED TO CHANGE THEIR PROVEN EFFECTIVE MANAGEMENT STYLES BY LOUD MOUTHED ARROGANT INERT RESIDENTS OF OUR AREA, WHO HAVE THEMSELVES BENEFITED FROM THE HIGH MANAGEMENT STANDARDS OVER MANY YEARS SHOWN BY WARRINGAH COUNCILLORS - I OFTEN WONDER WHY SOME OF THE UNELECTED LOUD MOUTHED WHO ARE SO VOCAL IN CONDEMNATING COUNCILLORS SUCH AS DARREN JONES, SEEM TO TAKE PRIDE IN INFORMING US LOCAL RESIDENTS THAT THEIR INABILITY TO MAKE A SUCCESS IN LIFE, BY HIGHLIGHTING THE SUCCESSES OF OUR LOCAL MEMBERS, WOULD MAKE THEM BETTER MANAGERS OF OUR COUNCIL - BEING A STRONG LABOUR VOTER I FIND IT HARD TO UNDERSTAND WHY BOB CARL HAS ALLOWED THIS PUBLIC INQUIRY INTO OUR LOCAL COUNCIL TO TAKE PLACE.

5.1.3.3 Conversely other Submissions raised concerns that Councillors were exercising powers beyond those contained in the Act.

The nature of these latter Submissions may be classified as follows:

- Influence over the behaviour of Council's former General Manager, Mr. Denis Smith.
- Influence over the conduct of junior staff.
- Interference with the conduct of Council's functions, and particularly interference with Councils decision-making processes affecting development applications.
- Interference in the manner in which Council gives effect to public participation, particularly involving appointments to and the conduct of Council Committees.
- Interference with the processes of public consultation.
- Measures to provide preference to certain individuals and organisations.

5.1.3.4 These concerns are principally dealt with separately in this part or in other parts of this report. Accordingly the concerns are only touched on in this part to provide as indication of the concerns which have been raised.

5.1.3.5 Mr. Barr provided a lengthy Submission (No. 292) which detailed concerns which had been raised by constituents and Warringah residents.

Separately the Inquiry received Submissions and heard evidence from:

- Former staff
- Residents
- Members of Committees
- Community representatives

who gave evidence from direct and personal knowledge of instances where the concerns are said to have arisen.

5.1.3.6 Submissions have contained assertions such as the following:

Submission 141

I was appointed as a community member of the Warringah Heritage Committee (sometime in the year 2000 I think) after responding to Council's invitation in the Manly Daily. I believe that my input to that committee was informed, useful and pro-active, and that my attendance was good. I sent a letter dated 15th September 2001 with some suggestions re the committee papers and a proposal to hold a 'Beginning of the Century' photographic competition to identify heritage items in the Warringah area, to the committee co-ordinator (letter attached 1).

I did not receive a reply to that letter, but did receive a letter from the newly elected Mayor, Darren Jones, dated 16 October 2001 (letter attached 2) advising that all citizen membership positions of the Cultural and Heritage Committee (name had previously been changed) had been declared vacant. This was well short of the period for which I was appointed to the committee. I was invited to re-apply in that letter, but would have had to submit an entirely new application. My opinion is that the new Mayor took the opportunity to install committee members that may be more sympathetic to his ideas for Warringah. It should be noted that one of the roles of the Heritage Committee was to review and recommend items for the Heritage Schedule of the Warringah LEP.

5.1.3.7 Submission 020 contained a detailed statement, alleging Councillor influence on process. Its author, Mr. Minnici, had been President of the Harbord Community Alliance and the Harbord Chamber of Commerce, and has been a strong community representative.

The extract from the Submission which is set out below, and the evidence subsequently given by Mr. Minnici on April 8 2003, which is also set out, gives credence to allegations of Councillor influence over the Corporate Body.

Submission 020

As President of the IICA, because there was so many new candidates, I organised a "Meet the Candidates" night before the last Local Govt. elections in 1999. All the B Ward candidates, numbering in excess of 20, were positioned on stage before a large public gallery. Each candidate introduced themselves and stated how they would best represent the community in the future. The night was a huge success and the community felt that at least now they could put faces to names.

Apparently, Darren Jones, saw this forum as a set-up and interpreted it as a means to undermine him as our current representative. As a result he has gone out of his way to personally victimise my family and myself.

Recently, the following has occurred –

- a) My family home adjoins an small open Council Reserve and for 17 years my wife and I have meticulously maintained this area. Cr Jones, against huge neighbourhood objection, directed Council staff to erect a ugly log fence around the perimeter of this Reserve and had Council instruct me to cease further upkeep. Council immediately placed an ugly log fence across the front of the Reserve and , now the Reserve is basically neglected and not properly maintained by Council. Council staff, Divisional Manager, Gary Thomson, other Managers, Dennis Corbett and Stephen Bax, have each admitted to me that Cr Darren Jones has instructed them to get me.
- b) An on-site meeting with Cr Darren Jones to discuss the abovementioned log fence resulted in the statement by him, " If you don't like it, move!... go and buy a house by the sea, and get a yacht!" I have a neighbour who witnessed this whole confrontation and was horrified by these rude remarks by Cr Darren Jones.

I was receiving letters and continual harrassing visits from Council officers up until the public announcement of the investigation into Warringah Council. These were all instigated by Cr Jones in what has to be a total misuse of his position.

Public Hearings Transcript – April 8 2003

MR BROAD: You talk about your involvement in maintaining a reserve.

MR MINNICI: Yes, I did.

MR BROAD: Can you indicate when and by what means Council instructed you to cease further upkeep of that reserve?

MR MINNICI: It was approximately the second half of 2001. Council instructed me not to maintain this reserve that I had been maintaining for 17 years.

MR BROAD: How as [sic.] it done?

MR MINNICI: It was done by way of a letter and also personal visits by senior Council staff. I was directed not to have anything to do with the reserve at all, that Council would maintain it.

MR BROAD: You state in your letter that certain persons, and I ask you not to name them, have admitted to you that a councillor, and again I ask you not to name that councillor, has given them certain instructions. Can you tell me when that took place and in what circumstances?

MR MINNICI: Under the same circumstances. When senior Council officers came to my place to inspect the Council reserve also to instruct me not to mow the reserve and basically to keep off the reserve, they indicated that there was pressure from above. Subsequent to that, I was doing renovations to my house and there was a fence, a construction fence around the home which was normal practice, and I was abutting the reserve by 6 inches, I was told to move the fence by 6 inches and I said, "This is stupid. This is very, very petty, ridiculous." They said, "Sorry, we can't help it, Frank, we're under instructions."

MR BROAD: So the nature of the statement is either we have instructions from above, is that a correct statement?

MR MINNICI: To some degree. It was more - - -

MR BROAD: As best as you can recall.

MR MINNICI: As best as I can recall, you know who it is.

MR BROAD: Was that on the first occasion that you were talking about or what it when you were talking about the fence?

MR MINNICI: On both occasions. Different Council officers said exactly the same thing.

Public Hearings Transcript – April 8 2003 (cont.)

MR BROAD: You said in your submissions that you had been receiving letters and continual harassing visits. Firstly, in respect to the letters, over what period did you receive these letters?

MR MINNICI: Probably - I started receiving the letters probably in June 2001. I continued to receive letters during the course of the building operations which went from that period, June 2001 through to May 2002 and even following that. I constantly got letters, no longer about the reserve but about my construction fence and other matters. Just continual - - -

MR BROAD: Do you have copies of those letters?

MR MINNICI: I don't have them with me but I can provide copies of letters.

MR BROAD: If you might. You say you had continual harassing visits from Council officers?

MR MINNICI: That's correct.

MR BROAD: Can you tell me what those visits related to?

MR MINNICI: Similar things. Just trivial matters. Like the - one councillor took up a complaint from an adjoining property that I was taking over the reserve and he immediately indicated that he wanted to put a log fence around that reserve. There was a certain amount of intimidation about that. I indicated, look, I'm more than happy to comply, let's not do a log fence - an ugly log fence that is unfavourable visual impact, doesn't comply with the amenity of the area, we'll do a nice grass hedge, I'll pay for that hedge, I'll get a landscape architect to design a nice hedge etcetera, etcetera. I subsequently had a meeting on site with this councillor. This councillor's words were: Frank, if you don't like it you can move. Go buy the sea and buy a yacht. I turned around and I just said, "If that's the way you feel."

MR BROAD: Coming back to the visits, how many did you receive?

MR MINNICI: I would have received no less than five to six visits by different officers at different times.

MR BROAD: Over what period?

MR MINNICI: Well, because I had move out of my house during the renovations, I wasn't there most of the time, but probably, over that year, would have been five to six visits.

MR BROAD: The purposes for the visits, can you indicate the nature of those?

MR MINNICI: Once again, just to see if I was complying and not touching the reserve, to make sure my construction fence was in place, just trivial matters. ...

5.1.3.8

On March 31 2003 Ms. Collis gave the following evidence:

Public Hearings Transcript – March 31 2003

MS COLLIS: Yes. What really concerned me was after my husband spoke to a Compliance Officer, he was told that we were the subject of a very vindictive nasty campaign, very nasty indeed and it was suggested that we write to the General Manager at the time who was Denis Smith, to ask him to intercede on our behalf. That fell on deaf ears and basically we received a letter from Denis Smith to say that - well, he wasn't interested, he wasn't doing anything about it. The other concern which has created a lot of stress for myself is the conversation that I had with a Compliance Officer. Do you need dates for - - -

THE COMMISSIONER: No, I think we have - you have probably put those in your written submission. I just want to distil your concerns.

MS COLLIS: Yes. When I was issued, upon 48 hours notice, that an inspection of my premises would be required, I telephoned the writer - I attempted to telephone the writer. He was unavailable and there was another person acting in that position who I must say was, apart from one other person that I dealt with on Council, the only helpful, compassionate individual in this whole messy saga. He had said to me that it was getting nastier and it was being - the pursuit against me was from very powerful - someone in a very powerful position at the instigation of my neighbour.

When I said: do you mean someone on Council, he said: yes. I said: could I have names? He said: look, it's more than my job's worth and I said: well, what if I nominate one or two people that I think may be responsible and - which I did and on the second - at the second name that I put up, I was given an affirmative that that person was driving the campaign and was pushing the Compliance Officer to do something about 73 King Street.

5.1.3.9

From the evidence contained in this part and elsewhere in this Report, the Inquiry accepts that some, but not all of the Councillors sought to, and have adversely influenced the governance of the Corporate Body.

5.1.4 Actions of the Former General Manager

5.1.4.1

Mr. Denis Smith was appointed Council's General Manager in May 1998. He had joined the Council earlier that year as Director of Services.

He left the Council before the end of his contract of services.

A number of Submissions have expressed concerns regarding Mr. Smith, and particularly his relationship to certain Councillors in the "Old Guard" or "Majority Block".

5.1.4.2 A number of serious allegations have been made against Mr. Smith in relation to certain matters. To try and assess whether such allegations had validity, the Inquiry has searched through certain documentary material as well as evidence presented in Submissions. No conclusions can be drawn from this material, however, because the Inquiry could not obtain evidence from Mr. Smith. He chose not to avail himself of the opportunity to present to the Inquiry.

5.1.4.3 The allegations referred to certain development applications connected to two Councillors.

In 1998 Councillor Caputo had lodged development application for dual occupancy development approval for various properties in Cromer. These applications had not been dealt with by the Council, as information requested by Council had not been provided.

In October 2000, Songkal Pty Limited, a company in which Councillor Jones discloses a pecuniary interest, had lodged a development application over a property at Pittwater Road, Dee Why.

This application, likewise had not been dealt with, and the company had not provided information which was sought by the Council.

5.1.4.4 In early February 2001, the Council passed a resolution which required that Mr. Smith provide a report to the next meeting of the Council addressing the following matters, in respect of each property.

Minutes of Council Meeting on February 6 2001

1. Notes that Clause 46 of the Environment Planning & Assessment Regulation provides for the "stopping of the clock" where additional information or details have been sought from the applicant.
2. Notes that Council's policy provides that following Council's written request for additional information to an applicant, if Council has not received the additional information to their satisfaction within 21 days of that request the application is determined on the basis of the information before the Council at that time.
3. Notes with concern that:
 - a) The application for 20, 20A, 20B, 22 Ryrie Avenue, Cromer was submitted on 10 September 1998.
 - b) Council informed the applicant on 24 September 1998 that the application was deficient and required further information. No response was received at the expiration of twenty-one (21) days.
 - c) Council sent subsequent letters on 20 October 1998 and 9 August 1999 and still the applicant failed to provide the required information.
 - d) At the expiration of the first 21 day period, Council failed to have the application determined on the basis of the information before the Council as at 10 September 1998. On each subsequent occasion Council failed to have the application determined on the basis of the information held by the Council.
 - e) The information required was not received until the 13 October 2000.
 - f) The proposed development, which is prohibited under the Warringah LEP 2000, is not subject to the Warringah LEP 2000, is not subject to the Warringah LEP 2000 due to it being held pending since 1998.
4. Notes that:
 - a) The application for 701 Pittwater Road, Dee Why was submitted on 31 October 2000.
 - b) Council requested additional information from the applicant on 27 November 2000. At the expiration of that date, the information was not submitted.
 - c) The applicant submitted a request for an extension of time on 11 December 2000, however at no time was a resolution passed by Council authorising an extension nor is there any letter on the file granting such an extension.

Minutes of Council Meeting on February 6 2001 (Cont.)

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Minutes of Council Meeting on 6 February 2001

- d) After inspection of the file on 5 February 2001 the required information as requested on 27 November 2000 had still not been received.
- e) The independent assessor, who recommended refusal of the first application has not been re-appointed by Council and a different firm has been appointed.

5. Notes that Council policy provides that when an application involves a Councillor, all matters regarding that application must be reported to full Council for consideration and determination.
6. Directs the General Manager to furnish a report to the next meeting of Council addressing the following:
 - a) Why there has been a variance to policy, without resolution of Council, regarding the processing of the above mentioned applications.
 - b) Why when the applicants failed to provide the additional information sought within 21 days, the applications were not immediately referred to independent assessors for assessment on the basis of the information held by Council at the time of the expiration of the respective 21 day periods and a determination recommended to Council accordingly.
 - c) The historic details of SEPP 53 and when this Policy was repealed by the NSW Government including relevant correspondence between Council and the State Government.
 - d) Why the application for 20-22 Ryrie Avenue, Cromer is being assessed on the basis of SEPP 53.
 - e) Why the independent assessor, Design Collaborations who recommended refusal of the previous DA for 701 Pittwater Road, Dee Why has not been reappointed and why a different independent assessor has been appointed to assess the DA.
7. Resolves to defer the determination of DA411, Lots 35,36,37,40, DP774979 – 20, 20A, 20B & 22 Ryrie Avenue Cromer and consider the DA upon receipt of the General Manager's report.
8. Directs the General Manager to immediately reappoint the firm, Design Collaboration to assess the application for 701 Pittwater Road, Dee Why with the assessment to be based on the information held by Council as at 11 December 2000.

(Crs Forrest/Smith)

The resolution made clear the intent of the Councillors to determine the applications at Council's next meeting.

It appears that the former General Manager did not provide the reports as required. A letter was sent to the applicants on February 15 2001 furnishing them with an opportunity to provide the outstanding information. The Inquiry could find no authorisation for this.

It was implicit to the Resolution that the delegation which would allow him to take this action, had been removed separately.

5.1.4.5 The then General Manager defended his actions, suggesting that the lodgement of a recision motion operated to override the motion. All of this is recorded in the Council's Minutes of March 6 2001, and are set out below. The purpose of recording this incident is not to make a judgement on whether the former General Manager acted properly or not. Rather, it is used to illustrate the complex interactions of the General Manager and the Elected Body. When these matters came into the public domain, as they did, they generated some confusion within the Warringah community. The lack of confidence in the capacity of the Elected Body to govern Warringah efficiently and effectively expressed by so many people had its genesis in such issues.

Report to Council Meeting on March 6 2001

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FILE NO: PF4205/20-22-C & PF3883/701-C

Report to Council Meeting on 6 March 2001

BODY OF REPORT**Reporting Officer**

General Manager

Council at its meeting held on 6 February 2001 considered a Motion of Urgency by Cr Peter Forrest as it relates to Development Applications for 20, 20A, 20B and 22 Ryrie Avenue, Cromer and 701 Pittwater Road, Dee Why.

Clause 6. of the resolution of 6 February 2001 is as follows:

Directs the General Manager to furnish a report to the next meeting of Council addressing the following:

- a) *Why there has been a variance to policy, without resolution of Council, regarding the processing of the above mentioned applications.*
- b) *Why when the applicants failed to provide the additional information sought within 21 days, the applications were not immediately referred to independent assessors for assessment on the basis of the information held by Council at the time of the expiration of the respective 21 day periods and a determination recommended to Council accordingly.*
- c) *The historic details of SEPP 53 and when this Policy was repealed by the NSW Government including relevant correspondence between Council and the State Government.*
- d) *Why the application for 20-22 Ryrie Avenue, Cromer is being assessed on the basis of SEPP 53.*
- e) *Why the independent assessor, Design Collaborations who recommended refusal of the previous DA for 701 Pittwater Road, Dee Why has not been reappointed and why a different independent assessor has been appointed to assess the DA.*

Rescission Motions were lodged at the Council Meeting of 6 February 2001 in respect of the total resolution pertaining to the Matter of Urgency raised by Cr Peter Forrest. The Rescission Motion was considered by Council at its meeting of 20 February 2001. Three of the Rescission Motions were determined out of order when Cr Peter Moxham withdrew his signature from the Motions. The remaining Rescission Motion was challenged by Cr Peter Forrest as being out of order and that was supported by a Motion of Dissent against the Mayor's ruling that, in his opinion, the Rescission was in order. Therefore the resolution of Council of 6 February 2001 became operative at the conclusion of the Council Meeting of 20 February 2001.

Council at its meeting of 27 February 2001 considered a Matter of Urgency by Cr Peter Forrest in respect of a report into Council's handling of Development Applications for 20, 20A, 20B and 22 Ryrie Avenue, Cromer and 701 Pittwater Road, Dee Why. The Council resolution was as follows:

Report of Warringah Council Meeting held on 6 March 2001

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Report to Council Meeting on March 6 2001 (cont.)

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FILE NO: PF4205/20-22-C & PF3883/701-C

Report to Council Meeting on 6 March 2001

That Council resolves in globo to:

1. *Note that Council resolved on 6 February 2001 to "Direct the General Manager to furnish a report to the next meeting of Council addressing the following:*
 - a. *Why, there has been a variance to policy, without resolution of Council, regarding the processing of the above mentioned applications.*
 - b. *Why when the applicants failed to provide the additional information sought within 21 days, the applications were not immediately referred to independent assessors for assessment on the basis of the information held by Council at the time of the expiration of the respective 21 day periods and a determination recommended to Council accordingly.*
 - c. *The historic details of SEPP 53 and when this Policy was repealed by the NSW Government including relevant correspondence between Council and the State Government.*
 - d. *Why the application for 20-22 Ryrie Avenue, Cromer, is being assessed on the basis of SEPP 53.*
 - e. *Why the independent assessor, Design Collaborations, who recommended refusal of the previous DA for 701 Pittwater Road, Dee Why has not been reappointed and why a different independent assessor has been appointed to assess the DA".*
2. *Note that, taking into consideration the withdrawn rescission motion of last week, the General Manager on behalf of Council's administration should have enacted Council's resolution of 6 February 2001 regarding Council's handling of DAs for 20-22 Ryrie Avenue Cromer and 701 Pittwater Road Dee Why and had the report submitted in Council's Agenda for consideration at tonight's meeting in accordance with Council's resolution of 6 February 2001.*
3. *Notes with very great concern that the General Manager as the head of Council's administration has failed to enact Council's resolution of 6 February 2001 regarding Council's handling of DAs relating to 20-22 Ryrie Avenue Cromer and 701 Pittwater Road Dee Why and adhere to a directive of Council.*
4. *Notes that in view of the General Manager's failure to enact Council's directive and furnish the report accordingly into Council's handling of the DAs for 20-22 Ryrie Avenue Cromer and 701 Pittwater Road Dee Why, Council resolves to censure Mr Denis Smith for his failure to implement Council's resolution of 6 February 2001 regarding Council's handling of DAs for 20-22 Ryrie Avenue, Cromer and 701 Pittwater Road, Dee Why.*

Report of Warringah Council Meeting held on 6 March 2001

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Report to Council Meeting on March 6 2001 (cont.)

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Report to Council Meeting on 6 March 2001

At the Council Meeting of 27 February 2001, notice was given of a Notice of Rescission in respect of the above resolution. This Rescission Motion will be submitted to the Council for consideration at its meeting of 6 March 2001.

The following comments are submitted in respect of clauses 2, 3 and 4 of the Council's Resolution of 27 February 2001. These clauses specifically relate to the Council's assertion that the General Manager failed to enact Council's resolution of 6 February 2001 regarding the DA's for Ryrie Avenue, Cromer and Pittwater Road, Dee Why:

- a) Between Wednesday, 21 February 2001 until Saturday, 24 February 2001, the General Manager was on leave to attend the Local Government Chief Officers' Group Conference. All Councillors were advised by Memo of the General Manager's attendance. Copy of Memo attached as annexure "A".
- b) During the period of Wednesday, 21 February until Sunday, 25 February 2001 inclusive, the General Manager appointed Ross Symons as the Acting General Manager. The Acting General Manager was delegated all necessary responsibilities that pertain to the position. All Councillors were advised in writing of Mr Symons' appointment as Acting General Manager.
- c) I have held discussions with the then Acting General Manager together with other senior staff regarding the implementation of Council's resolution of 6 February 2001 which in effect did not become operative until 20 February 2001.

The following comments have been submitted by the Acting General Manager and other relevant staff:

1. The Agenda for meetings of the Council is finalised and closed off for internally prepared reports and matters no later than 10.00am on the Thursday prior to the meeting - in this case 10.00am Thursday 22 February 2001.
2. The resolution of 6 February was subject to a Rescission Motion at the meeting of 20 February, which was subsequently determined to be out of order. The decision of 6 February 2001 requiring the submission of the report therefore became effective from 20 February.
3. Commencement of any report could not begin until Wednesday 21 February 2001, which effectively allowed little over one (1) day to prepare a report.
4. The preparation of a report addressing the five (5) items required considerable research of files by staff from the Local Approvals Unit, including consultation with Council's solicitors in respect of the matters concerning SEPP 53 to be addressed in the report.

Report of Warringah Council Meeting held on 6 March 2001

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Report to Council Meeting on March 6 2001 (cont.)

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Report to Council Meeting on 6 March 2001

5. As mentioned in 3. above, there was little over one (1) day to complete the report, whereas the original motion of 6 February 2001 (if not subjected to a Rescission Motion) would have allowed at least eight (8) days to prepare a report for "the next meeting of Council" which was scheduled to be held on 20 February 2001.
6. Irrespective of the time required by LASU to prepare a response to the five (5) matters required for any report, the Acting General Manager had a number of pre-arranged meetings and matters regarding draft budget sessions and staffing matters, which were of paramount importance to the overall organisation. The Acting General Manager was also responsible for the preparation of letters to the Minister and Director-General of the Department of Local Government regarding Motions of Urgency that were also submitted at the Council Meeting of 6 February 2001. The decisions of 6 February 2001 were held on abeyance pending the determination of Rescission Motions, which were the subject of Council consideration and its meeting of 20 February 2001.

Adequate explanation has been given to me by all relevant staff why they did not implement clause 6, of the Council resolution of 6 February 2001 as it related to the Motion of Urgency.

I draw Council's attention to Section 335 of the Local Government Act, Functions of General Manager, which states The General Manager is generally responsible for the efficient and effective operation of the Council's organisation and for ensuring implementation, without undue delay, of decisions of the Council.

I am firmly of the opinion that the Council's decision of 6 February 2001, which became effective on 20 February 2001, has been implemented without undue delay. The criticism on the General Manager or implied criticism on the Acting General Manager is totally unwarranted and without substance. Further, I would point out to the Council that the Motion that led to the resolution of 25 February 2001 was raised as an Urgent Motion and I was not given any prior notice or other opportunity to respond to the matters. I believe that the failure to give me reasonable opportunity to respond to the Council resolving to censure me constitutes an invalid decision of Council on the grounds of failure to give the General Manager procedural fairness.

The following comments have been submitted by the Service Unit Manager for Local Approvals as it relates to the Matter of Urgency dealing with the DAs for 20, 20A, 20B and 22 Ryrice Avenue, Cromer and 701 Pittwater Road, Dee Why:

1. **Why there has been a variance to policy, without resolution of Council, regarding the processing of the above mentioned applications.**

Answer:

There is no policy by resolution of Council that indicates applications will be determined by Council if additional information has not been submitted within 21 days of Council officially requiring such to be submitted.

Report of Warringah Council Meeting held on 6 March 2001

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Report to Council Meeting on March 6 2001 (cont.)

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Report to Council Meeting on 6 March 2001

ii) **701 Pittwater Road, Dee Why**

The current Development Application was submitted on 31 October 2000. As Scott Carver had been appointed to assess the original Application, they were requested to provide an update fee proposal as the new Application was identical to the previous amended plans of 1999. Scott Carver replied on 22 November 2000 acknowledging that they would undertake this new assessment and submitted a fee proposal to carry out the work. This application is the application that is still to be determined by the Council. On 27 November 2000, Council wrote to Leffler Simes Architects on behalf of the applicants requesting additional information to enable Council to further process the application. The applicant was advised in terms of the following:

“You are advised that Clause 48 of the Environmental Planning and Assessment Regulation has the effect of “stopping the clock” for the calculation of the period of time taken to assess the application, where additional information or details are sought. If Council has not received this information, to its satisfaction, within 21 days, your Development Application will be determined on the basis of information presently before the Council. Should you require additional time in which to provide this information, you are requested to seek an extension in writing. Council has adopted this procedure in the interests of streamlining the processing of all Development Applications.”

On 11 December 2000, the applicants wrote to Council requesting permission to extend the period to the new year. On 7 February 2001, a further submission was made by the applicants and on 15 February 2001 a letter was sent to the applicants by Council advising that all outstanding information should be submitted to Council by 2 March 2001.

On 1 March 2001, Council received all outstanding information that had been requested by the applicants and their consultants.

3. **The historic details of SEPP 53 and when this Policy was repealed by the NSW Government including relevant correspondence between Council and the State Government.**

Answer:

The historical details of SEPP 53 and when this policy was repealed by the NSW Government including the relevant correspondence between Council and State Government is attached as annexure “C”.

Report of Warringah Council Meeting held on 6 March 2001

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Report to Council Meeting on March 6 2001 (cont.)

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Report to Council Meeting on 6 March 2001

4. **Why the application for 20-22 Ryrie Avenue, Cromer is being assessed on the basis of SEPP 53.**

Answer:

The Consultant's Report referred to Council on 6 February 2001 advised that the provisions of SEPP53 applies to this application. Under clauses 33 and 40 any applications lodged prior to amendment 4. (this deleted Warringah from the SEPP53 provision) and not determined by Council and should be determined as if SEPP53 still applied. The application was lodged on 10 September 1998, one month prior to amendment 4. being gazetted which was at 9 October 1998.

5. **Why the independent assessor, Design Collaborations, who recommended refusal of the previous DA for 701 Pittwater Road, Dee Why has not been reappointed and why a different independent assessor has been appointed to assess the DA.**

Answer:

This question relates to 701 Pittwater Road, Dee Why and Design Collaborative who recommended refusal of the original DA were not appointed as it was considered that when the amended plans were submitted at a later date, there had been quite a large time lapse since the original submission and the latest submission, and the most appropriate action for Council staff was to call for fresh quotations to do the assessment of the amended plans. As a result of calling for fresh submissions and quotations to assess the amended plans, it was considered that the price submitted by Scott Carver was the most cost-effective and together with the experience of that planning organisation, it was determined that this company should be appointed to carry out the assessment.

Recommendation by the General Manager:

That Council notes that the information submitted in this Report satisfies the Council's directive to the General Manager on 6 February 2001 and that the Council resolve to withdraw the censure of the General Manager as contained in the resolution of Council on 27 February 2001.

Report of Warringah Council Meeting held on 6 March 2001

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- 5.1.4.6 The actions of Mr. Smith have been seen by a number of people as actively promoting the interests of Councillors Caputo and Jones.
- 5.1.4.7 Following his initial evidence at the Public Hearings on March 20 2003, Councillor Smith provided a written Submission and subsequently gave evidence on April 1 2003. Councillor Smith attached an extract of the Minutes of Council’s meeting of November 23 1999. It might be noted that Councillor Smith had only then served for just over 2 months.

Councillor Smith sought answers to eight questions.

As has been pointed out elsewhere in this Report, the questions were entirely proper, and, given Council’s then financial position, should have been both asked and answered.

- 5.1.4.8 Mr. Smith is recorded as responding that he would instruct Council’s solicitors to take legal action against the Councillor, which can clearly be interpreted as a threat.

Minutes Council Meeting Warringah Council November 23 1999

1. Reported in today’s Manly Daily “Senior Man Suspended: 23/11/99. Is this report true or not true? If true why weren’t the Councillors informed before the press release? Will an official report on the same be forthcoming.
2. Is the Council’s computer Y2K compatible or will all information be lost especially financial records?
3. The Auditors should be checking the books each three months. Has the financial problem developed over the last three months?
4. Does the General Manager meet on a regular basis with the Council department heads, if so, why has this financial problem developed and the auditors cannot do their audit? If not, why aren’t these regular meetings going on to keep the Finances of the Council under strict control?
5. How many people work in the accounts department?
6. How many people are involved in the preparation of the actual Council’s financial reports?
7. Surely someone had an inkling that the department was not functioning correctly. Is there a method of staff reporting problems?
8. Does the buck stop with the top person, namely the General Manager?

NOTE: Cr Smith subsequently stated that the questions were his questions to the meeting.

A. The General Manager informed the Council that in view of the fact that the questions were the questions of Councillor Smith, that he will instruct the Council’s Solicitor’s to take legal action against Councillor Smith, on the contents of the above questions.

5.1.5 The Reform Process under the existing General Manager

5.1.5.1 Whilst this chapter largely explores governance issues giving rise to concerns, it is important to highlight that there are reforms which have been already put in place, or which are in the throes of being implemented.

Some of the reforms which have been introduced predated the Investigation, whilst some followed from recommendations contained in the Mitchell Report.

5.1.5.2 Mr. Blackadder, when replying on behalf of the Council, indicated that further changes to Council's Code of Meeting Practice had already been made and adopted by the Council. These changes were a direct result of matters which had been raised in submissions or is in evidence at the Public Hearings.

5.1.5.3 The Tables which are set out below indicate the reforms which have already been implemented and have been signalled and are in the process of being proposed with a view to implementation.

It is pleasing to see that during the term of the current General Manager, Council is implementing reform.

It is anticipated that, in light of the recommendations, which are contained in this report, substantial further reforms will be necessary to ensure efficient and effective governance of the Corporate Body.

Table 5.1.5.1

Reforms in Place

Amendments to Code of Conduct	December 3 2002
Amendments to Code of Meeting Practice	December 3 2002
Policy ENV-PL7670	
“Use of Sportsfield Rectification Funds”	
Amendment to Code of Meeting Practice	March 4 2003

Table 5.1.5.2

Reforms To Come

Information & Communication Technology Strategic Plan	
	- accepted in principle
Involvement of St James Ethics Centre	
	- Ethics Committee
Audit of Complaints Handling Procedures by Ombudsman Office	
Appointment of Internal Ombudsman	
Workshops to identify Councillor and gallery conduct deemed unacceptable	
Data work document-handling system	- May 2003

5.2 Council's Administrative System

5.2.1 The Council Model

5.2.1.1 Council's Submission, No.288, attached a model of its Administrative Structure, and Organisational Charts.

The model is complex. The organisational charts, however, appeared to compartmentalise the work of the three principal groups into a seemingly logical order.

In light of concerns taken up in Submissions, and in order to obtain an overview of the manner in which the Council conducted its business, the Inquiry sought evidence from a number of Council's staff, during the Public Hearing.

The Inquiry heard from the following members of Council's staff:

- Mr. Blackadder – General Manager
- Mr. Symons – Director, Public Office
- Mr. Ryan – Director, Strategy
- Mr. Thomson – Director, Service Group
- Mr. Vescio – Unit Manager, Governance Service Unit
- Mr. Fletcher – Unit Manager, Local Approval Service Unit
- Mr. Borthwick – Unit Manager Policy Planning and Commissioning Service Unit
- Mr. Gatenby – Manager, Development Assessment
- Mr. Nicholson – Manager, Facilities
- Mr. Smith – Leader, Local Approvals Service Unit, Customer Service and Administration team
- Mr. Kerr – Manager, Strategic Land Use Service Unit
- Mr. Corbett – Manager, Environment Management Service Unit
- Mr. Brisby – Team Leader, Environmental Compliance Services

In seeking evidence from these staff, the Inquiry was seeking to test both the legitimacy of the concerns over Council's administrative system, and whether, if there were legitimate concerns, there were aspects affecting Council's governance which were flawed, or which might bear improvement.

5.2.1.1 As observed, the administrative models are complex, appearing to provide three autonomous units, that of the Public Office, Strategy and Services.

Within the three divisions there are a number of subgroups.

5.2.1.3 When announcing the Inquiry, the then Minister for Local Government, had highlighted the number of complaints, which he had been receiving. Whilst the Minister did not differentiate between the complaints affecting the Elected Body, as against the Corporate Body, it must be accepted that many complaints involved the Corporate Body.

The Submissions which were received by the Inquiry certainly evidence this fact.

Additionally, the Submissions which were received by the Inquiry raised a number of separate issues affecting the efficiency and effectiveness of the Corporate Body. These issues are dealt with in other parts in this Section and elsewhere in this report.

5.2.1.4 Given this background, and given that the Inquiry was directed to inquire into matters affecting the public's confidence in both the efficiency and effectiveness of the Elected Body and the Corporate Body, it was important to inquire into aspects associated with Council's Administrative System.

A number of Council's senior staff and managers were asked to provide an overview of the matters falling within their division or unit. Additionally specific matters were explored with them.

The Inquiry has concluded that Council's Administrative System bears the following hallmarks:

- The system presents an opaque image to the public of how the Council works.
- The system operates by a number of discrete divisions.
- The adoption of discrete divisions gives rise to issues as to which division has ownership of matters.
- Ownership issues give rise to subsequent issues of who has ultimate responsibility for outcomes.

5.2.1.5 The Inquiry explored a number of specific issues with Council staff, including;

- (1) The Development Assessment Process
- (2) Enforcement Issues where Non Compliance had been alleged
- (3) Building on Council Reserves
- (4) The Conduct of legal proceedings
- (5) Access to Information

The Inquiry considered the structure of the staff dealing with the development assessment process with a number of members of staff.

Mr. Smith, Council's Team Leader of the Customer Service unit, was asked a number of questions at the Public Hearings on April 4 2003.

Mr. Smith described the role of the section in the following terms:

Public Hearings Transcript – April 4 2003

MR SMITH: ... There's two primary sections, administration section which has a staff of four. That section looks after the administrative work of the development assessment offices. Its work involves - they look after initial notification letters, the response to the applicants of DAs initially. From that point they don't have much association with the development application until it is completed and then they issue the determination, whether it be refusal, consent or whatever.

The other main area is the counter area, the customer service area. That has a staff of three - four, sorry. It deals with customer inquiries, both with counter and over the phone to do with the local approval service section. It only services our area. There is another customer service area, a general one, for the entire Council but our counter is specifically local approval.

5.2.1.6

The issue of notification of development applications was taken up with Mr. Smith, who was asked who was notified. Mr. Smith referred to notification to immediately adjoining neighbours. When pressed about other forms of notification, other than letters to adjoining neighbours, Mr. Smith replied:

Public Hearings Transcript – April 4 2003

MR SMITH: There is for certain types of building, certain types of applications - I am probably not the person to ask as to which one exactly fall into that category, that is relayed to administration. We do the notification but certain types of application - you know, as an example, flat buildings and larger buildings of that type, also there is an ad put in the local paper, in the Manly Daily, and a sign is erected on the site.

Mr. Smith was subsequently taken to the process which would follow, if a person who had received notification of a development application lodged an objection to it. Mr. Smith gave the following evidence:

Public Hearings Transcript – April 4 2003

THE COMMISSIONER: Right. If people do object, they find something they don't like about the plan, do they write to the assessment officer then, or does it go through your unit? What is just the physical procedure of that?

MR SMITH: Typically, in the letter that is initially sent out there is a time to respond to the application and they would write in within that period and write their concerns down. Those letters would come in and be registered and go direct to the assessment officer. Our section wouldn't have anything to do with those.

THE COMMISSIONER: So the process then is all in the hands of the assessment officer?

MR SMITH: Yes.

5.2.1.7

Mr. Smith as then asked questions about concerns over subsequent non-compliance matters. Again, he gave the following evidence:

Public Hearings Transcript – April 4 2003

THE COMMISSIONER: What about after the event, after it has gone through and maybe approved - - -

MR SMITH: Yes.

THE COMMISSIONER: - - - and something happens on the site, what if people then have objection to - we had some comment earlier in the hearings about non-compliance issues. Would concerns like that come through your unit? How are they managed at the Council meeting?

MR SMITH: That is probably not my area to answer, I really couldn't tell you. There is different avenues to address, as I understand it, and I don't know the details. Some issues are dealt with by the assessment officer after the event. Other issues are dealt with by the compliance section, the rangers. It has nothing to do with my area and I really couldn't tell you the specifics of who deals with what. I don't know.

THE COMMISSIONER: So you are not too sure how a complaint comes into the system? I mean, sometimes the complaints might be telephone calls. What is the system for routing those to the appropriate person, that is what I'm trying to find out?

MR SMITH: You mean, after the event still?

THE COMMISSIONER: Yes, yes.

MR SMITH: If it comes in via a letter, records would distribute that to - usually to the assessment officer - so again I don't have anything really to do with that.

In quoting the foregoing evidence, it is not intended to suggest any criticism of Mr. Smith, but rather to demonstrate the compartmentalisation of the particular units of Council.

5.2.1.8

The issue of compliance was taken up with Mr. Brisby, Council's Team Leader of the Environmental Compliance Unit.

Mr. Brisby was asked a question about his unit's involvement in proceedings in the Land and Environment Court.

Mr. Brisby confirmed that the Environmental Compliance Unit brought certain classes of proceedings in the Land and Environment Court, associated with the enforcement of breaches of development consent or illegal works, where no approval has been granted.

The unit was not involved in other proceedings in the Land and Environment Court, such as appeals against Council's refusal of development consent.

Whilst this evidence would appear to provide a complete answer regarding enforcement proceedings in the Land and Environment Court, Mr. Fletcher gave the following evidence at the Public Hearings on April 8 2003:

Public Hearings Transcript – April 8 2003

MR BROAD: Does Council have any policy that provides for any action to be taken where it is found illegal building work has commenced?

MR FLETCHER: There is a draft policy presently under production, but presently - no, there hasn't. But may be the Manager of Compliance may be able to address that, because he addresses that area a bit more than myself.

MR BROAD: Right, so that is not within your - - -

MR FLETCHER: We usually - once the order has been served, it comes from another section and then they apply for a building certificate and there is a bit of liaison between different sections.

MR BROAD: So when it comes to enforcement proceedings, Class 4 proceedings in the Land and Environment Court - - -

MR FLETCHER: For illegal works?

MR BROAD: - - - for illegal works, does that issue from your department?

MR FLETCHER: Only if it relates to a project already been approved and they are in the stages of construction. If it is - the building has been completed for a number of years and they start to do other works, no, that comes under the Environment Manger Service Unit.

5.2.1.9 The involvement of separate units of council in the development assessment process was taken up with other speakers. Council's Manager of the Environmental Management Service Unit, Mr. Corbett, spoke on April 3 2003.

Mr. Corbett described the operations within his unit in the following terms:

Public Hearings Transcript – April 3 2003

MR CORBETT: Right, Commissioner, my unit, Environment Management, part of the services group, consist of four teams. Catchment Management, which includes stormwater. Conservation and Land Management, includes bushlands and weeds and a variety of programs in our parks and reserves. Environmental Compliance, which includes Council's rangers team, Environmental Health and Environmental Education.

Commissioner, when that structure was put together by Council in 1998, I believe what Council intended to do was to have in the one service unit the complete range of responses to environmental issues, so we have both an educational response, an enforcement response and a works response, and part of my responsibility is to determine what is the correct mix, or balance of responses for any particular environmental issue. If it needs an enforcement, some education, some works by Council.

When asked of the Unit's connection with the development approval system for public land, Mr. Corbett gave the following evidence:

Public Hearings Transcript – April 3 2003

MR CORBETT: There is a connection. The main connection, Commissioner, is through the area of vegetation management. Now, you would appreciate one of the particular areas of challenge for us and other councils is management of trees and vegetation on development sites. It includes now management of threatened species communities. So with the local approvals unit there is a process where there is a lot of development applications that they send to us. So Commissioner, in that regard we work as a kind of in-house consultancy providing advice to local approvals, especially on things like vegetation management, rare and threatened species and flora and fauna management.

So I guess there's a threshold the local approvals staff are aware of and part of their process is they know which development approvals to send to us. Now, it's not just on vegetation. Issues like creek and catchment management, issues like coastal management, areas along Collaroy and Narrabeen, for example. There's a whole range of issues that when the local approvals officer assesses a new DA, there's a whole lot of triggers where they will know this application needs to go amongst others to environmental management for their comments.

So we do provide that service as that in-house group and we have experts, external if we need them, especially for things like threatened species, where we can give timely advice to local approvals and then on to Council as part of assessing those DAs.

When asked whether the Unit was automatically part of the development approval process, Mr. Corbett gave the following reply:

Public Hearings Transcript – April 3 2003

MR CORBETT: Well, I have had discussions with local approvals to make sure that it is working both ways, Commissioner. That's a very valid point. We don't just sit back and say: well, we'll accept what they give. I can say we have a very good relationship. Any time that I have gone to them and said: look, there's an area there where I think we need to perhaps modify the threshold and have a greater range of issues coming to my staff, that's always been agreed to with the local approval service unit manager.

So it is very much a two-way and it's very much a responsibility of mine to make sure that we are getting a look at the ones that we think we should be viewing, not just the ones that local approvals think. but it does work very well. The teams do work in a close harmony together to get that two-way relationship.

Subsequently, Mr. Corbett was asked the following questions:

Public Hearings Transcript – April 3 2003

MR BROAD: Where a development application involves work on a reserve, a Council reserve, would that development application normally be referred to your unit?

MR CORBETT: It's a question, Mr Broad, because as I mentioned, my unit is very diverse, we both play an educational role, a regulatory role and a works role. So an example would be where one of my teams applies for a DA to do some rectification at a subsiding site. If there were some creek and catchment issues there, what local approvals would do, and do do, is they would say: well, normally we would take advice from the catchment team, but as part of their engagement of an external consultant and as part of the skills that they buy in, if they've got some questions normally coming through the catchment team they would say you don't need to buy those skills in. They can't say they will have one part of Mr Corbett's team, apply for an application and another part of his team assess the application, even though it's only a small part of the assessment.

Part of that probity is for local approvals to subcontract out externally the relevant skills. It doesn't mean my staff are prevented from making an assessment. If my staff happen to have a particular concern about, say, a DA, they are welcome and encouraged to put their points of view forward. It won't be the only point of view the Council will rely on.

MR BROAD: Yes. If such a matter was referred to you and it involved an application for development in a reserve, would your unit give emphasis to compliance with the terms of the plan of management affecting that reserve?

MR CORBETT: Yes, Mr Broad, the plan of management is the first port of call that we make for a DA but again, the assessment of DAs is under the charter of local approvals. I'm often, as you are saying, as an applicant and other parts of my team may make comment on any DA but for all of us across Council the plan of management is the first port of call. The plan and LEP are the first ports of call.

5.2.1.10 Mr. Fletcher, the Manager of the Local Approval and Service Unit spoke at the Public Hearings on March 21 2003.

Mr. Fletcher described the role of the unit in the following terms:

Public Hearings Transcript – April 3 2003

MR FLETCHER: Basically the role of the unit is to consider development applications and approve them; assess construction certificates, that is like the construction side of the programme; manage development through the process from approval to finish; development engineering areas look at infrastructure in relation to applications, drainage, subdivision works, issue certificates under our planning controls, that's a major issue in our administrative area; prepare reports to Council when applications are reported to Council. As regards to autonomy, there's certain delegations to myself and the manager and team leaders below myself and also the officers at delegations.

Mr. Fletcher gave evidence of the involvement of the various units of Council involved in the preparation of the Local Environment Plan, mediation, the policy for notification of development applications, and emphasised the different units in Council which deal with these different aspects, saying:

Public Hearings Transcript – April 3 2003

MR FLETCHER: Yes. I mean, we all work for the same organisation. They will come and talk to us and say, you know, these are issues. What do you think about it, because we are the operational people. We find a lot of issues that strategic people are not aware of.

There is no doubt, as Mr. Fletcher suggests, that all staff work for the same organisation.

The concerns which appear to be thrown up by the compartmentalisation of tasks, outlined in this part, are that they rely upon the attention of the various units being focussed on matters, given the complexity of the structure and safeguards can only be assured by putting in place appropriate directions and policies.

As was acknowledged by Mr. Corbett, the references of applications between his unit and the Local Approvals Service unit relies on:

"...discussions with Local Approvals to make sure that it (references) is working both ways..."

This approach is not considered to be appropriate, and does not represent good governance.

5.2.2 Financial Management and Budgetary Relationships

5.2.2.1 In 1997/1998 the Council reported a deficit from its ordinary operations of \$11.087m.

In 2001/2002 the Council reported a surplus from its ordinary operations of \$10.889m

This represents a turnaround of almost \$22m.

This has been principally achieved by:

An increase of Rates and Annual Charges of almost \$10m

An increase in user charges of over \$8m

A one-off gain from the sale of assets of \$8.55m

Against this, Council's costs for materials and contracts have risen by nearly \$5m.

By anyone's reckoning, this is a major turnaround in Council's performance over the period.

5.2.2.2 Council's Cash Assets were shown in its last annual accounts as \$54.818m, up from \$25.298m at the start of the period, and up by \$17.566m in the financial year. Again this represents a substantial turnaround in Council's position and indicates strong growth from cash flows.

The 2001/2002 Accounts record that 14% of employee leave entitlements have been funded from monies set aside for this purpose. This figure is indicative of sound financial practices having been adopted by the Council.

5.2.2.3 In light of these figures, the Council may be properly entitled to say that it has been responsible in its budgetary measures to overcome the matters which led to its previous deficits.

In addition to this, Council, in its Submission provided details of its anticipated figures for the next 10 years. Whilst limited reliance can be put on these figures, it indicates that the Council is looking to the future to anticipate the financial pressures and constraints which may be placed upon the Council.

On the other hand, Council's Submission highlights that the figures which it provides do not allow for depreciation, stating:

Submission 288

Council does not budget for depreciation ...

This approach is somewhat surprising, as not only is this required to be provided by the Department of Local Government in Council's Annual Accounts, it recognises that funds are required to keep up and maintain Council's assets.

Generally, however the financial information suggests that the Council is exercising care and control over budgetary matters, a sign which the Inquiry believes is indicative of good governance on the part of the Council.

5.2.3 Institutional Connections to Council

5.2.3.1 In its Submission to the Inquiry, No.288, the Council emphasised its connections to the public through cultural and sporting involvement.

This involvement was clearly recognised in the wider community, with a number of sporting and cultural groups, their representatives and those having lengthy connections to these groups, providing Submissions.

These Submissions emphasised strong bonds, which had developed over a number of years between the groups and the Council and Councillors.

In speaking to the Inquiry, at the Public Hearings on March 19 2003, Council's General Manager, Mr. Blackadder emphasised these connections, giving the following evidence:

Public Hearings Transcript – March 19 2003

MR BLACKADDER: Yes, indeed. The second issue from 67 submissions related to the behaviour of councillors at meetings and I won't go into detail but there are a number of aspects raised in that area. Commissioner, there were 57 submissions in support of the Council and its councillors and I should acknowledge at this stage that many of those submissions were from organisations, associations, bodies that were representing a large number of members and if I can just acknowledge the group submissions include the Terry Hills Computer Pals, the Aboriginal Support Group, the Manly Warringah Pittwater Eisteddfod, the Computer Pals for Seniors, Harbord Diggers Club, the RSL War Veterans, Northern Beaches Visitors Association, Pittwater House School, Manly Warringah Netball Association Incorporated, the Sporting Union, the Cubby House Toy Library, the New South Wales Rural Fire Service, the Surf Life Saving Northern Beaches Association, the Beacon Hill Polar Bears, Belrose Rugby League Football Club, Forestville RSL, Cromer Junior Rugby League Football Club and Valley United Junior Rugby League Football Club.

So I just acknowledge that whilst they are individual submissions, I would hope, Commissioner, that you will have regard for the fact that those bodies and organisation represents many hundreds if not thousands of members. The next submission referred to councillors generally, pecuniary interest and the like, term of office, occupations of councillors and they related to 35 submissions.

In so doing, Mr. Blackadder sought to emphasise that the organisations represented the views of a large number of the Council's population. Whilst evidence given at the Public Hearings indicated that the forwarding of a Submission did not necessarily indicate the committee's view, let alone that of the membership, it is appropriate to acknowledge the strength of the goodwill and respect afforded by institutions and groups, to the Council and Councillors.

5.2.3.2 The Submissions generally followed three themes:

- (1) That Council had provided support for the association
- (2) That the Councillors had been active in their support
- (3) That if the personal connections with the Council were severed, principally through the possible appointment of an Administration, it would adversely affect the operations of the association in the future

The groups making Submissions included Seniors groups, such as Belrose and Terry Hills Computer Pals. A summary of the main points of Submission 041 is given below.

Submission 041 – Summary

- Since our formation in early 2000, we have had a close and continuing association with the Council and its Councillors.
- Through the Community Development Grants scheme, we have had ongoing financial support. Without this support, we could not have achieved the degree of self-sufficiency that we currently enjoy.
- They facilitated our occupancy of our present rooms at Terry Hills Community Centre...
- During our forced move, we received assistance from several councillors, one of whom provided us with free transport of our equipment using his own vehicle. We also had support from several Council employees, who personally donated items of furniture and both office and computing equipment.
- We continue to receive valuable advice and guidance from several departments of the council, and are currently working very closely with them on a new project where we take computers from businesses that no longer require them and recondition them. The completed computers are subsequently given free of charge to underprivileged persons and community groups in Warringah. Council works closely with us on this, and their main function is to find and recommend suitable deserving recipients.

The Submissions also included cultural groups, including the Warringah Eisteddfod Inc.

The President of the Eisteddfod spoke at the Public Hearings on March 24 2003 describing the Eisteddfod as:

Public Hearings Transcript – March 24 2003

MS MACKIE: That is correct, yes, this is the 50th Anniversary year this year and we now have over 12,000 competitors and I don't think it is broadly known that it is the second largest Eisteddfod following the McDonald's Performing Arts Challenge, which is now called, City Of Sydney Eisteddfod, and we draw from a very large area from Warringah of course, we are the source of the Eisteddfod, but also from the northern beaches from North Sydney, from other areas. As far as Wollongong, Newcastle and even into Central Western and Southern New South Wales.

In its Submission the Eisteddfod had emphasised the support given by the Council. Eisteddfod participants have benefited greatly from the support of Warringah Council over many of the last 50 years. In the last two decades Council has financially supported the Eisteddfod as a major sponsor. This is primarily thanks to the Councillors who have voted funding, and the Council's support in recognition of the valuable cultural contribution made by the Eisteddfod to the local community.

Public Hearings Transcript – March 24 2003

THE COMMISSIONER: ... You said that Warringah Council is a very strong supporter and sponsor. What are the kinds of ways in which that support is rendered?

MS MACKIE: Well, first of all, they give us a great deal of recognition. Always very willing to promote the Eisteddfod and we have a part in the Mayor's column on occasions, particularly when we are coming up for the close of entries. They certainly give us a lot of financial support and, of course, they come along - the Mayors are patrons of the Eisteddfod automatically, they come along to our winner's concert, which is when the prize giving is - takes place and present prizes to the championship winners on that night.

And in return we help them too, we supply singers for their Citizenship Ceremonies and it has been quite successful.

THE COMMISSIONER: So in a sense it is a partnership?

MS MACKIE: It is a partnership, and all the Mayors that I have dealt with have been very, very supportive and, in fact, the current Mayor has been a very long time supporter and also a private sponsor of the Eisteddfod and attends many of the sections includes, especially the speech and drama. We publish the names - of course the Patrons are published in both our syllabus and program too, so the general public are very much aware that the Mayor of Warringah is a Patron of the Eisteddfod.

THE COMMISSIONER: Yes. Would you consider this one of the major cultural contributions to the life of the Warringah area?

MS MACKIE: Certainly, we do have sponsors who give us a little more, but sponsors come and go and Warringah Eisteddfod has been there as a constant and I think without their support, the Warringah Eisteddfod may have died some years ago.

Mrs. Mackie enlarged on this avenue when speaking at the Public Hearings. Mrs. Mackie described the standard of the Eisteddfod in the following terms:

Public Hearings Transcript – March 24 2003

MS MACKIE: Extremely high standard. I can tell you just for an example, if you are talking about standard, just in the ballet field alone, last year we had the Adeline Jenne Awards. Now, these are international awards run by the Royal Ballet School, and five of the 15 finalists have performed at Warringah Eisteddfod, including Stephen McRae, who won the Gold Jenne Award. I mean, we are talking the highest standards.

The Harbord Diggers Memorial Club Ltd wrote of its alliance with the Council in establishing the:

- Duke Kahanamoku Statue and commemorative Surfing Park
- A wall of Remembrance at Joshua Park Harbord
- “Symphony of the Sand”
- The Club’s RSL Youth Club

5.2.3.3 A number of sporting bodies also provided Submissions to the Inquiry.

The Manly Warringah Pittwater Sporting Union sent a Submission.

Again, this emphasised their support for the Council and spoke highly of their relationship with the Council.

The Sporting Union wrote:

Submission 097

We have enjoyed an excellent relationship with Warringah Council for nearly forty years. We have not always had our requests met by council but the council and the Sporting Union have been prepared to discuss and revise sporting needs and reach agreement.

Surf Live Saving Sydney Northern Beaches Inc described its relationship, both at branch level and club level, with the Council.

Submission 138

The Council is very supportive of community volunteers and we have found them to be fair and equitable in their dealing with our organisation.

Additionally, a great number, if not all the junior rugby league football clubs, provided Submissions adopting the same theme.

Perhaps all the Junior Rugby League Football Clubs in Warringah prepared Submissions in favour of the Council. Many of these spelt out the assistance given by the Council to the construction of, or improvement to, their facilities.

Submission 151 from the Beacon Hill Bears summarised below provides an example.

Submission 151

They have assisted our club in many ways, some examples of which are:

- Assist in the construction of a canteen adjacent to our field at Beacon Hill Reserve.
- Assist in the renovation/extension of shared change rooms (League/Soccer/Little athletics) at Beacon Hill Reserve
- Introduce mural style art to the toilet/dressing block in an effort to combat continued graffiti vandalism.
- Returf, fertilise, topdress, mow and maintain generally both paying fields at Beacon Hill Reserve *and throughout the whole of the shire*. These grounds are the pride of Sydney, all due to the dedication of the Warringah Council with the support of its councillors.

5.2.3.4 Representatives of other institutions, including Commissioner Koperberg wrote indicating the support given by the Council.

It was clear that there is widespread support for the Council (and the Councillors) from a wide range of community groups.

There may be doubt that all of their members supported the views expressed in the Submissions, or that the views expressed were necessarily the views of all of their committees. This was evidenced by the brief appearance of Mrs. Boydel at the Public Hearings on March 25 2003, following evidence from Mr. Tighe. She gave the following evidence:

Public Hearings Transcript – March 25 2003

MS BOYDEL: Well, as I said, I made the point I haven't - you have got the letter. I haven't got it in front of me. I feel that he should have consulted others before he put in a submission. As I said before, I put one in myself but not as a director of the club. Now, I think he should have put one in as an individual and not representing the club because other people were not consulted.

It is clear that, by and large, the groups referred to supported the Council. Most of these Submissions expressed concerns:

- (1) That Councillors not be dismissed from office, and
- (2) That an Administrator should not be appointed.

Oxford Falls Grammar School took up these concerns in the following form:

Submission 187

If the Council was to be dismissed, thus leading to the appointment of an Administrator, we feel strongly that that would deny us proper representation by our own elected representatives. We feel so strongly about this that we would be willing to have one of our board members appear before you at the Public Inquiry.

Many of the Submissions (070, 151, 177, 195, 204, 271, 310) expressed their concerns in the following very similar form:

Submission 070

We are very happy with Warringah Council and to suggest they should be dismissed from office would be very wrong. This could lead to the appointment of an Administrator, denying us proper representation by our own representatives.

It must be acknowledged that, if the Councillors were to be removed and an Administrator appointed, the groups referred to in this part will lose their direct connections to the Councillors.

To the extent that they lose this personal connection, they may be disadvantaged. However, it must be borne in mind that those Council staff with whom they have built strong and personal connections will remain, and will not be affected by any such appointment. Emphasis should be given to the fact that the Corporate Body would not be altered by the appointment of an Administrator, should it be made.

5.2.4 Awards to Council

5.2.4.1 In its Submission to the Inquiry, the Council, when dealing with issues associated with the efficiency and effectiveness of its governance, listed awards which had been won by Council.

Council submitted that these awards acknowledged that the Council was “a high achiever in the delivery of its products and services”.

Council sought to rely upon the objectivity of these awards to support this view.

A review of the awards listed by the Council indicated that many of the awards are not totally referable to the work or endeavours of the Council, but also include contributions from the community. It would be an oversight not to recognise this.

5.2.4.2 Many of the awards listed in the Submission relate to environmental awards.

Council’s Service Unit Manager for environmental management, Mr. Dennis Corbett gave evidence at the Public Hearings on April 3 2003, that Council and Hornsby Council are probably the leading councils for their commitment to environments.

Mr. Corbett attributed the success to:

Public Hearings Transcript – April 3 2003

MR CORBETT: ... I believe that part of the reason for the success - in fact, I would suggest the entire reason for the success is that mix of things that we are showing some of these award bodies and we can show them that we have got the leadership from the Council. We have got community involvement. We have got the money through the environmental special rate, and through our advisory committees, again, a big community involvement there.

Many speakers at the Public Hearings emphasised the environmental management achievements of the Council.

Councillor Colman, a retired zoologist, spoke of involvement in environmental matters in the following terms:

Public Hearings Transcript – April 3 2003

MR COLMAN: ... I had been fighting for or against Council for 30 years on various issues, mostly friendly fights, of course, but when I retired I thought perhaps instead of yelling and screaming, I should join them and see if I can do anything that way. I also had been closely involved with Council on various issues, particularly the Narrabeen Lagoon Committee, and I felt that there was still room for work to be done there, and I hoped that I could add my bit to that.

Mr. Hamlyn-Harris, the President of Curl Curl Lagoon Friends Inc., spoke of the inception of the group in July 1980 to address issues surrounding the Lagoon, and the support provided by the Council.

Councillor Colman spoke of his involvement in the Collaroy/Narrabeen Beach front, recalling that as far back as 1978 he worked with Council on Collaroy/Narrabeen coastal issues.

5.2.4.3 Given the awards which have been won by the Council it was puzzling to receive a number of Submissions questioning Council's environmental performance.

The Submissions raised the following general themes:

- (1) That the Council area is being overdeveloped, with insufficient regard for environmental matters.
- (2) That the Council was paying insufficient regard to environmental concerns raised in respect of particular areas including John Fisher Reserve and Manly Dam.

Within the concerns relating to the particular areas, there were a number of sub-issues, including:

- (1) Failure to properly address environmental concerns when considering developments.
- (2) Failure to give effect to Plans of Management affecting Reserves.
- (3) Failure to give regard to genuine community concerns.
- (4) The awards process.

It is clear that the Council enjoys the support of a large and active group of constituents with a genuine commitment to the environment and a willingness to contribute their time and efforts to protect and improve the environment.

This is demonstrated by the ongoing commitment of such groups as Curl Curl Lagoon Friends Inc., and by the number of resident and other interest groups.

A significant indication of this interest is provided by the community raising \$20,000 towards the cost of buying back the Ardel site near Manly Dam.

The evidence given by Mr. K Higgs served to highlight some of the concerns expressed by the public regarding environmental awards.

Mr. Higgs holds 2 degrees in Physics, worked for the University of New South Wales for 26 years, spending the first 21 of these at the Water Research Laboratory at Manly Dam. During the time that Mr. Higgs spent at the Water Research Station, he had conducted a number of environmental studies affecting the dam and its catchment.

Accordingly, Mr. Higgs' evidence brought with it his expertise and a wealth of practical experience.

In a joint submission with Mr. Parsons (Submission 193), on behalf of the Save the Manly Dam Catchment Committee Inc., and in subsequent evidence, Mr. Higgs highlighted the failures of Council to properly manager the Manly Dam Reserve, and the failures to properly assess the Ardel site. Highlighting these issues was an extract, contained in the submission, of a memo sent by Councillor Forrest to Mr. Corbett on November 16 2001, reporting “*alarmingly high levels of phosphates immediately below the water quality control pond...*”.

There was widespread public concern over the Ardel site, particularly environmental concerns.

Mr. Malcolm Fisher made a written Submission and subsequently gave evidence at the Public Hearings.

In his Submission Mr. Fisher wrote:

Submission 036

Unfortunately one of Sydney's real natural treasures was destroyed by the Ardel development (now called Madison) and the very future of Manly Dam's water quality has been compromised. So what was Warringah Council's response?

They actually invited one of Ardel's contractors, Egis Consulting, to apply for an Environmental Encouragement Award! Egis's Michael Grey advised that Ardel's Earthmoving Contractor 'Narel' were going to be offered the award but their nomination 'fell through' because of reported 'breaches'. Egis was subsequently presented with an award at a ceremony in Council chambers which was boycotted by another winner, the Streamwatch Team from Mackellar Girls High school, in protest (see attachment 2). The Chairman and Managing Director of Ardel were, however, both seen in attendance at this 'by invitation only' function.

The impression this left the community with was that certain people at Warringah Council were determined that someone connected to this highly unpopular development would 'by hook or by crook' get an environmental award despite the nonsensical logic behind this gesture. This continued to erode the community's confidence in Council.

This issue was taken up with Mr. Fisher in the Public Hearings, with Mr. Fisher giving the following evidence:

Public Hearings Transcript – March 31 2003

THE COMMISSIONER: This morning, the issue of an award being given to one of Ardel's contractors, the award in fact was called the Environmental Encouragement Award, the fact that that happened was raised in the hearings this morning. In your submission, you state that certain people at Warringah Council were determined that someone connected to this highly unpopular development would, by hook or by crook, get an environmental award despite the nonsensical logic behind this gesture. Here I get a bit puzzled.

Given the fact that Warringah Council fought the development through four cases in the Land and Environment Court, why would these certain people that you refer to at the Council, want to acknowledge the development by giving it an award?

MR FISHER: Well, that is the question that's been on everyone's lips. Why would you spend so much money, ratepayers' money, trying to stop the contentious development proceeding and then after fighting it supposedly for so long, turn around and give the perpetrators of what's happened an award, an encouragement award, to a company that isn't even based in the local area? It just seems very quizzical.

5.2.4.4

The dichotomy between the awards and such public concerns was taken up with Councillor Colman during the Public Hearings, as follows:

Public Hearings Transcript – April 3 2003

THE COMMISSIONER: There's something that puzzles me about the submissions. In Mr Blackadder's submission as General Manager, he, at one stage, lists a whole series of awards that Warringah Council has won, and there is a very strong emphasis within that, awards for environmental management. Quite outside of those awards, I think Warringah Council, from my outside experience, stands as one of the Council's with one of the strongest records of environmental management in the State.

What puzzles me is that given that there seems to be two things in the submissions. One is a theme that the area is being over-developed and perhaps not enough attention is paid to environmental-type issues, and then there is another theme where particular places have been singled out as really difficult areas and people are very unhappy about the way in which Council is managed, those particular places, from Manly Lagoon to John Fisher Park to a number of other places.

I wonder if you could help me by explaining what seems to be some sort of contradiction, that on the one hand, Warringah Council is well recognised for its very strong environmental management programs. On the other hand, a number of submissions seem to be saying something else. Could you help me?

MR COLMAN: Well, I think first of all, I need to not claim too much honour for the awards we have been given. I think that despite what we councillors have done. I have a very, very full and impressive regard for the staff of Council who, despite many issues which have come up over the years while I was a councillor and before I was a councillor, they kept on doing what they were employed to do without - or trying not to be worried too much with what happened in the Chamber on a Tuesday night, and I say that with all sincerity here.

I have known Council for, as I said, 20 or 30 years. I have been long involved in certain issues. I like the way they go about - the staff go about what they want to do, what they are trained to do and what they are trying to do and so despite what we might do on a Tuesday night, they go ahead as much as they can and I give them full credit for that. I think at times we have all - we councillors have all played our part in helping that area, but in certain other places we haven't helped at all. We have hindered through procrastination, through various other reasons, so that they battled on without the help that they could have had.

Perhaps in trumpeting its environmental awards, Council must adopt principles similar to those attaching to natural justice. That is that the awards must be worthy, and also be seen by public as being worthy.

Clearly the Council has received awards which it deserved. Having regard to the concerns which have been raised in the Submissions and in evidence at the Public Hearings, public confidence in the Council is easily undermined where the public perceives that the awards are not justified.

The last award listed, in the awards won by the Council relates to its Community Consultation Framework. It is appropriate to measure the value of awards such as these, against the manner in which the public perceives they are carried into effect.

This will be referred to later in this Section.

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5.3 Community Concerns About Warringah Council's Management System

5.3.1 Evidence of the Adequacy of Council Responses to Community Concerns

5.3.1.1 Submission 317 contains the following sweeping statement:

Submission 317

It appears that Warringah Council had amended their copies of plans to make it appear all was correct when the Ombudsmans Office investigated.

Its author, Mr. Daniel, was later asked to speak at the Public Hearings, and did so on April 9 2003.

Mr. Daniel gave a background involving construction levels of an adjoining house and driveway, and of approved plans anticipating construction below the level of a fence line, and of problems encountered, which would have required excavation.

Mr. Daniel went on to give the following evidence:

Public Hearings Transcript– April 9 2003

THE COMMISSIONER: ... It would have cost a lot of money to excavate it. It is in solid rock. So there was a way around it. They have to change figures. We found this out by ---

THE COMMISSIONER: How did you find that out?

MR DANIEL: I went down and paid money to have a look at plans and took a builder and a witness with me. The builder went through the plans with me and he found out the fault and you could see - he could see what they had done to cover it up.

THE COMMISSIONER: So are you alleging that the Council records were falsified?

MR DANIEL: Well, I don't know if the Council has done or somebody in the - well, it just seems funny that you get a builder that can get away with that when I am have been arguing and arguing. This went on for ages and ages and I said: it is too high. Nobody could pick it up. When I went through the whole lot of the building plans and had a look at it, it stood out like anything. I said you could see where it had been - one plan didn't match up with the other plan.

When I first went there I should have woken up straight away because I said: can I have a look at that plan? They covered it up. They said: no, you can't have a look at that plan. That is not for you to look at. That was in a meeting with the building inspectors and I thought: well, why are they covering all this up. You know, like, where is it coming from? Why would they want to help this fellow out? Two guys just building inspectors. It was all to do with relation of money right from the top. There is no other reason for it. It was going to cost a lot of money to lower this place a metre.

MR BROAD: You took a builder with you.

MR DANIEL: Mm.

MR BROAD: He looked at the plans.

MR DANIEL: Yes.

MR BROAD: Did you rely on his expert opinion as being able to read plans?

MR DANIEL: Look, I know how to read plans as well but I took him there as well to have a look at the plans and you just have to follow the plans across and see from the fence height that it was not down a metre. You could also see the ink mark how it was thicker where it had been changed from a certain level down one metre.

MR BROAD: So you referred the matter to the ombudsman?

Public Hearings Transcript– April 9 2003 (cont.)

MR DANIEL: Yes.

MR BROAD: The ombudsman told you that the plans appeared to be correct?

MR DANIEL: Yes, well, if they get - if they send us the same plans as what I have got here it is correct but it is not. You have got to see both lots of plans. One has been inked out, put over. If you look at all the plans they don't match up with the one plans they have given us.

MR BROAD: That is what you saw?

MR DANIEL: Yes.

MR BROAD: Thank you. I have nothing further.

THE COMMISSIONER: What response did you get from the ombudsman?

MR DANIEL: Well, he rang me back and he said: I have looked at the plans. I said: which plans did you look at it? He said: the ones they handed me. I said: I told you you have got to go through the original plans. He said: I can only go on what they give me.

MR BROAD: Did you take up your concerns with Council?

MR DANIEL: Many times.

MR BROAD: What did they say to you?

MR DANIEL: It was just - you know, it is just - it's bad luck. I rang up Ruth Sutton. She was the only one that tried to help me out and she said her hands were tied.

THE COMMISSIONER: Did you write to the general manager?

MR DANIEL: Yes, I did. I got a letter back from the general manager which I think was a Smith then at the time. I don't know if he is still there. He said: there is nothing wrong with the plans. I said: there is. I rang him up and they just won't go and do anything.

MR BROAD: You got stonewalled?

MR DANIEL: Mm?

MR BROAD: You got stonewalled?

MR DANIEL: Yes, virtually, you know, I couldn't afford to take the Council to Court. You have only got to look and read the news all the time. It costs you money and you have got to have big money to win it. If no one hands the paperwork over and you can't get the paperwork you can't do anything.

Submission 191 contained an even more succinct statement of concerns:

Submission 191

Response: Letters missing from file ,with only a relevant inter- Council memo from Mayor accidentally left behind (when my solicitor and I accessed the file under Freedom of Information) No Engineers Report on file.

Similarly, its author Ms. Bilderdeck-Frost was asked to speak at the Public Hearings. Ms. Bilderdeck-Frost gave the following evidence on March 27 2003.

Public Hearings Transcript – March 27 2003

THE COMMISSIONER: We need some particular examples rather than just general statements. You also allege that you have evidence, you have found evidence of incomplete files within the Council's record system.

MS FROST: That's right.

THE COMMISSIONER: Again, can you give us examples or evidence of that?

MS FROST: Yes. I'd had some issues with a wall which never had approval. It was a retaining wall and it didn't have approval although I have letter which tell me it had approval. There was never a DA lodged for that and it didn't have approval. My letters of objection were missing from the file. I went along - a solicitor friend, a personal friend, was commenting on this wall and he said: look, when I have time I'll come with you to Council and we'll get the file and go through and I'll see what I can do to help you.

So I went through Freedom of Information and I paid \$30 too and had a look, but they were missing. All of my correspondence was missing from the file and the only clue I had had any communication at all was an inter Council memo from the Mayor to the Senior Building Inspector. I've got all those names....

MS FROST: So that was the clue to say that my letters even existed.

THE COMMISSIONER: Yes.

MS FROST: The fact that I had been to the Mayor and she had written to the building inspector but my letters were gone.

In other evidence at the Public Hearings, Mr. Beckman also spoke of concerns over a neighbouring property. In Submission 159, he had raised concerns that Council's file had not been kept up to date, in evidence he said:

Public Hearings Transcript – March 27 2003

THE COMMISSIONER: Okay. You also state that the pile (sic. file), on this particular - the Council, this particular site, had not been kept up to date - - -

MR BECKMAN: Yes.

THE COMMISSIONER: - - - how do you know that?

MR BECKMAN: I did a freedom of information on his file and I went to inspect it just to - this is going back - it must be '91 - not '92 - - -

THE COMMISSIONER: 2001?

MR BECKMAN: 2001, yes - where I had a chance to look at it. Now, we had asked to look at - or our solicitors had asked to look at the file back in '97 and they were refused. They said there was a report thing and the file had gone to Council's solicitors.

THE COMMISSIONER: But you did get it in 2001?

MR BECKMAN: I did see it, yes. There are, there were items missing, especially one item. In '97 we had an agreement with the next door neighbour signed by him, our secretary and myself as presented to Council as the condition of allowing Tim to operate extra hours. This - we came to this agreement in June - the June 31 of '97. We went to Council with it and submitted it and that was to be the base of his operating. Now, there's certain conditions that went before - that we gave to the company involved but there were certain conditions he had to meet to suit our requirements.

THE COMMISSIONER: Yes.

MR BECKMAN: It was a community agreement and we thought we were doing a really good thing at the time. We save the Council a Court case and we were quite happy with it. The agreement was broken approximately a year later. We tried to arrange a meeting with the director. He cancelled and before we could get another one his son had an horrific accident and out of compassion we decided not to pursue it at that stage. One problem we had was our agreement was actually missing from the file and that presented to the Council at the Council meeting and the consent issued from Council was different to our agreement.

Not much different but they were all the things that really affected us, that we wanted, seemed to be left out - or the majority of them I should say, I shouldn't say every one. Now I don't whether that was - whether Council had the power to enforce some of the things in that agreement. You know, I really don't know that. That is up to - - -

THE COMMISSIONER: In terms of the agreement not being there, did you raise this with anyone?

Public Hearings Transcript – March 27 2003 (cont.)

MR BECKMAN: Yes, I seem to remember saying that the file wasn't up to date. There was very other letters that didn't seem to be there at the time.

THE COMMISSIONER: What was your response, what got the response?

MR BECKMAN: I did - we did get a letter back saying that the file was now up to date and I could go and look at it. Unfortunately, at that stage it didn't help ill health. I couldn't view it.

5.3.1.2 The concerns which are raised in this part are serious. They do not give an indication how widespread the matters of this type are. When linked to other aspects, however, including concerns over access to information and to documents, raised elsewhere in this Section, and to concerns over the manner in which Council has addressed complaints, it is reasonable to assume that the concerns are more widespread than the limited evidence suggests.

5.3.2 Community Complaints and their Management by the Council

5.3.2.1 The issue of complaints was considered in Section 4. There the emphasis was on the volume of complaints and the relationship of this to the community's confidence in, and support of, the elected representatives. Here the focus is on the management of complaints directed to the Council.

This issue was taken up with Mr. Blackadder who gave the following evidence at the Public Hearings on March 19 2003:

Public Hearings Transcript – March 19 2003

THE COMMISSIONER: One of those is concerned with the nature of complaints and how they are dealt with at large and particularly within the Council, you would recognise that some of the submissions were suggesting that their complaints are not being properly addressed by the Council, would you agree with that?

MR BLACKADDER: Yes.

THE COMMISSIONER: Thank you. There is also a suggestion in some of the submissions that a number of complaints also went to the Department of Local Government and the Minister and I think in some submissions, there is questions about why only a small number of those were ultimately investigated. What I'm trying to get round to is the Act, the Local Government Act gives Council a great deal of autonomy, in fact it is built around trying to preserve a lot of autonomous features within Councils.

Would you say that the primary responsibility for dealing with complaints for the public lies with the Council because of that autonomous role?

MR BLACKADDER: Most definitely, Commissioner,...

The Inquiry adopted the view that it should not attempt to inquire into the individual nature of the complaints which had been received by the Department of Local Government, the Ombudsman or by the Independent Commission Against Corruption, but rather to focus on the governance issues thrown up by the high levels of complaints which had been reported to the Inquiry.

The main issues that appeared to arise were:

- The attitude of Council to complaints
- The facilities that Council has put in place to deal with complaints
- The steps being taken by Council to reduce the incidence of complaints in the future.

5.3.2.2 Whilst concerns or complaints are most likely to be principally directed to the Corporate Body, such concerns or complaints may be taken up with Councillors either directly or as a result of a perception that the person has not obtained satisfaction from the Corporate Body.

In the latter instance, Councillors act akin to a review body.

In those circumstances concerns and complaints affect both the Corporate Body and the Elected body.

The role of the Councillors as a review body was taken up with Councillor Caputo, who gave the following evidence at the Public Hearings on March 24 2003:

Public Hearings Transcript – March 24 2003

MR BROAD: So your role is something of a filter in that sense, that people come to you, perhaps if they are dissatisfied with the answers they have got from Council staff, or something like this?

MR CAPUTO: Well, sometimes they come to us, no, I don't think that is right. I think we get people that come to us directly and say: look, I'm not happy with this, something is happening here, there is no action been taken and then we go through the general manager and say: look, there is our general manager, there is a problem here, can you try and sort it out? So, no, we get plenty of those complaints and we sort them out.

In turn, the role of the Councillors in monitoring the level of complaints received by the Council was taken up with the Mayor, Councillor Julie Sutton, who gave the following evidence at the Public Hearings on March 23 2003:

Public Hearings Transcript – March 23 2003

THE COMMISSIONER: Just a last point about that, in your role as Mayor do you monitor complaints at?

MS SUTTON: Yes. I mean, I don't have a computer data base where I monitor how many complaints have been made about this and how many about that and Mr Blackadder explained yesterday, we have got that in train and I take that on board. I think that is a good suggestion that we should do that and in fact we are trying to do it at the moment. People come to me. I have an open door. I go to Council every single day.

I have been every day except Christmas Day and New Years Day since I have been there. Even yesterday, I was there before the hearing and after the hearing, as I will be today and I have an absolutely open door policy. People can come to me about the most trivial or about the most serious complaint and each one is acted upon, giving the person who is complaining every opportunity. Sometimes it is necessary for me to - well, it is nearly always necessary to have a staff member there to help.

We go to people's places and we look at the problem, if it is a development application problem or a problem with a neighbour. Sometimes I have gone to the neighbours and sorted it out myself. Some of the complaints are very, very entertaining. One lady was very, very upset because she had been married for 60 years and I sent her a letter saying they had been married for 50 years and congratulations so I bought them a lovely card and sent them another letter or I would go and visit them.

I do everything to try to organise to help people with complaints and nobody could possibly say that they have tried to - except one person - that I have no spoken to them. We have an absolutely open door and I think all the councillors. The whole nine of us absolutely fall over ourselves to help people with complaints because we feel that is one of our main duties.

I mean, one of our lovely duties is doing all the lovely social things and so on like I will have a great citizenship ceremony tonight and 20 people will come up to me afterwards and say that it is the best citizenship ceremony out and the electoral office will say, as they always do, the people from there, I wish everyone's citizenship ceremony was like yours. You know, we get plenty of bouquets.

Anyone who complains, in my opinion, gets a fair hearing even if I think the person is being quite nasty to a neighbour or quite unreasonable and, of course, they often are, neighbourhood disputes are everywhere. They get a full hearing and a long hearing and you know, at least half an hour or maybe an hour and that is why we all work such long hours and I think that applies to every single councillor Warringah and it does not apply to every single councillor in all areas, I can tell you that.

Public Hearings Transcript – March 23 2003 (cont.)

MS SUTTON:

We are very well known for our accessibility. People often say nobody knows who their local councillors are, well, Mr Commissioner, I can assure you in Warringah people know who we are. They where to find us. They know we will help them and in most cases we do. There are some where we don't and although I am not allowed to use figures I think that 67 out of 135 is not really outrageous.

Regretably, the Mayor missed the point of the question.

Clearly however, some Councillors are approached by members of the public to take up their concerns and complaints.

Despite the Mayor's suggestion that "*The whole nine of us [the Councillors] fall over ourselves to help people with complaints ...*" the evidence received by the Inquiry suggests that many of the Councillors were both dismissive of the nature of the concerns raised or complaints levelled at the Council, and of the figures published by the Department of Local Government.

When asked at the Public Hearings on March 27 2003 whether he received a lot of complaints, and whether he devoted a lot of his energies in dealing with them, Councillor Jones replied:

Public Hearings Transcript – March 27 2003

MR JONES: I don't get a great number of complaints. People ask questions and seek clarification and more often than not, through my experience, I am able to answer the question there and then. There are other items of a technical nature that I would go and seek assistance from the appropriate officers.

But the complaints are very few and far between and that surprises me. I mean, this is not being cynical, but I heard Councillor Smith in here on Friday talking about all these people that come to him with complaints.

Now, he said he is in the minority and nothing happens as the majority do all this, that and the other.

If you took that in the simplistic way in which it was spoken, why would you go to someone that is not going to achieve anything if you did have a problem. Why wouldn't you raise the issue if there is a perception that there is five down there controlling the Council. Why wouldn't you go to one of the five to try and seek resolution to it? I don't get a great number of complaints.

The complaints that do come, I follow through. I have heard you speak to other people about what sort of business the Council has got as far as reporting complaints and so forth. I have a system, because I write them down and I tick them off if they have been resolved. If not, I'm like a terrier dog and I keep going until I get the answer.

It might seem very simple. I explained to your assistant, I don't have a computer. I'm computer illiterate, so I do everything longhand, on a piece of paper, and I've given myself - I could show you things that I needed to do for today's hearing. I write myself a want list, or things to do list.

When Councillor Stephens was asked at the Public Hearings on March 20 2003 whether he separately inquired within Council about the complaints received by him, he replied:

Public Hearings Transcript – March 20 2003

THE COMMISSIONER: Do you separately inquire, within Council, about the complaints it receives?

MR STEPHENS: Yes, I have asked about those complaints. Any complaint I have received has been acted upon very properly by the staff and I have followed them through. At the moment there is three complaints that I know of that I pass onto staff that are unresolved. One of those cannot be resolved by staff because it is not an issue for Council and that is actually one of your submissions. Another one is only recently from the recent rains and we are already taking the neighbour to Court and unfortunately the Court process is very frustrating for that person complaining.

The other one, we are waiting on Sydney Electricity to do something about a very bright light they put on a path and it has been ongoing now for a few months and Mr Thomson has been quite diligent in chasing that up. You made a great light about these complaints. Councillor Sutton might not have been quite clear when she said 300 - there has been 300 over the last 2 years and of those 300, 11 went to the second round of investigation and then were dismissed.

THE COMMISSIONER: I have suggested that slightly - - -

MR STEPHENS: 300 over the last 2 years - 317, I think.

THE COMMISSIONER: These are complaints of the Department. I am talking about complaints made to the Council.

MR STEPHENS: Well, every complaint I have received, I have been satisfied with one, the speed of response and the response. Your assistant was going on about, you know, a policy for how claims are fixed. Well, I have rung Mr Thomson or Mr Corbett, they have taken the complaint on board and basically within a few days, if not a couple of weeks if it was a bigger problem, on most routine matters the problem has been fixed so why do I need a policy to say go fix this when you might need a tree-lopper, you might need an engineer. Certainly on the bigger expensive things like drainage, no you can't fix some of those problems immediately.

THE COMMISSIONER: Any indication you have of how many problems like that, how many complaints that come through?

MR STEPHENS: Probably get one or so a day on average but usually they are complaints there is an overhanging tree or a street tree has a broken branch and hanging down and needs to be fixed and they get fixed within the week.

Whilst indicating their involvement in addressing complaints, the Inquiry was left with an overriding view that certain Councillors and the Corporate Body was both dismissive of the levels of complaints reported particularly by the Department of Local Government, and of complaints generally.

Councillor Jones indicated this view, when putting the following question to Mr. Mitchell at the Public Hearings on March 19 2003:

Public Hearings Transcript – March 19 2003

MR JONES: Mr Mitchell, I'm sorry, I am obviously not clear. Of those complaint - people can complain about anything, they can complain about the colour of the tie you have got on. It is of no substance, other than to make a statistic. The amount of complaints that were of some substance is, would you agree, a more important factor than just the pure number of people that wished to write in and complain?

In his Submission to the Inquiry, (Submission 294) Councillor Jones wrote:

Submission 294

Complaints Against the Council

The Minister has come out and boasted about the fact his department had 117 complaints against Warringah. He now refers to in excess of 300, and he named Warringah as the most complained about Council in NSW. However, the Minister failed to finish the sentence that should have been finished in that there were only 11 matters that required investigation by the Department after examination of those 300 complaints. Is that fair, and does it reveal the truth behind many of those complaints and who are behind them?

If members of the NSW Parliament are wishing to use a statistic that is falsely based, then perhaps I should make it my work over the next 12 months to target a member of the Parliament, get all my mates to make complaints, and make that person the most complained about person in the history of Parliament. All that would do is prove the point that if someone sets about a course of action they could create a statistic that is absolutely useless. However, it casts a slur on the person or the body that person represents.

Before moving on, it should be said that Councillor Jones did not furnish, nor did the Inquiry receive, any evidence which suggested such a campaign had been mounted. Rather, the number, sources, and diversity of the Submissions which were received by the Inquiry, would suggest the contrary.

Councillor Caputo was asked at the Public Hearings on March 24 2003 why, in his view, the relative figure, published by the Department of Local Government was so high, and why the Council thought it should have a strong system of dealing with them, he gave the following evidence:

Public Hearings Transcript – March 24 2003

MR CAPUTO: Okay. As I said before, Commissioner, there has been a number of - or a small number of supporters of some of these councillors that have orchestrated a campaign from within the Gallery and outside the Gallery, to have the Council sacked. My daughter actually was in the Council one night, she came down, she said: I was going by, dad - with her husband - and she came down and she had a look at the proceedings, and she observed certain people going around with forms asking people - volunteering their services that they would help write submissions to the Local Government Department to complain about the Council, and those sort of things had been happening - there has been orchestrated campaign to get rid of the Council and the number of complaints - I believe during the investigation I think we were told there was 117 complaints and 105 of them were dismissed.

I believe, Mr Commissioner, there has been an orchestrated campaign since the last election, because this minority didn't have a majority to get rid of the Council, and there has been all sorts of things that I'm sure you will - it will be brought up by other people, but as I said there has been newspapers comments and letters to the paper - to the Editor - there has been all sorts of propaganda to discredit some councillors. There has been letters in the papers about myself, they always thought agents should be on Council.

Now, that didn't happen in the previous 12 years. Nothing like that. I mean, we got on really well with the other councillors, we had Labor, Liberals, we all stood as independents but we had Labor councillors and there were members of the Liberal Party, which were councillors as independents and we all got on really well. This has only happened in the last 4 years and the reason was that they didn't have a majority and they wanted to discredit the Council, so the Council would be sacked. They would then have another election at some stage and get a majority and, I believe, that is what has been happening.

Well, I think that in the last 2 or 3 months the Council is getting a lot better. I mean, generally, the councillors get on well. The problem is not within the councillors, I think it is outside the Council. I mean, I get on pretty well with all - I mean, I talk to all of them and we sort of discuss things and applications, I haven't got a problem, but I think it would be a shame to see this Council dismissed - and I know that you have got to consider all the submissions - but I think you should take note of the orchestrated campaign that has been going on for some time from certain people to get this Council dismissed.

The other matter that you were saying about this Complaints Department within Council, I understand what you are saying. With the complaints, normally, if anyone has got a complaint they normally write to the Mayor, ring their councillors and we sort out most of the complaints straight away. I mean, that is why I believe there has not been a complaint department.

Public Hearings Transcript – March 24 2003 (cont.)

MR CAPUTO: I mean, I don't think it was necessary but, you know, maybe it is not a bad idea to have one, but if anyone has got a complaint - I've had people complain to me about certain things and they say: look, John, this is happening, can you help me? And I've done that. Other councillors have done the same thing. The Mayor is there and most of the Mayors have been there full-time and they have an "open door" policy. They let people go and have their say and there has never been any problems.

In the last 12 years there has not been any problems, it has only been the last 3 years, that is with this orchestrated campaign that has been happening and I don't believe that it has been a problem, but it is not a bad idea to have a Complaints Department where people can air their problems. Or, the general manager, if they have got a complaint they normally go to me or the general manager, or their councillors and it has always been - in my - I believe that it has always been satisfactory to most residents, but of course if you have got a resident that has had an application and he has had it refused and, you know, I have seen the submissions that some of them go back 10, 12 years and 4 years and 5 years, you are going to get those gripes, of course you are going to get 300 submissions, you are going to have more, you know, with 135,000 residents, I'm surprised you didn't get more.

Councillor Moxham, whilst exhibiting pragmatism at the Public Hearings on March 27 2003 commented on the levels of complaints received by the Department of Local Government and by the Ombudsman in the following terms:

Public Hearings Transcript – March 27 2003

MR MOXHAM: Yes, I understand they started to grow in numbers from '99 onwards. Before that there wasn't much in the way of complaints. I know that there has been a concerted effort by a small group to undermine the Council and to bring it down and in doing so - well a method of doing that was to organise pro formas and complaints to the Department, the Ombudsman, the ICAC and anyone else who it can get hold of. So there has been an orchestrated agenda or campaign if you like and that has been successful and you must credit those behind this because it has been very successful because that is the reason we are here tonight.

THE COMMISSIONER: So you believe that in reality, the number of real complaints, if I can make that statement, has not grown in the same proportion that the number of apparent complaints have grown?

MR MOXHAM: Sorry?

THE COMMISSIONER: Well, you were saying that there were pro forma letters and other things which I would put under the heading of an apparent complaint because it does get registered but you are saying the number of real complaints has now grown.

MR MOXHAM: Well, I don't believe that is the case. I think that, you know, when you get 10 people turning up for an application who are objectors and they walk away disappointed because the staff recommendation is consent and five of the counsellors support that, then they are angry and upset and if someone comes to them or gets these blokes, here's what you've got to do and, of course, human nature being what it is, I'd probably do the same thing and I think a lot of us are generated by this method.

5.3.2.3 The matter of complaints was taken up by the Council in its Submission to the Inquiry.

In commenting on the complaints, and whilst noting his concerns, the General Manager, Mr. Blackadder wrote in Submission 288:

Submission 288

I observe, however, that the complaints to the Department do not correspond with the complaints to the Council. Of course, there can be many reasons for this - not least of which could be a mistrust of the Council, and its ability to effectively deal with the complaints in the first instance. A disaffected resident or customer will then seek recourse, and appeal to a higher authority - and the well publicised activities of the Department and the Minister involving Warringah would encourage some to do so.

At the same time it has to be said that many complaints are trivial.

In his subsequent appearance at the Public Hearings of the Inquiry on March 19 2003 the issue of triviality of the complaints was taken up in the following manner:

Public Hearings Transcript – March 19 2003

THE COMMISSIONER: I will just go on from there. You further observed, after saying that many complaints were trivial:

I say this with great respect to those who see the issue as highly relevant and important.

If the people who made the complaint thought they were highly relevant and important, and I am not restricting this to complaints about behaviour of councillors at meetings or could be a whole range of things - what I get concerned about when I read that, in trying to piece together what the various pieces are, that on the one hand there is people in the public domain who have issues, which you say are highly relevant and important to them but somehow, when they get to Council, there is a decision that they are not highly relevant and important. Can you explain that divide for me?

MR BLACKADDER: I am not sure whether the Council is saying that they are irrelevant or unimportant.

THE COMMISSIONER: You said they are trivial but with respect to those who see the issues as highly - - -

MR BLACKADDER: Commissioner, on page 31, yes, you are right, I did say "at the same time it has to be said that many complaints are trivial" and I gave you my understanding of how I formed that opinion that it was acknowledged by Mr Mitchell in his draft report. So I drew from that that of the many complaints that the Department was concerned with and lead to the section 430 inquiry - the investigation and has largely resulted in this inquiry through the Minister taking a separate decision. What I guess I am saying is that it has to be recognised that the Council feels that the complaints are important if it can be demonstrated that they are important complaints.

Now, I have been trying to encourage persons to submit their complaints to me. What is of concern to me is that they are going to the Department instead. I acknowledge, Commissioner, that we do not have an effective complaints management system, and that is a fact, I acknowledge that, but I think we would be regarded far less if we weren't doing something about it and you may be also aware that I have approached the Office of the Ombudsman that has the complaints management handbook that is published for Local Government and I have sought from the Deputy Ombudsman's help and that help has now been provided.

Regretably, it must be concluded that both arms of the Council have adopted an attitude which has led them to trivialise, ignore and denigrate the levels and seriousness of complaints made by constituents.

This attitude has been especially directed by some Councillors within the “Majority” block, against those persons who hold a contrary view to that held by them, or those who have been past candidates for Council election.

5.3.2.4

In its Submission to the Inquiry, the Council through Mr. Blackadder’s Submission 288 wrote:

Submission 288

My aim is to rebuild community confidence in the ability of Warringah Council to effectively and decisively deal with complaints.

The levels of complaints, to which the Minister was referring (5.7.1.3), when announcing this Inquiry were not new.

On January 23 2002 the Director-General of the Department of Local Government had authorised the Investigation which culminated in the Mitchell Report.

The levels of complaints received by the Department were concerns which underlay the decisions to authorise the Investigation.

The Mitchell Report contained the following conclusion:

Mitchell Report

I consider that the high quantity, content and extent of complaints by members of the Warringah community is a useful indicator of the low level of confidence in which the Council is held.

Given this historic background, the Inquiry was concerned to know what policies and systems the Council had in place to deal with complaints. Accordingly, in a letter dated February 4 2003, the Inquiry wrote to the Council seeking that it provide:

Letter to Council February 4 2003

8. Any Policy adopted by the Council for dealing with complaints made by members of the public, and if varied over the period from 20 September 1999 to 15 January 2003, a copy of each version adopted during such period;

and:

Letter to Council February 4 2003

9. Statistical details showing (or tending to show) the number of, nature of and manner of resolution of complaints received by the Council in the period from 20 September 1999 to 15 January 2003.

Council was unable to provide neither an adopted policy nor the statistics which had been requested.

It was felt by the Inquiry that the inability to provide this information reflected adversely on Council's governance and performance, accordingly these matters were pursued at the Public Hearings.

The matter of Council's failure to have a policy affecting the manner in which complaints were dealt with was initially taken up with Council's General-Manager, Mr. Blackadder, who gave the following evidence:

Public Hearings Transcript – March 19 2003

THE COMMISSIONER: I know that is an issue but do you think the community at large might be unclear about how you deal with complaints and what success they might have when they make complaints to the Council?

MR BLACKADDER: I think they would be unclear, and I think they would be perhaps mistrustful of the Council's system if they didn't get an adequate response. What I've tried to do, obviously, is if there is a complaint and the records staff are alerted to the fact that I have personally required any particular complaint, particularly involving a staff member, to be referred directly to me, and we have some protocols to deal with that. As to a complaint that might be regarded as a failure to undertake a service or a facility, then that is handled through the Inform system. So I'm sorry, just to summarise, yes, I think members of the community may be misunderstanding of the Council if we weren't able to provide an adequate response.

And subsequently:

Public Hearings Transcript – March 19 2003

THE COMMISSIONER: ... You had a draft system that was prepared in 1998. Is that right, for managing complaints?

MR BLACKADDER: A draft policy?

THE COMMISSIONER: Yes.

MR BLACKADDER: I can't verify that now, I'm sorry. I think that is so but it was never actually formalised, as I understand it.

In its response to the Inquiry's request for information, the Council advised:

Council Letter to Inquiry

During 1998 a draft policy was developed which, whilst not being formally adopted by the Council, has provided guidelines and procedures which are being followed by the Council at present.

The failure to adopt this policy was taken up with Mr. Blackadder at the Public Hearings on March 19 2003 in the following terms:

Public Hearings Transcript – March 19 2003

MR BROAD: Now, Council did develop a policy to deal with complaints. Have you reviewed that policy as part of your process?

MR BLACKADDER: That's part - I have not personally reviewed that policy yet. That is part of the review that's being undertaken by the Ombudsman, the auditor.

MR BROAD: Yes. Given that the Council has been the recipient - I'm sorry, the Department of Local Government and the Ombudsman have been the recipient of a large number of complaints over at least 2 years, has - have you considered whether, as an interim measure, that that policy or a policy devolved from it could be adopted as an interim measure pending the adoption of more formal processes?

MR BLACKADDER: No, I, as I mentioned earlier, no, I haven't considered it. I haven't - I referred that as apart of the audit by the Ombudsman.

MR BROAD: Do you think that suggestion bears consideration?

MR BLACKADDER: An interim, an interim implementation of that policy, I'm happy to consider that, but I regarded it that it would be far better to have it considered when the Ombudsman does the audit.

The issue was taken up on the following day, March 20 2003, with the Mayor who provided the following evidence:

Public Hearings Transcript – March 20 2003

MR BROAD: If I could, yes, if I could. Councillor Sutton, yesterday the General Manager was asked a number of questions in respect of the ability or the manner in which Council dealt with complaints. Now, you have indicated that you have an open door and I assume that the other councillors, Councillor Jones who I recognise here of course, Councillor Smith, would also have a similar approach in respect of complaints.

MS SUTTON: I did say that.

MR BROAD: Yes, I accept that. Yesterday we heard from Mr Blackadder that Council does not have a policy for dealing with complaints. We did, however, hear - and I separate the two - that Council was in the throes of adopting a record tracking system for dealing with complaints. Now, in respect of a policy for managing complaints, that is responding to complaints rather than tracking them and ensuring that a letter in response had been sent, is it a concern to you that Council does not have in place a policy at this stage?

MS SUTTON: Yes, I think of all the things that have been said and all the many unfair criticisms that have been made. I think that's a pretty good point and it's a pity that really I feel very sad that the Department of Local Government didn't ring us up as they used to in days of yore, I may say, and say, "What about this, this needs fixing up, what about doing this" and we - it is a concern and we're working on it this minute. We worked on some of it last night and this morning. I think that's something we need. We need a policy and God willing we will have that in place very soon and it will be implemented. I'm not saying the complaints will be handled any better but they will be handled in a more comprehensive way and a way that's easier to track and to analyse and I think that's a very good suggestion and I take it on board.

MR BROAD: Can I stop you there?

MS SUTTON: Yes.

MR BROAD: I'm trying to differentiate between tracking complaints which have been made. I'm trying to emphasise the adoption of a policy which deals with the complaints, that answers the complaints. Do you understand the difference?

MS SUTTON: Absolutely. Our complaints are answered. Our complaints are answered, there's no question about that. Even if I receive a most, you know, quite a rude, silly letter, I answer that in a nice way because it's a complaint, it's something the person is worried about. All complaints are answered but what I think we need is a policy, as you say - - -

MR BROAD: Can I stop you short?

MS SUTTON: Yes, a policy, and we haven't got that exactly.

Public Hearings Transcript – March 20 2003 (cont.)

MR BROAD: Can I stop you short? I'm not talking about the manner in which you personally or in which other Councillors respond to complaints, I'm talking about the Council as a corporate body, that is the General Manager and the staff acting under the General Manager, deal with complaints.

MS SUTTON: I think we need a policy put together and I - thank you for that suggestion and we'll take it on board. It's a good idea.

MR BROAD: Yes, and it is a concern to you that - - -

MS SUTTON: Yes.

MR BROAD: - - - it has not been adopted to date.

MS SUTTON: I hadn't - I mean, it just hadn't occurred to me but I think it's a good idea.

Whilst Councillor Sutton saw the adoption of such a policy as a “good thing” that “hadn't occurred to” her, Councillor Jones was again dismissive in the following terms:

Public Hearings Transcript – March 19 2003

MR BROAD: Can I just raise a couple of other issues, and clean up some scraps? The Commissioner referred you to the complaints register. As you will be aware, I've raised question of a complaints policy which is not a matter of writing something down in a book and ticking it off when it is done.

It is a policy to deal with complaints so that there is a measure of uniformity in dealing with complaints. It has been revealed that there was no such policy in place. Is it a concern of you that Council has not had a policy, leaving aside a register of complaints, in force?

MR JONES: No. As you say, I am of the very firm view, certainly the way I conduct myself as an elected councillor, is very effective.

MR BROAD: I'm not asking you as a councillor - - -

MR JONES: No, no, I say - - -

MR BROAD: I'm asking - - -

MR JONES: If you can draft a policy, if you would like to forward it through, we will give consideration and may be adopt in total or vary it, because we might have a little bit more experience than yourself in some aspects, but if you are happy to do that, we are happy to take in on board.

MR BROAD: I'm not seeking that answer.

MR JONES: I know you are not - - -

MR BROAD: What I'm - - -

MR JONES: - - - doing the job, but you might have something that you have been able to refer to.

MR BROAD: I think I've got more than enough to do just at present. No, what I'm leading to is this. In not a matter of councillors, what I'm talking about is the staff, I assume, would be first in line to deal with matters of concern, whether they are seen as complaints or not.

One of the important things, I suggest to you, is that Council is seen to act with parity and equitably in a range of matters. What I'm saying is, that a policy may go in part to giving the public a perception that Council is seriously adopting that course.

MR JONES: Well, I answered the Commissioner before and I think it is a good idea and so whatever guidance you can offer, it would be appreciated, I am sure.

Both Mr. Blackadder and the Mayor appeared to have difficulty differentiating between a policy by which the Council would bring probity, parity and equity to the manner in which it determined complaints, and a system which would ensure that Council responded to complaints and which allowed tracking of them.

Public Hearings Transcript – March 19 2003

MR BROAD: See, what you have said earlier, is that there is this data works programs which is set to commence in May. Now, would I be wrong if I concluded that that was really a document tracking system. It is not a complaints handling system, is it?

MR BLACKADDER: No, it's - you are right, it is a document management system, but it also has the ability to record, monitor and track and follow up and request for service, whether it's by way of telephone, written correspondence and the like.

MR BROAD: At the end of the day would it be beneficial for tracing of complaints and getting it, as it were, off the corporate desk, and also being very useful as a tool from which real information can be gathered as to the nature, the number, the type, etcetera, of complaints. Would you agree with that?

MR BLACKADDER: Well, my expectation would be all of that and it would provide us a very effective complaints handling and a monitoring tracking system.

MR BROAD: It would certainly give you a very clear understanding of what complaints you had, it would give you the ability to extrapolate tremendous data?

MR BLACKADDER: Yes.

MR BROAD: The question I have, that system alone does not appear to be a system that enables you to deal with the issues of complaints?

MR BLACKADDER: Well, no, I disagree. It provides for that complaint or request for service or any action required of the Council to be recorded, firstly.

MR BROAD: It is a recording program?

MR BLACKADDER: It then allows an assessment of that complaint. It allows that complaint, or request for service, or issue to be referred to a particular officer. It requires - it will then require that officer to action that request within a stated period of time. It will incorporate a standard and in current terminology it will provide a guarantee of service. It will then allow that standard to be followed so that if a person requests actions or seeks information or seeks recourse to something that has not been done, then it will be done within a certain period of time. If that is not done, it then gets elevated to a review person, a manager. That means that that request, that complaint, that service issue is not lost. It will then be actioned and provides a guaranteed response to that concern.

Public Hearings Transcript – March 19 2003 (cont.)

THE COMMISSIONER: Does it provide any policies by which the person who actually deals with the complaint, handles the complaint? In other words, does it give that person any guidance whatsoever in the manner that he should deal with particular aspects of that complaint?

MR BLACKADDER: Well, as I said before, the standards, the guarantee of service would have to be spelt out beforehand and that would encapsulate the policies at that time.

As will be seen in the earlier passage, the Mayor had similar difficulties.

Ultimately, Council needs to adopt a policy for dealing with complaints and a system which will ensure response to complaints and an ability to determine their path and progress through Council.

5.3.2.5 In giving evidence to the Inquiry, Mr. Blackadder acknowledged that concerns such as those highlighted in this part, can cause a lack of confidence in Council.

As has been indicated earlier in this part, Mr. Blackadder, on behalf of Council, expressed an aim to rebuild the Community's confidence in the Council.

Mr. Blackadder then detailed the steps which had been undertaken arising from the Mitchell Report.

Principally this appears so far to have been directed towards an audit of the complaints management system, upon the basis that the system, when adopted would constitute

Submission 288

encouragement to complainants to allow the council to resolve their complaint in the first instance.

During the Public Hearings the possibility of Council appointing an Internal Ombudsman was raised with Mr. Blackadder.

Sutherland Shire Council and Wollongong City Council have each appointed an Internal Ombudsman, and the possibility of the Council was taken up in the following terms:

Public Hearings Transcript – March 19 2003

THE COMMISSIONER: You agree with that. Some other Councils have developed complaint handling mechanisms of various sorts, Sutherland and Wollongong are two that come to mind. Are you working along those lines or your strategy is different?

MR BLACKADDER: Commissioner, as acknowledged in my submission, that is the - the end result of what I would expect from the - the audit by the - the Ombudsman. What I hope to institute is a best practice complaints management system.

THE COMMISSIONER: ... What would be very helpful, if you would do it to help us, would be a short written submission, further submission to us outlining your interim measures to handle this problem of complaints. Would that be possible?

MR BLACKADDER: We - we would be very happy to do so.

THE COMMISSIONER: Thank you. Mr Broad, have you got any [questions] - - -

MR BROAD: If I may. You understand that the example that the Commissioner gave you and referred to Sutherland and Wollongong Councils relates to their adoption of an internal Ombudsman. Do you understand that that may be a way in which Council may internally provide a review mechanism for complaints within Council?

MR BLACKADDER: Mr Broad, I didn't understand that at all from the Commissioner because he didn't indicate in any way, but if that is the case then I'm very familiar with the internal Ombudsman process adopted by Sutherland. In fact, I've had some detailed discussions with the General Manager, John Rayner, about that system. I am known - I know personally the internal Ombudsman, Kath - her second name escapes me, Kath - she's doing a terrific job.

MR BROAD: And does that system commend itself to you?

MR BLACKADDER: Very much so and I have - - -

MR BROAD: Is - - -

MR BLACKADDER: Sorry, Mr Broad, I have sought information from Sutherland, we've - we've got the full details of how the system works. We've had a copy of their review and we are considering that, yes.

MR BROAD: And that is something that you have disseminated amongst the councillors as a possible way that complaints may be handled in the future?

Public Hearings Transcript – March 19 2003 (cont.)

MR BLACKADDER: No, no, but this is our internal review at the present time. This is what I commenced after the - Mr Mitchell's report sought that information. Sought the support of the Ombudsman. I will be gathering all of that information together and coming up with a proposal that I will then institute.

Subsequently, whilst speaking in reply at the end of the Public Hearings Mr. Blackadder confirmed that he had taken a decision to introduce an Internal Ombudsman as soon as one could be recruited.

5.3.3 Access to information

5.3.3.1 The Local Government Act 1993 expressly provides that one of its principal purposes is to encourage and assist the effective participation of local communities in the affairs of local government.

In turn, the Act invests Councils with a Charter, requiring that Councils:

- Facilitate the involvement of Councillors, members of the public, users of facilities and services and Council's staff; in the development, improvement and co-ordination of local government.
- Keep the local community informed of its activities

Section 8 of the Act requires that Councils, in the exercise of their functions, pursue the Charter.

The Act emphasises in Chapter 4 the manner in which the community may influence what a Council does, and includes within this part, express provision for the public's access to information regarding a Council's activities or held by it. These are contained in Section 12 of the Act.

The Act provides a generous approach to the information. It provides that everyone is entitled to inspect the current version of documents enumerated in the Section, free of charge.

Restrictions placed on access to documents are limited, principally to documents of a commercially sensitive nature. Accordingly the public is given access to a wide variety of documents, which may be inspected at Council's offices free of charge.

The provisions contained in the Act are separate from the provisions which enable access to information under the Freedom of Information Act 1989.

Neither Act inhibits the operation of the other.

There are, however, some major differences in the manner in which these Acts operate which are relevant, and set out below:

- Everyone is entitled to inspect documents free of charge, under the Act, conversely:

A fee is payable under the Freedom of Information Act.

- Council is required to have a copy of the document which are enumerated in Section 12 (1) of the Act, immediately available, conversely:

The Freedom of Information Act imposes a timeframe for providing access to information.

- There are greater discretions for refusing access to documents under the Freedom of Information Act.

5.3.3.2

Given the guarantee of public access to documents provided by the Act, it was surprising to receive Submissions which raised concerns over access to information or which detailed the difficulties encountered by members of the public exercising this statutory right.

Under the Act, the Public Officer has functions, which include:

The Local Government Act 1993 No 30 – Section 343

- ...the responsibility of assisting people to gain access to public documents of the council ...

The concerns over access to public documents which were raised in the written Submissions, were, subsequently taken up with a number of speakers in the Public Hearings.

The concerns were repeated by many speakers, and became one of the recurring themes of the Hearings.

Submission 106

My attempts to get information from council staff were frustrating and sometimes impossible.

This issue was subsequently taken up with Mr. Meanwell at the Public Hearings on April 1 2003 where he gave the following evidence:

Public Hearings Transcript – April 1 2003

MR BROAD: ... The other thing I would like to take you to is this, that you say in your submission that your attempts to get information from Council staff were frustrating and sometimes impossible. What sort of information were you seeking?

MR MEANWELL: After the second DA was approved I just wanted to go down and look at the approved plans to see if anything had changed from what had been submitted because I was concerned about the height of the building and I wanted to see if the height had been brought down or not. At that stage I was told I had to fill in a freedom of information request and lodge it with the Council along with \$30 and then they would look at the information for me. When I spoke to the general manager some weeks after that he said that shouldn't have been the case, I should have been able to look at those plans at that time.

MR BROAD: So how long did it take you to get this information?

MR MEANWELL: I still haven't got it.

MR BROAD: You still haven't got it?

MR MEANWELL: No.

MR BROAD: You say that it was impossible to get some information. Was there any information that you sought that you simply were not able to obtain? Do I take it - sorry, if I can make myself clear. Do I take it that your application under the Freedom of Information Act is still being dealt with?

MR MEANWELL: I didn't lodge it.

MR BROAD: You didn't lodge it?

MR MEANWELL: No, I thought it was a waste of time. At the end of the day - to me I didn't understand why I couldn't look at that information. The general manager agreed that I should have been able to but there was no effort to then allow me to look at it.

MR BROAD: Did you go back and seek to look at that information?

MR MEANWELL: No, I didn't. I pretty much gave up at that point.

MR BROAD: Was there any information that you found impossible to obtain?

MR MEANWELL: Maybe I didn't pursue hard enough to obtain it but anything I've asked for at this stage I've only had some times a verbal answer but nothing in writing. I'm sorry, I should change that. I did get a letter in writing off the general manager stating that he has asked the approvals department to make sure that the height limit of the building next door does comply with the 8.5 metre maximum height.

Mr. Meanwell was entitled to inspect this material under the Act. The material formed part of the “associated documents” to a development application and was not otherwise excluded. The Council was required to have the documents available and to allow inspection free of charge.

There was no possible reason why Mr. Meanwell should have been required to make an application under the Freedom of Information Act.

Mr. Thomas gave similar evidence of being required by Council’s staff to make an application under the Freedom of Information Act, importantly indicating this to have been occurring during the period of the Mitchell Investigation. Mr. Thomas gave the following evidence at the Public Hearings on March 24 2003:

Public Hearings Transcript – March 24 2003

THE COMMISSIONER: In preparing your submission, you have obviously spent a great deal of time obtaining information and I assume that has been predominantly obtained from Council. Has access to information been easy or has there been difficulties on your part obtaining information?

MR THOMAS: ...In terms of general access, I have to say from experience that I have found it very difficult at Council.

Even to go and try and obtain the simplest piece of information on, for instance, a development application that may be on exhibition that if you asked to see something, Council staff would answer with: well, you will have to fill in a Freedom of Information form and pay your \$30 and then you will be able to get that information. When I reported this to someone in the legal section of the Department of Local Government, they actually faxed me a portion of information that set out every item that should be made available freely to people asking for that from Council.

It is quite astonishing the amount of information that we should be able to get straight away but certainly when you go to Council and ask for something, you are inevitably answered by: yes, fill in a Freedom of Information form and pay your \$30.

THE COMMISSIONER: Has that happened to you recently or some time in the past?

MR THOMAS: I have to say that I'm not going to Council very regularly on matters. I can't really recall. I would say it has happened - it has certainly continued to happen during the inquiry process that has been going on but certainly during the time when Mr Mitchell was carrying out his investigation, it was still occurring. I haven't actually been in a situation to ask for information and been denied it at this point. However, I [sic] would say that there was a recent development application within the Park area and there were issues there where not all of the information was being made available.

Certainly whenever anyone went and asked to see the documents, there was never a statement of environmental effects with those documents. When you kept pressing the staff for any other information, they said: no, there's just the plans, that is all there is. It only became aware in the last week of the submission period that there was a statement of environmental effects and when pressed by the Minister on this, Council suddenly found it and said: well, we will put two copies out now for the rest of the week so that people can see it.

Such was the outrage from the community at that point that Council actually had to go through a re-exhibition of that whole DA because not all of the information had been made readily available for the public.

5.3.3.3 The Inquiry was concerned that there might be a policy which had been adopted by Council which directed members of the public to make application under the Freedom of Information Act. The issue of access to information was taken up with Council's Public Officer, Mr. Symons, who gave the following evidence at the Public Hearings on March 24 2003.

Public Hearings Transcript – March 24 2003

MR BROAD: Now, your role as Public Officer of the Council is defined in section 343 of the Local Government Act, and it brings with it the responsibility on your shoulders of assisting people to gain access to public documents of the Council.

MR SYMONS: Yes.

MR BROAD: Section ... 12 is probably the correct section, deals with the public's access to information and section 12(1) sets out a great deal of material which is available to the public free of charge. Some of these submissions which have been received by the inquiry refer to Council requiring people to make an application under the Freedom of Information Act. Now, of course, that Act also makes express provision for provision of information to the public. Does Council have a policy under which the people are asked to submit an application under the Freedom of Information Act, rather than to proceed under section 12 of the Local Government Act?

MR SYMONS: The only time that we, to my knowledge, require Freedom of Information applications to be made is where people are requiring copies of documents. The provision in the Local Government Act provides the right of access to, as you say, a host of - range of documents which we do provide and we comply with that. It is essentially when there's considerable staff time being required to provide copies of information that we ask for a Freedom of Information application to be submitted.

MR BROAD: Yes, but doesn't section 12(b) of the Local Government Act include a right to take away a copy of the document?

MR SYMONS: Not all of them, to my knowledge, Mr Broad, I don't think.

MR BROAD: Well - - -

MR SYMONS: There are certain exclusions in - - -

MR BROAD: What I'm suggesting to you is that section 12(b), subsection (1) provides a right under this Act to inspect a document and includes the right to take away a copy of the document, and it also provides in subsection (3) that copies may be taken away either free of charge or on payment of reasonable copying charges - - -

MR SYMONS: Mm.

MR BROAD: - - - if the Council - as the Council chooses.

MR SYMONS: What, what, what we apply in terms of copying is the fees that are set for the Freedom of Information application. They are based on a need to do and charge for copying.

Public Hearings Transcript – March 24 2003 (cont.)

MR BROAD: Yes, so is what you are saying to me that Council simply says that if you want to take copies, you must make an application under the Freedom of Information Act, or is Council saying we simply make the copies available and we charge the same as we are entitled to charge under the Freedom of Information Act?

MR SYMONS: Our approach is that if you want to take copies of documents and take them away, you should make a Freedom of Information application. That is - to my knowledge, that is the approach taken in the Records area.

MR BROAD: Would you agree with me that doesn't comply with the terms of the Act, the Local Government Act?

MR SYMONS: I would need to take some advice on that, Mr Broad.

Subsequently Mr. Vescio gave evidence to the Inquiry at the Public Hearings on March 27 2003 and the matter of a public policy was taken up with him. Mr. Vescio gave the following evidence.

Public Hearings Transcript – March 27 2003

MR BROAD: ... can I ask you, in your role, whether Council has any policy which suggests that people seeking information, which would be available under section 12 of the Local Government Act are asked to proceed by way of an FOI application?

MR VESCIO: I am not aware of that. Section 12 of the Local Government Act is open to many interpretations. I will qualify that.

MR BROAD: I would like to have some input on that.

MR VESCIO: Subsection (1) of the Act details a whole range of information that is publicly available. Most of that information is Council produced documentation, either plans and management, annual reports, management plans, various registers that Council is required to keep and access to those documents is available free of charge. If a member of the public wishes to take away a copy of one of those documents, there is a copying charge. There is no search fee for that but we are, under the legislation, allowed to charge for copying and our fees and charges schedule details the copying charges.

... There is another section in section 12 which says other documents of Council. Now, one of the main issues is just what is referred there. If you read the section of the Act and take subsection (1), which details a range of registers and documents the Council is required to produce, you could read into "other documents" to mean other Council produced documents. They are not always documents the Council has on its records. That is an interpretation you could place on section 12.

MR BROAD: The sort of instances we have had drawn to the inquiries attention have been documents within development application files and the like and, of course, there is expressed provision under section 12 that certain documents in respect of applications before Council be available.

MR VESCIO: In recent times, and I stand to be corrected, but July/August last year, I think, maybe a little later, the Director-General of the Department admitted that there is a discrepancy between the Local Government and the EP&A Act in relation to access to information under a development application, specifically in relation to access to the plans.

MR BROAD: Well, I'm not going to debate that on behalf of the Director-General. The point I would - - -

MR VESCIO: Or Council has received correspondence to that effect.

MR BROAD: The point I'm trying to make clear is that in your view, is Council making information freely available as is required by the terms of section 12 of the Local Government Act to the extent that Council understands it is bound to do so?

MR VESCIO: As I'm aware, me and my staff that are responsible for that, are aware of section 12, we are aware of our requirements under the FOI Act, we are also aware of our requirements under the P - PPIP Act (sic. the Privacy and Personal Information Protection Act 1998). One of the things you have to be careful of as well is that one of the exceptions under section 12 is the fact that access can be denied if it would constitute a breach of another Act under the PP&I Act, if we were to release private information, inappropriate private information, we are in breach of PP&I Act and could face a fine of up to \$40,000.

Public Hearings Transcript – March 27 2003 (cont.)

MR BROAD: I thought there had been some directions given to the effect that the Local Government Act overrode the Privacy Act Provision?

MR VESCIO: The only advice I've ever seen is the FOI Act overrides PPIP. ... The question of whether the Local Government Act overrides I think is to my mind, hasn't been cleared.

MR BROAD: So there is no policy which would suggest that if someone wants a copy of the document which is otherwise available, that they should proceed under the FOI Act?

MR VESCIO: No, there are instances where the majority of our FOI applications that we receive are actually from purchases wanting to look at the file and they will, you know, they are advised by real estate agents and that to come and fill in an FOI application to get access to the building file rather than apply for appropriate certificates. Now, if we receive an FOI application, we will process that application as an FOI application.

But our Customer Service Staff, if they were to hand a FOI application form to a person for a document under section 12 and we have a separate form for that, that is just human error, there is no policy to say that that is what we - we would do. In the time I have been the Manager of the Governance Service Unit, whether an application is made under section 12 or whether an application is made under the FOI Act, in my time there I can recall only one application that we refused, that was under the FOI and the reason was commercial and confidence information.

The person appealed, appealed to the Ombudsman, the Ombudsman reviewed the information and requested that we release that information and we released it so whether the application is received under section 12, for section 12 information or whether it is an FOI application, we don't refuse in actual fact, the Records Manager has delegated authority to approve access to documents under FOI or section 12 and he is only - his delegation does not extend to refusal. If it is refusal he must refer it to me.

MR BROAD: I'm not after a question - I wasn't talking about an access - an access application, I was directing a question towards the provision of copies of documents?

MR VESCIO: Yes, if - if a person wants a copy of their document, there is - you have got to be careful of copyright as well, of the Copyright Act, that we don't breach that. But for those - whether it is under section 12 or whether it is under FOI, our copying charges are detailed in our Fees and Charges Schedule and they are what applies. We don't - if someone comes in and says: I want a copy of your Annual Report? We don't say: make an FOI application.

MR BROAD: No.

MR VESCIO: We - we say it is - unless our fees and charges details a charge - an actual charge for that report, for the copy of that report, you know, to buy a copy, we would say there is 60 pages at 30 cents a page.

5.3.3.4

The Inquiry does not accept that the Council has been making information freely available in the terms required by the Local Government Act.

The evidence given by Mr. Beckman at the Public Hearings on March 27 2003, the President of the Myoora Road Residents Action Group Inc, served to support a suggestion that Council had adopted a policy directing the public to proceed under the Freedom of Information Act. The evidence also highlighted that the access under the Act is immediate, conversely access under the Freedom of Information Act is delayed. Mr. Beckman described his experience in the following terms:

Public Hearings Transcript – March 27 2003

MR BROAD: Now, you spoke about an FOI, a Freedom of Information Act application - - -

MR BECKMAN: Yes.

MR BROAD: - - - did you only apply under the Freedom of Information Act, or did you apply under the Local Government Act for information? Do you know the difference?

MR BECKMAN: I didn't know there was a difference. No, I'm sorry.

MR BROAD: ... Were you asked to lodge an application under the Freedom of Information Act by Council staff?

MR BECKMAN: Yes, yes.

MR BROAD: Did you pay a fee when you lodge it?

MR BECKMAN: Yes, \$30.

MR BROAD: Thank you. Were you advised that you might be entitled to information other than under the Freedom of Information Act?

MR BECKMAN: No, no. Well, actually it was pointed out - there was - I couldn't see plans or responses from Council to the business concerned, yes.

MR BROAD: Was there a delay after you applied for access under the Freedom - - -

MR BECKMAN: I think it took 30 days.

The delay in obtaining information under the Freedom of Information Act deterred Mr. Meanwell from pursuing his enquiries.

Delays in obtaining access to material may be very important, particularly where a time-limit for response may be imposed.

Commonly members of the public seek information regarding contentious issues before Council or regarding development applications which are being considered.

Not all members of the public who made Submissions spoke of problems encountered when seeking to obtain access to documents.

Ms. Ann Sharp gave the following evidence at the Public Hearings on March 25 2003.

Public Hearings Transcript – March 25 2003

MR BROAD: In respect of access to information, I assume that you have sought information from Council, I mean Council staff in the sense of inspecting documents obtaining copies of documents. Has that occurred on your behalf?

MS SHARP: Not a lot lately. I have done it in the past. I haven't found - I haven't done very much of that really but I have found Council staff is generally helpful although when you have to look at DAs on public exhibition you have to get there in office hours which can be limited to some people and some of the documents are huge. You need quite a bit of time to actually read them which is, again, you know, restricting to some people in terms of accessing the detail.

The ability to obtain information, without barriers may derive from experience, certainly Councillor Moxham had received no complaints from members of the public raising difficulties obtaining access to information whilst appearing to acknowledge difficulties that he had encountered. An excerpt from his appearance at the Public Hearings on March 27 2003 shows:

Public Hearings Transcript – March 27 2003

THE COMMISSIONER : ... In some submissions, there have been suggestions that people have had difficulty getting information from the Council. You would be aware of section 12 of the Local Government Act which details a number of things which are meant to be freely available to the general public free of charge. There are some riders on that and I will just mention some of those riders. Inspection does not apply to parts of documents that - as set out in section 12(1)(a) of the Act and 12(7).

Things like detailed building plans, certain commercial information, personnel matters regarding particular individuals, personal hardship of any resident or ratepayer, trade secrets a matter of disclosure of which would constitute offence against the Act or found an action for breach of confidence. So there is a group of things that halt that flow of information but outside that it is meant to be freely available. Do these complaints or submissions that are critical of the Council in this regard have any justification, in your experience?

MR MOXHAM: Well, after 7 years on Council, I can't recall, in all honesty, that anyone has ever come to me, even the 2 years when I was mayor when I was seeing hundreds of people very week, a thousand sometimes, but no-one has ever come to me and said there is problem in getting some information or I have been locked out or I can't get access to a particular matter. I mean, you know, in all bureaucracies, Government levels, residents will contact departments and go around in circles a bit.

It happens to me, it happens to everyone here, I am sure, you get the run around sort of thing but eventually, if they know the right person to go to in the first place, they can get whatever they want and in fact that is the role that Councils do. People call us up because they don't know what to do, we say, look talk to this person here, he or she will fix you up otherwise you will go around in circles again, this happens but I have never had any complaints or contact by anyone who said they couldn't get access to information. I don't know whether it is such a major issue.

Councillor Jones believed there were no problems, giving the following evidence at the Public Hearings on March 27 2003.

Public Hearings Transcript – March 27 2003

THE COMMISSIONER: ... Moving on to another issue. If you will pardon me, I quoted this yesterday. I will read it out again. It is about information availability. In the guidance booklet that is given to Council referred to this by the Department of Local Government, it offers the following advice:

Access for an inspection must be provided to all Council documents referred to in section 12(1), (2) and (5) of the Act, unless the particular document is subject to any of the exemptions set out in section 12(1)(a). Access for inspection must also be provided to all Council documents unless in the case of a particular document, the Council is satisfied that allowing inspection of the document would, on balance, be contrary to the public interest that section 12(6). In addition to this requirement to allow inspection, this requirement to allow inspection does not apply to any part of the document dealing with any of the exemptions set out in section 12(1)(a) and (7).

And these are the particular circumstances:

Detailed building plans, certain commercial information, personnel matters concerning particular individuals, the personal hardship of any resident or rate payer, trade secrets or a matter of the disclosure of which would constitute an offence against the Act, or found an action of breach of confidence.

So it says, information should generally be available to councillors and the public except for those circumstances. Do you think the information flow from Warringah Council is in accord with that?

MR JONES: Absolutely, and I think that what public are able to go and view plans and so forth.

The Inquiry is satisfied that the rights of access to information provided by the Act are not being afforded to the public.

The Inquiry is satisfied that Council has adopted a policy which at least requires that members of the public wishing to obtain copies of documents are required to make an application under the Freedom of Information Act.

Whilst the evidence given to the Inquiry does not make it certain, the Inquiry is concerned that members of the public may have been required to make applications under the Freedom of Information Act in order to deter them from seeking information or to delay the provision of material or to limit the material available.

The evidence given by Mr. Symons, given his position, and the responsibilities placed on him by Section 343 of the Act, does not support a conclusion that through him members of the public are being assisted to gain access to public documents of the Council.

The Inquiry regards the evidence given by Mr. Vescio as evasive. Mr. Vescio was asked whether in his view Council was making information freely available as required by Section 12 of the Local Government Act. The question called for either an affirmative or negative answer. Mr. Vescio's reply which is cited earlier in this part is not responsive and suggestive of Council's approach which has been the subject of the concerns raised in the Inquiry.

It represents a failure of proper management on the part of the Council.

Council operates under a statutory duty contained in its Charter to facilitate the involvement of members of the public in aspects of local government. There are express provisions contained in the Act, in clear and unequivocal terms providing for access to information.

Council must give effect to these provisions.

The ability to obtain information, should not be governed by, as Councillor Moxham suggests, "*if they know the right person*".

5.3.4 Community Concerns with the Involvement of Council in Court Cases and Other Legal Costs

5.3.4.1 In its Submission to the Inquiry, the Council reported that total legal expenses for planning and development in the period from September 1 1999 to February 18 2003 had totalled \$4.6M, against a budget of \$2.5M.

This of course represents a very substantial over-run.

Council's total legal bill, over the period from July 1999 to February 2003, is advised in Briefing Paper No. 43 as \$6,384,577.59 (Volume 3, Appendix 2). This amount was not reported in Submission 288, and accordingly this larger amount was not taken up during the Public Hearings.

The Mitchell Report had expressed concerns regarding the legal costs which had been incurred by the Council.

The issue of the qualification of legal costs was taken up with Mr. Mitchell in the Public Hearings, Mr. Mitchell gave the following evidence on March 19 2003.

Public Hearings Transcript – March 19 2003

MR BROAD: In your report you talk about legal costs as being a concern and I think it falls within recommendation number 8. Were you aware either today before making your submission to this inquiry or at the time that you made your report that the actual legal expenses which have been incurred by Council substantially exceeded its budget?

MR MITCHELL: I'm not sure that I'm aware of that now. So I'm not sure that I was aware of it at the time. I'm not sure that I was aware of that, no.

MR BROAD: The inquiry has received a submission from Council's general manager, Mr Blackadder, and if I can extract from that report which deals with the period from 1 September 1999 to 18 February 2003, that is the life of the current Council that total legal expenses for planning and development in this period have totalled 4.6 million. The actual budget has been \$2.5 million. Would that be of concern to you?

MR MITCHELL: Yes, if I had of known that at the time, that would have been a matter I would have included in my report.

Councillor Caputo gave the following explanation for the Council's large expenditure on legal fees:

Public Hearings Transcript – March 24 2003

MR CAPUTO: I would say the reason for that is that if an application does not comply with the Council policies, we have staff that recommend refusal, so I would say the councillors go along with the recommendation and refuse it so, of course, once we refuse that we have to defend it, and in recent times with the new LEP. We have had I suppose lots more applications than we normally have.

Having reviewed the Submissions, which were received by the Inquiry, and having reviewed the evidence which was given by speakers at the Public Hearings, the Inquiry does not accept this response.

The most recent comparative figures published by the Department of Local Government list the Council in group 3. This group includes Bankstown, Blacktown, Canterbury, Fairfield, Holroyd, Ku-ring-gai, Marrickville, Parramatta, Randwick, Rockdale, Rockdale, South Sydney and Sutherland Councils.

In a comparison of legal expenses to total planning and development costs, Warringah rates as follows:

	1999/2000	2000/2001	2001/2002
Percentage	52.96	27.09	37.44
Average of group	12.77	14.67	14.98
Position on list	1	2	2

It is worthwhile noting that in the first year, the next closest percentage to Warringah was Ku-ring-gai, with 18.26%. In the latter years Ku-ring-gai bore the highest percentage, although in 2000/2001 Ku-ring-gai's figure was 27.85%. In 2001/2002 Ku-ring-gai's costs had blown out to 50.09%. Perhaps more importantly, the next highest Council ratio after Warringah in that year was South Sydney with a figure of 13.62%. It will be seen that the Council has consistently borne a high legal costs ratio during the entire period, with an average 39% over the period.

The figure appears only to have been surpassed by Bourke and North Sydney Councils.

5.3.4.2 The evidence which was received by the Inquiry supported a view that many of the legal proceedings which were conducted by Council fell into three categories:

- (1) They contained a failure to ventilate all issues in the proceedings or a failure to appraise the Court of all relevant evidence.
- (2) They exhibited withdrawal from proceedings near, at or after the commencement of hearings.
- (3) They involved institution of proceedings, or the maintenance of issues, in proceedings which were not sustainable.

Ancillary to these matters there were instances quoted which suggested that the Council either failed to institute proceedings in appropriate circumstance, or granted approval to applications to avoid Council being joined as a party in legal proceedings.

Before proceeding further, it is appropriate to sound the following cautionary warning.

The Land and Environment Court exercises specialist jurisdiction in facets relevant to Councils. Particularly, the Court exercises appellate jurisdiction should Council refuse a development application.

Additionally the Court exercises jurisdiction in proceedings instituted by Councils seeking to restrain breaches of its planning instruments and policies or to ensure compliance with such instruments and policies.

In dealing with appeals from Council's decisions to refuse development applications, the Court may be called upon to consider discrete questions of law, questions whether the application meets with the relevant or appropriate planning principles or the public interest. These latter considerations are often referred to as "merit consideration" or "merit matters".

Accordingly the Court may be called on to decide questions of law of varying complexity and merit considerations which will require the Court to consider and weigh expert advice.

Whilst questions of law lead to a purposive result, either in favour of, or against the applications, much discretion resides in the decision-maker where merit considerations arise.

Commonly, matters before the Court involve merit considerations, whether separate from, or as an adjunct to, questions of law.

Given the width of the discretion available to Council, or to the Court, the fact that the Council may have taken a view subsequently taken by the Court, is not of itself to indicate a failure on the part of the Council, nor is it an indicator of poor governance on the part of Council.

Notwithstanding this, members of the public often form their views simply on the outcome of court proceedings.

In dealing with this part, the Inquiry has been careful to exercise caution in expressing its views, let it be suggested that the criticism in this part arises simply from the reports of the outcome of proceedings in the Court.

Before concluding this part it is also important to acknowledge that in pursuing proceedings, regard must be had to the quality of the evidence which can be marshalled to support the Council's case, or to meet the opponent's case.

There are times, when the quality of the evidence is reviewed, that cases do not proceed because the prospects of success are regarded as too low.

5.3.4.3

Submission 193 referred to cases conducted by the Council in the Land and Environment Court following its refusal of the Ardel development. The Council was successful in these proceedings.

The Submission, when referring to a subsequent court case, says:

Submission 193

11. The second Ardel court case at the Land and Environment Court (*Hassell v Warringah Council*) was finally lost when Warringah Council dropped the case and allowed the subdivision to proceed. Warringah Council failed to present evidence that was available to it on the Endangered Duffy's Forest vegetation community or to convey concerns expressed in a letter from the Department of Fisheries.

The Submission quotes from a letter dated March 24 1998 from Mr. Tim Robertson, Barrister, as follows:

Submission 193

“Evidence from Bavor’s own work demonstrates that many wetlands are ineffective to control some pollutants and may even be a source of pollution.”
“All I can conclude is that Council was unaware of these matters and therefore failed to raise them in evidence in the proceedings”.
“Perhaps the error was made when Council failed to rezone the site after it won before Justice Pearlman.”

The issue was subsequently taken up with Mr. Higgs in the Public Hearings on March 31 2003.

Public Hearings Transcript – March 31 2003

THE COMMISSIONER: You said there were three cases that Warringah Council lost. Earlier in the hearings, we have been told that the Council spent a very considerable sum of money fighting those cases. Why then would the Council, as you suggest, not put forward evidence? You say that there is critical evidence that didn't go forward.

MR HIGGS: I can't answer that but there was evidence that it wasn't presented. Some other Councillors may have just lost interest and got bored with it. Some of them - it may be that - have been the cost but this was critical evidence which could easily have won the case. There's no point in fighting something if you give up in the last minute.

THE COMMISSIONER: Very briefly, what was the nature of that evidence?

MR HIGGS: For instance, the vegetation on the site was endangered, listed as endangered under the Threatened Species Act. It was dubbed as forest vegetation. Council had reports saying that that was forest vegetation. They had paid consultants to prepare those reports. I believe that evidence wasn't presented but they also had communications from some State Government departments saying that the development was not in accordance with, for instance, the Fisheries Legislation.

There were a lot of situations that Warringah Council often - Ardel development where Council staff did not refer matters to either New South Wales Fisheries or Department of Land and Water where there was a requirement for them to do so. For instance, where they were digging up creeks or piping creeks. There is a concurrence role for State Government and we believed it - in a lot of these cases, the Council was not referring those to get their view or if they were, they were ignoring the view.

THE COMMISSIONER: The period over which these happenings took place, was a fairly long period, was it or how long did all this go for?

MR HIGGS: Well, the first court case there was intense activity for 6 months or a year but then the court case was won, so there was then a break and we were - during that break we were lobbying Council to make the site safe. The development had been refused for a very good reason so we lobbied Council to try to get them to protect it in some future way, because we were expecting another DA. Then the second one came through. The second court case took a long time because there were matters that the court decided it could not decide on.

For instance, the site was isolated and they applied for a road access across Crown - not across - land and they did not have owners consent for a road. So this was to go across vegetation known to be listed as endangered and the owner had not given consent for a road and the development couldn't possibly go ahead without a road. So there were a lot of odd ends so that that court took place over a long time.

Public Hearings Transcript – March 31 2003 (cont.)

MR HIGGS: After the second case, there were a lot of matters still not resolved. The basic sub-division had been approved but the court said very clearly that any further matters had to be discussed in the individual DAs.

A lot of the objections about say vegetation or rare frogs - there was a rare frog on the site, a lot of other rare plants, the view was put that this is only a sub-division and Council will have to address these matters when the housing DAs go through but that doesn't appear to have happened.

In circumstances such as these, if the Council has resolved to oppose an application in the Court, then good governance would suggest that the Council should put all matters before the Court which are relevant to its determination.

5.3.4.4 The second issue which has come from the Submissions and the evidence, is that Council has withdrawn from Court proceedings near, at, or shortly after the commencement of the hearing.

The Inquiry received a Submission which detailed extensive delays on the Council's part in dealing with development applications for the company. The delays ranged from 99 days to 205 days. The Submission went on to detail various concerns regarding the Council's processes in dealing with the applications lodged by this company.

The Submission contained the following:

Submission 225

We had a similar experience in our Development Approval at 30-34 Gordon Street, Manly Vale where despite a Land & Environment Court case being set down for four days, council presented no argument and we had our approval within 1 ½ hours.

The Submission contrasted this type of treatment with another application made by a different applicant for a property near to one which the company is now seeking development consent over.

Submission 225

What really infuriates us though is that a home unit development at 66 Lynwood Avenue, Cromer less than 50 metres from our development was approved by council on Tuesday 18th February. It did not technically comply with setbacks. This Development Application was submitted long after ours.

Mr. Kerr, the author of the Submission gave evidence at the Public Hearings on April 5 2003. In his evidence, Mr. Kerr raised the issue of legal fees, commenting that “ *the ratepayers are paying legal fees as well* .

He confirmed that staff had recommended approval to each project. These recommendations had not apparently been acceded by Council, further advising that each, other than one which required a small re-design, were conforming developments.

The matter of the legal costs incurred in such Land and Environment Court cases was pursued in the following terms:

Public Hearings Transcript – April 5 2003

MR BROAD: In other words, do I - were you ultimately left in this position that you had prepared a case for hearing, that you had retained consultants to prepare reports, that you had exchanged reports with Council, that you had to retain your consultants to reply to the Council reports, that you had retained legal representatives. They involved a solicitor. Did they involve a barrister?

MR KERR: Yes, they did.

MR BROAD: That in retaining your barrister, you retained the barrister on the basis that the barrister would appear for 4 days.

MR KERR: Correct.

MR BROAD: That in leading up to the hearing, you were involved in conferences with your barrister.

MR KERR: Yes.

MR BROAD: Did your barrister adopt the usual approach of saying: I have taken a brief for 4 days. Although I'm only here for 1 hours, I will still charge you for the 4 days that I've set aside.

MR KERR: I don't think he charged us for the whole 4 days from memory.

MR BROAD: Did he charge - - -

MR KERR: But he charged - - -

MR BROAD: - - - an additional amount over the 1 hours?

MR KERR: I think so.

MR BROAD: Did you obtain an order for costs requiring Council to pay your costs?

MR KERR: We didn't receive it. No. We were advised that it's a very difficult thing to obtain anyway.

MR BROAD: It's unusual for the court - - -

MR KERR: Yes. And we didn't really want to sort of upset too many people I guess either.

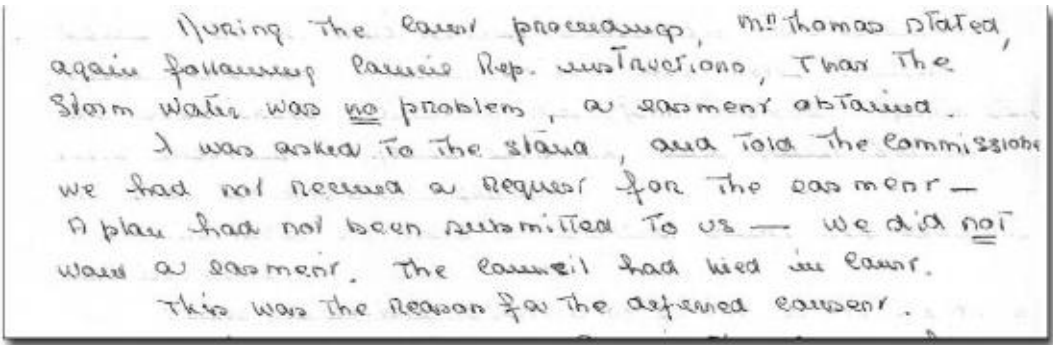
MR BROAD: So you were put to substantial expense when on the first day, Council presented no argument.

MR KERR: Correct.

In another instance the Inquiry received a submission and subsequently heard evidence from Mrs. N Oliver.

Mrs. Oliver wrote:

Submission 045



During the court proceedings, Mr. Thomas stated, again following Council Rep. justifications, that the storm walls was no problem, a easement obtained. I was asked to the stand, and told the Commission we had not received a request for the easement — A plan had not been submitted to us — we did not want a easement. The Council had lied in court. This was the reason for the deferred easement.

5.3.4.5 The evidence given by Mr. Kerr strongly suggests that in defending the proceedings, the Council may have conducted a defence which was not sustainable.

In light of Council's response to Mr. Otton's evidence on April 5 2003, Briefing Paper No. 61 (Volume 3, Appendix 2), that whilst they were not Land and Environment Court proceedings, the Council was maintaining prosecution which was not sustainable.

The Inquiry was provided with a copy of a decision in the Land and Environment Court, in proceedings number 10951 of 2001, Submission 032.

The decision involves an application for costs which was made by Council in the proceedings.

In these proceedings the Council had sought the removal of "*all structural walls and other building works that had converted the slab floor area at the front of the building to habitable areas*".

Mr. Patterson, a 90 year old pensioner, was represented by his son, who held a PhD in Architecture. The judge held that Mr. Patterson junior had properly and successfully opposed the orders which were being sought by Council as it would have required removal of all structural walls, and "*would have imperilled the very existence of the entire building*".

The judge noted that "*only at the end of a two day hearing did the Council concede that ... the original order should not be pressed...*"

Clearly, in light of the foregoing proceedings in which these orders were sought should not have been instituted.

Even more surprising was that Council then brought a subsequent application for costs, particularly where it could not demonstrate that ultimately, it had only been partly successful in the proceedings.

In a number of other Submissions which were received by the Inquiry, or in evidence in the Public Hearings, it was suggested that the Council had failed to institute proceedings, particularly to restrain breaches of its approvals.

Whilst these concerns will be primarily taken up in other Sections in this Report, it is appropriate to touch on the nature of the evidence which was received by the Inquiry.

Mr. B Condon made a Submission to the Inquiry and subsequently gave evidence at the Public Hearings.

The Submission attached photographs which provided graphic evidence of fill placed on adjoining land. The fill was estimated to be about 2 metres high along the common boundary and to a depth of about 4 metres elsewhere. There can be no doubt that there is at least 2 metres of fill along the common boundary, as this is clearly shown in the photographs.

The Submission describes Mr. Condon's attempts to obtain a response from Council:

Submission 279

Classically, when the last lot of illegal fill went in, thousands of tons of it, we advised Council Officers and Councillors, particularly the then Mayor, Peter Moxham, from the time of the first truckload of material. But no effective action was taken to stop the tipping. It did stop for about 2 or 3 days, and I spoke to the fellow whose trucks were tipping, that he understood that it would be OK to resume in a few days, which is in fact what happened.

Mr. Condon subsequently gave evidence at the Public Hearings on April 1 2003, stating:

Public Hearings Transcript – April 1 2003

MR CONDON: From the time the first truck load of material arrived on the second occasion, I spoke to the property owner and asked him what he was doing and he sort of waived his hand about and said: I'm just going to do something here. I see: well, according to the development approval that I understand you have, there is no fill to go in there. He said: I'm just going to put a little bit, and I said: well, if it's according to Hoyle, don't do it.

Now, more trucks started to arrive so I immediately contacted the development - the approvals people in Council. I then contacted the Mayor's office and every time trucks would arrive, I would ring the Mayor. Now, it stopped for about 2 days. I spoke to the bloke whose trucks were putting material in and he said it will be okay to work, to resume in a couple of days time in putting it in and that is exactly what happened.

THE COMMISSIONER: So your particular issue here is a lack of enforcement of the DA?

MR CONDON: Yes. My advice - and I know very little about the relevant Acts - but my advice is that an interim injunction order was easily available to the Council and that they would have stopped him in his tracks. That didn't happen.

MR BROAD: Can you tell me when that fill was placed?

MR CONDON: It went in over a period of about 6 weeks in around about August 2001.

MR BROAD: Did you prior to that fill being placed receive any notification from Council that a development application had been lodged for placement of that fill?

MR CONDON: No.

MR BROAD: Now, did you register a complaint with Council when this fill was placed?

MR CONDON: About 50 of them.

MR BROAD: To your knowledge were any actions taken by Council in respect of that fill?

MR CONDON: It all gets quite curious as to what did happen. Council officers have sought through this to characterise me as being - as characterise the situation as being a neighbourhood conflict and basically they said that, you know, they don't really need to speak with me.

MR BROAD: So to your knowledge nothing has been done in respect of this fill?

MR CONDON: The fill is still there today.

Given the serious and continuing breaches which have clearly occurred, the Council should have instituted court proceedings to restrain the continuing breaches and to require removal of the fill.

It was not appropriate that:

Submission 279

Council officers have deliberately sought to characterize this as a dispute between neighbours, and to characterize us as simply being "difficult".

Before moving from this matter, it is appropriate to note that in this matter, as in some other matters which were referred to the Inquiry, actions were taken by the Council.

The Inquiry has not formed a view whether such actions resulted from the concerns being drawn to attention of the Inquiry.

Following the conclusion of the Public Hearings, Mr. Condon wrote a short Submission noting a subsequent site inspection. Surprisingly, the Submission contained the following:

Submission 279

At the site inspection, the mayor, Ms J Sutton, allowed the councillors and some staff to accept my offer to enter my property to view the illegal fill from my perspective, but refused to allow them to actually get anywhere near the affected area to actually be able to see it. Thus, it could be said that she had been giving me a fair hearing without actually doing so.

Submission 229 referred to and attached photographs of a 3-storey dwelling, in an area which permitted only 2-storey dwellings. The Submission detailed attempts to encourage the Council to take actions to restrain breaches of its approval "*for a modest 2 bedroom extension of ... the 2-storey home*", culminating in a suggestion by the Council's inspector:

Submission 229

that planting some mature trees on the boundary would hide it.

The photographs which are attached to the Submission, demonstrate how ludicrous this statement is.

Another Submission referred to an inspection of unapproved building works. The Inspector is attributed as saying: "*...It's a pity they've gone so far...*"

Council did not require this work to be removed, rather it gave a retrospective approval to the work.

There are many Submissions which, similarly, raised concerns over the Council's failure to take appropriate steps to restrain such works and to require their removal.

The Inquiry attempted to obtain evidence from the appropriate member of Council's staff who had supervision over court matters.

Whilst the Inquiry heard from Mr. Fletcher, and from Mr. Brisby on April 8 2003, the Inquiry was left with a view that there was no direct supervision of court matters by any single person or unit of the Council.

At the outset in this part, reference was made to the blow-out in the Council's budget in legal costs.

The Inquiry has received Submissions and heard evidence which indicate that the Council's governance of these issues is flawed.

Council needs to take steps which both ensure that legal proceedings are commenced where they are appropriate. Further, that when called upon to defend proceedings, the Council fulfils its functions in a proper manner.

Having regard to the foregoing, and having regard to the roles of the Councillors to:

- Direct and control the affairs of council in accordance with the Act, and
- To participate in the optimum allocation of the Council's resources for the benefit of the area, as provided for in Section 232 of the Act, the level of concerns expressed by Councillor Caputo in evidence on March 24 2003 as follows, was insufficient.

Public Hearings Transcript – March 24 2003

MR BROAD: Now, in respect of the legal expenses of Council, I raised last week a statement in the Council's submission that total legal expenses for planning and development over the period of the Council had totalled \$4.6 million.

MR CAPUTO: Over what period is that, sorry?

MR BROAD: That is the period of the Council, 1 September 1999 to 18 February 2003, had totalled \$4.6 million, whereas, the actual budget had been \$2.5 million. Now, in light of what you have said, is the real problem simply that Council has not budgeted enough for legal expenses?

MR CAPUTO: No, the - as you know, within Councils you have application - you get daily applications and it is very hard to foresee what you have to defend, I mean, so when the estimates are made you know you estimate what you would - you know, something that you think is the right figure, but it is very difficult to estimate a figure like \$500,000 for the Ardell [sic.] site, where we had, you know, the Court case was going on forever, barristers, QCs and whatever and that cost \$500,000, so if you get big cases like that, your budget is gone for - you know, you are really gone, so it is very hard to foresee those sort of situations and I don't think any Council, or any Government would be able to budget for those sort of things.

MR BROAD: Yes. There wasn't the past history - I assume that you say that you budget from past history, that you look to the future by looking at the past and you make budgets from that, and what you are sort of saying is: even though there had been a history of Court cases in the past, it was impossible to look at that past and say: it could go from \$2.5 million, well beyond that?

MR CAPUTO: Well, I mean, you are not going to get too many Ardell's [sic], you know, there is only one of those, that that has happened in the history of Council and I would doubt whether you are going to get another one, so it is very hard to plan those sort of things.

5.3.5 Community Concerns with Council Minutes

5.3.5.1 The failure to properly record the decisions of committees or the failure to disseminate minutes of meetings were raised in a number of Submissions.

Submission 073 details the difficulties encountered by its author to engage with the Warringah Traffic Committee, writing:

Submission 073

After two months, August to October 2002, without success I requested the opportunity to attend a meeting of the Warringah Traffic Committee. Surprisingly the chairman required that my attendance be approved by the full Council, however I note my attendance was put on the agenda of the Committee for the morning of 17.12.02 although the supposedly necessary approval was not obtained from Council until the evening of that day. As it happened I was unable to attend and sent my apology well in advance.

Now we come to the most intriguing part. The matter was not put on the agenda of the next meeting i.e. 18.2.03 because the Chairman claimed that the minutes of the Council meeting giving the approval 17.12.02 had not been conveyed to him. This was despite me telling him of the approval on the day after the Council meeting, and he then had two months to confirm the fact.

I cannot believe that Council is so dysfunctional that it cannot communicate the outcome of the Traffic Committee's business to its Chairman within a period of two months. Alternatively it could be that someone at Council regards my concerns on a road safety matter with contempt. I believe this matter warrants your attention.

In Submission 125 Mr. Thomas raised concerns over inaccuracies in the minutes of the Sportsfield Rectification Advisory Committee.

This is an important committee, charged with significant functions.

Submission 288

To oversee and ensure the implementation of the projects undertaken from the approved schedule of works detailed in the Sportsfield Rectification Programme.
To oversee the expenditure of funds collected as per Sportsfield Rectification special variation of the General Rate.
To consider and make recommendations to Council on a three (3) year rolling Sportsfield Rectification Programme.

The committee oversaw the expenditure of many hundreds of thousands of dollars.

Given this background it was surprising that Mr. Thomas, a member of the committee, should raise the following concerns in Submission 125.

Submission 125**7.1**

In the minutes of the SRAC meeting of 19 Dec 2001, it was reported under item 2.1 on page A32 that: 'At the 6 June meeting (Item 3.4) an amount of \$416,410 was set aside as a commitment to the end of the financial year 2002 for the John Fisher Park Netball Courts upgrade.'

There is no such commitment minuted.

Item 3.4 of the minutes of the SRAC meeting of 6 June 2001 simply states 'it is necessary for the Committee to approve the design,...the basic design has to be approved'. Nowhere is there any mention of setting aside any amount of reserve finances for this project.

In fact this item was not even an adopted item as the Committee did not have a quorum at this time and therefore could only make comments not recommendations. The comments by the Committee state only: "That no objection is raised in relation to the John Fisher Park Netball Courts provided it is in accordance with the adopted Plan of Management."

7.2

At the SRAC meeting of 7 Nov 2001, Councillor Peter Moxham submitted the following statement:

"As all members are aware the State Government recommended a direction that there should be a 40m Riparian zone around all sporting fields."

This is a gross misrepresentation of advice received by Council from the Department of Land and Water Conservation, which was referring to riparian vegetation along waterways – clearly only affecting those parts of sportsgrounds adjacent to creeks and lagoons. The statement made seemed to be a further attempt to frighten sports users and paint passive users as anti-sport.

At the Council meeting when these minutes were up for adoption this and other minuted inaccuracies were pointed out to Councillor Moxham by the President of Curl Curl Lagoon Friends. Councillor Moxham ignored these objections, implying that he understood the Department's recommendations and that the minutes may not be completely accurate. The minutes were adopted, however, without change.

Ref: Minutes of SRAC meetings 6 June and 7 Nov 2001.

These concerns were subsequently the subject of evidence given by Mr. Hamlyn-Harris at the Public Hearings on April 2 2003.

Public Hearings Transcript – April 2 2003

THE COMMISSIONER: You claim that the Council has misrepresented information and adopted inaccurate minutes in relation to John Fisher Park. Briefly what is the substance of your evidence for that?

MR HAMLYN-HARRIS: This related to another letter that came from DLAWC at some stage. There was a letter which - I mean, I'm not really sure what happened. It seems that it went to Council and then some time later the Local MP made it public, or made some of its contents public and then, suddenly, some of the councillors launched into a huge campaign of saying that: this was all our fault, that we had made the Minister say these things and that if they did what this letter asked them to do, then, you know it was the end of sport as we know it in Warringah. It would mean that, you know, there would be no sport left in John Fisher Park, for example.

There was a meeting of - I believe it was the Abbott Road Land Steering Committee, at which one of the councillors stated that - you know, explained this letter and stated this point of view and said that they would have to put a 40 metre buffer around every sports field and so forth, which was clearly not the case. I mean, what DLAWC was asking for was a stage development of a 40 metre buffer along the water way which would of course only be on one side of the sports ground, but it all seemed to be a campaign to make us look anti-sport in the back of that, I would think.

So I was concerned about that and I addressed Council on the night that they were adopting those minutes and they basically said - I mean, no questions were asked of me, once I was safely back in the gallery they had a debate and, you know, said things like: yes, it is all very well, them coming in here and telling us what to do. Look at this misinformation they have been spreading and the lies and so forth.

There was a statement even made, I think, by one councillor that: well, minutes don't necessarily - they are a summary of what happened, they don't necessarily reflect what did happen, and it seemed a strange way to justify some minutes that were actually incorrect - or some statements that were incorrect, and Council then went ahead and adopted those minutes.

Mr. Hamlyn-Harris reinforced the matters contained in Submission 125 on behalf of Curl Curl Lagoon Friends Inc. in the following terms:

Submission 120

Misrepresentation of information and adoption of inaccurate minutes

On 7 November 2001, at a meeting of the Sportsfield Rectification Advisory Committee, Cr Moxham made statements about the potential effect of DLWC's riparian zone requirements. According to the minutes of that meeting, he greatly exaggerated the implications of riparian zone protection. Furthermore, the minutes state that the 'local representative present' (presumably Cr Jones) said that he had not received any significant expressions of objection to the sporting proposals for JFP (ignoring, in the process, 18 months of campaigning and thousands of letters to Council). When the validity of these comments was challenged in a Council meeting by Curl Curl Lagoon Friends Inc., the speaker was dismissed and ridiculed by majority Councillors. In further discussion of the Council, Cr Moxham, by way of explaining the disparity between the minuted information and reality, said that the minutes don't necessarily reflect what was actually said. Despite this, the Council then proceeded to adopt the minutes without change.

At the meeting where our representative had asked to speak on the above matter, the majority Councillors' disrespect for the community view on this issue was highlighted by their deliberate action to pass over the agenda item (which was one of the first on the agenda) until 11:50pm – by which time the public gallery had all but cleared. It seemed that they wanted to discourage the speaker and/or avoid his comments being heard by other members of the community.

Ref: Minutes of Sportsfield Rectification Advisory Committee, 7 November 2001, p. 28; presentation to Council by President of Curl Curl Lagoon Friends Inc., 20 November 2001; Council meeting proceedings, 20 November 2001.

Further material was put in reply by the association, as follows:

Submission 120

Adoption of inaccurate minutes

That no amendments were requested after inaccuracies were pointed out is evidence that Councillors are prepared to see inaccurate statements that suit their own point of view left on the public record.

Submission 300 attached a letter dated July 8 2002, expressing concerns that:

Submission 300

the minutes of the Brookvale Park Advisory Committee Meeting of 19 November 2001 do not accurately minute matters I raised at the meeting on behalf of the Brookvale Valley Community Group whom I represent. In particular:

The letter then went on to detail the inaccuracies which were asserted, the attempts to correct the Minutes and the seriousness of the concerns, requesting that the Minutes be corrected.

Council's Director of Public Office, Mr. Symons responded, in a letter dated July 22 2002, in the following terms:

Submission 300

Like most other Advisory Committees, the Brookvale Park Advisory Committee Meeting Minutes reflect any updated information or comment relevant to items on the Agenda, and they are not intended to be a Hansard of the meetings. This may explain why your comments are not represented in the Minutes to the meeting.

Not deterred, Mr. Baxter, on behalf of the Group, again took up his concern in a letter dated September 10 2002, in the following terms:

Submission 300

Mr Symons response to my request that the minutes be amended to include concerns I raised regarding the finances, is to say the minutes are not intended to be a "Hansard of the meetings". I consider that they fall a long way short of being minutes let alone a Hansard.

May I ask whether you consider the omission acceptable and if so, perhaps you could refer me to a guide manual or document.

5.3.5.2 The matters which Mr. Baxter was pursuing were important, they involved concerns over inaccurate reporting, and concerns whether the Manly Warringah Rugby League Club was in default under its agreement.

At this point, it is surprising that Council had simply not recorded the amendment which had been requested.

The matter continued, with Council's General Manager, Mr. Blackadder, replying in a letter dated October 31 2002.

In responding, Mr. Blackadder referred to Council's then Code of Meeting Practice, setting out the provisions of clauses 39, 39.1 and 39.2.

Relevantly, clause 39(1) provided:

"Each committee of a Council must ensure that full and accurate minutes of the proceedings of its meetings are kept."

The subsequent parts and clauses in the code do not impinge on this primary obligation.

In writing, Mr. Blackadder referred to section 375(1) of the Act, which provides:

“The Council must ensure that full and accurate minutes are kept of the proceedings of a meeting of the Council.”

The views expressed by Mr. Symons in his letter of July 22 2002 were taken up with Mr. Baxter in the Public Hearings on April 3 2003. Mr. Baxter gave the following evidence:

Public Hearings Transcript – April 3 2003

MR BROAD: ... In May and July 2002 you took up concerns with Council regarding statements contained in the minutes. It was suggested to you in response in Council's letter of 22 July 2002 that minutes are not intended to be a hansard [sic.] of the meetings. It would be my understanding that minutes of a meeting are intended to record what occurred at the meeting. Would that be your understanding?

MR BAXTER: Well, I don't know the Local Government Act in detail but I would have thought that would be the practical aim of a set of minutes, so that you could see what was discussed and what decisions were made.

MR BROAD: And the minutes aren't there to record some update of the information that might have been provided subsequently?

MR BAXTER: No. Well, as a result of my letter, my specific concern raised was the issue I raised was concerning the accuracy of the financial statement that was in the discussion paper as we previously discussed and so I guess that wasn't put into the record at the Council meeting.

MR BROAD: But if those financial statements had been updated subsequent to the meeting, then any inclusion of those financial statements as part of the minute of the meeting wouldn't correctly record what took place at the meeting.

MR BAXTER: I didn't call up specific items in that meeting as I recall.

MR BROAD: No, I'm talking as a principle.

MR BAXTER: Yes, sure.

MR BROAD: Not as a specific event that occurred at that meeting.

MR BAXTER: Yes, I mean I think the appropriate process would be - and I tabled my concerns in a letter, written form afterwards that should have been brought back to the meeting and any corrections or adjustments made.

The approach taken by Mr. Symons, as contained in his correspondence is incorrect.

Minutes must accurately record the matters which took place at the meeting, not subsequent events.

In this regard, Minutes are not a moveable feast to be changed at a whim.

5.3.6 Community Concerns with Consultation

5.3.6.1

In its Submission to the Inquiry (No. 288), the Council emphasised its Community Consultation Framework. Given the emphasis placed on public participation in the Act, such emphasis is important to the public perception of the effectiveness and efficiency of the governance of the Council.

Submission 288

In 2000 the Council developed an award winning community consultation framework to guide staff in the practice and process of consulting with the community about council business.

The Warringah Community Consultation Framework comprises:

- the Community Consultation Matrix
- the Community Consultation Toolkit.

The Community Consultation Policy and Strategy, adopted by Council in August 2000, support these documents. The Policy outlines the philosophical basis of Council's commitment to community consultation, while the Strategy covers the Framework's implementation across the organisation.

The Strategy Group developed the Matrix and Toolkit in conjunction with Suter and Associates, Leisure and Tourism Planners. Its development involved extensive community research and consultation with Councillors and staff.

The *Community Consultation Matrix* guides staff on when and how they should consult with the community for different situations, and is used as an implementation guide to assist staff in determining the extent and type of consultation that's best suited to a particular project.

The *Community Consultation Toolkit* gives staff practical guidance on the 'how to' of community consultation. It outlines the tasks that should be undertaken and suggests a range of approaches aimed at encouraging community participation.

Staff have been trained in using the Matrix and Toolkit, and it is available on Council's Intranet and Internet sites. It has also been incorporated into Council's project planning template so as to ensure that community consultation requirements are considered at the commencement of each project.

There has been a high level of demand from other organisations requesting permission to use these documents to guide their own consultation planning.

In November 2001 Council won a Commendation Award in the Organisational Practices category of the National Awards for Innovation in Local Government, run by the National Office of Local Government.

In the Submission, the Council also referred to “...a very extensive involvement of the community and external bodies, groups and authorities in its governance role as envisaged in section 7(c) and dot point 8, section (1) of the Local Government Act 1993 through the establishment of, or having delegates to 42 Advisory and Community Committees.”

Public participation was further emphasised in the Submission in the following terms:

Submission 288

These committees cover a broad spectrum of Council's facilities and services. They provide an opportunity for members of the public and users/special interest groups to assist Council in managing the facilities or providing services that meet community needs and expectations.

Given that Council saw public participation, through Committees, or otherwise as “assisting” Council, it was difficult to reconcile this statement with concerns raised in Submissions and in evidence at the Public Hearings.

This issue of the provision of public participation in Council was taken up with Council's General Manager, Mr. Blackadder, in the following manner:

Public Hearings Transcript – March 19 2003

THE COMMISSIONER: ... In the terms of reference to this inquiry I've been asked to give some special emphasis to section (c) which I will just repeat what subsection (c) of section 7 is. That is:

To encourage and assist the effective participation of local communities in the affairs of Local Government.

This is acknowledged on page 5 of your submission. You would agree that the effective participation of local communities is specifically provided for by ... expressions of community interest in sections 14 to 20. You with that?

MR BLACKADDER: Yes, I accept that.

THE COMMISSIONER: Further public participation is provided for by the involvement of the public in various committees and again in your submission you have outlined some 42?

MR BLACKADDER: Forty-two advisory committees to the Council, yes.

5.3.6.2 There were a number of concerns, which were raised in the Submissions received by the Inquiry, they may be categorised as follows:

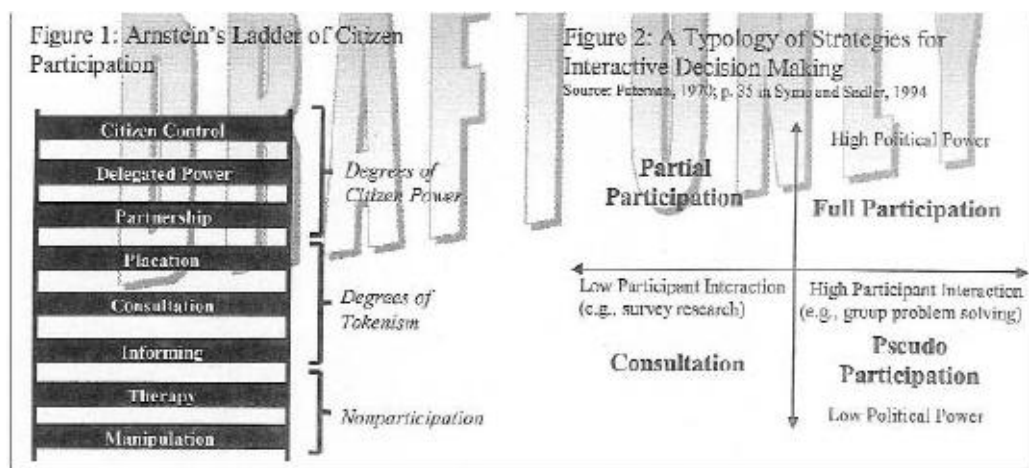
- (1) Consultation and the manner of consultation.
- (2) Particular matters affecting Council committees.
- (3) Personal attacks on committee members by Councillors.

It may be contended that the third category does not specifically fall within the ambit of this part. But such matters directly affect the public's willingness to involve themselves in such committees.

It might also be noted that to a large degree parts 1 and 2 overlapped. Accordingly Submissions and evidence referred to in this part may have application in one or more of the categories outlined above. It is emphasised that this part seeks to explore the manner of community consultation in the context of governance of the Corporate Body. The matters in items 2 & 3 above are therefore dealt with more fully in Section 6 of this Report. For the purposes of this part, they are highlighted and dealt with as part of item 1.

Before proceeding, it is appropriate to refer to 2 models of citizen participation, which are set out below:

Arnstein's Model



Whilst each has borne some criticism, they are useful to give an insight into the levels of participation which may be achieved by the community, particularly, as Mr. Blackadder suggested, the community has a role “assisting” the Council.

5.3.6.3 Many of the Submissions which were received by the Inquiry expressed concern over the consultation process adopted by the Council.

Many of the concerns which were raised expressly related to the consultation process during the preparation of the John Fisher Park Plan of Management 2001.

Principal amongst these concerns was a perception that, by facilitating a private meeting with the Manly Warringah Netball Association, prior to a public meeting, and by the failure to publicise that this meeting had been called, nor to advise that it had occurred, the Council was preferring the interest of this group over the greater community.

The Brookvale Valley Community Group wrote in its Submission on the Brookvale Park Plan of Management:

Submission 300

There is great disappointment in the community that a whole raft of items which further the interests of the League at the expense of the community have been added at the 11th hour. It is tailor made for what are obviously the interests of the MWRLC yet there are no documents or submissions from them included which detail their requests. It would appear that these negotiations have taken place outside the prescribed consultation process.

The changes, which are detailed in the Submission, include some which are said to fall outside the Plan of Management.

More general comments are contained in other Submissions, such as those contained in Submission 121, which describes to consultation processed for the development of the Dee Why Centre, as follows:

Submission 121

What were the results of all the community consultations? It was a cynical exercise in tokenism:

Another Submission, (No. 114) put the following:

Submission 114

We cannot rely on council informing and seeking the opinion of the community before a decision is made.

Mr. Hamlyn-Harris, on behalf of Curl Curl Lagoon Friends Inc. wrote:

Submission 120

In developing a revised Plan of Management for this park, rather than engaging in a fair consultation process to find the best solutions taking into account all users, the Council (the political majority and some staff) became adversarial, appeared to make private undertakings to individual sporting groups and actively discouraged – and even ridiculed – genuine and widespread community concern about actions being proposed.

Another Submission contrasted the long history of the Curl Curl Lagoon Committee with the current consultation process, stating:

Submission 102

It is with great disappointment therefore that I have observed a gradual deterioration of the commitment of Councillors and their staff to genuine consultation. This decline has coincided with the reign of the current Council (elected in 1999) and of Denis Smith as General Manager. The last time I recall participating in a Council run consultation that at least had the appearance of being genuine, was the meeting organised in March 2000 advertised as seeking community input to a revision of the current Plan of Management (PoM) for John Fisher Park.

Another Submission contrasted the consultation process relating to John Fisher Park with Council's prize winning consultation model:

Submission 161

4. About this time Warringah won a special prize from the Local Government Association for a "Method of Consultation" in which great emphasis was placed on the consultation with the interested residents and ratepayers. This procedure included meetings and surveys of local concerns. Great Stuff, but Warringah went through all these procedures with JEP, and then clearly went their own predetermined way, with only minor concessions to local feelings.

5.3.6.4

There were specific matters raised in Submissions regarding consultative committees; they comprised:

- Disbanding of committees
- Removal of committees
- Stacking committee membership
- Councillor interference in committee decision-making.

It should be remembered that committees provide advice and guidance to Council, they do not have a decision-making role. It should be noted that around one third of the Council's 42 Consultative Committees do not include direct participation by the Community.

Council's Submission to the Inquiry, (No. 288), provided particular information regarding each of its committees. The information, in schedule form, contained details such as membership, functions and the term of appointment to the committees.

Mr. Michell provided a Submission and subsequently gave evidence at the Public Hearings on April 3 2003. Mr. Michell detailed his involvement in the Dee Why Town Centre Management Group/committee. He wrote:

Submission 11

common ground and set of objectives, recommended to Councillors that the Group be upgraded to a full Committee of Council, constituted under Section 355 of the Local Government Act. As such, its Minutes would be seen and approved by Council. Councillors agreed to this upgrade of status at their meeting of 28 November 2000.

4. Sometime around May 2001, the Committee began to address the problem of funding sources for the various public infrastructure items that the Urban Design Study had recommended for Dee Why (e.g. streetscape improvements) and which had been formally costed by consultants (McGregor) during the term of the previous Council. The concept of a commercial levy was raised and researched with other metropolitan Councils who had undertaken town centre revitalisation projects recently, particularly the approaches taken in Crows Nest, Concord and Leichhardt. In its Minutes of 28 June 2001, the Committee recommended that Council staff investigate and report on the commercial rate concept. These Minutes went to Council sometime in July 2001.

5. Staff members of the committee prepared a discussion paper on the subject of a commercial rate levy but were apparently advised by their senior management not to put it forward as a stand-alone document but rather to list a levy as one of a variety of fundraising options. However, before this could be done the Committee was disbanded, with no prior discussion or warning. The step was a complete surprise to all of its members, including the staff and the two Councillor members.

Mr. Michell expanded this in evidence at the Public Hearings on April 3 2003:

Public Hearings Transcript – April 3 2003

THE COMMISSIONER: How did the Dee Why Town Centre Management Group come into existence?

MR MICHELL: Well, I guess I can either start at the start or start before the start. I will go back a little way, I mentioned the move by Council to revitalise Dee Why where upon - and this was back in probably '97 or so when they commissioned some consultants and there was a great concern by residents at that time but although a Steering Committee was formed for that process, there was no resident representation on that committee. So that was one of the great concerns that residents at the time had.

And of the completion of that process when the consultants produced their study, which was adopted by Council, a group which did involve residents was formed in order to turn some of the concepts in that into a DCP and that group did its job and ended. But in the consultant's report, they recommended that an ongoing Town Centre Management Group be formed which would involve not only residents, but particularly would involve businesses and property owners and Council staff and Councillors, and that was in the original 1998 or so report.

It was I think, initiated, agreed by Council in 1999 and finally came into being in May 2000, and I hope I've got my dates right there. So the group came formally into being in May 2000 and it's role was - it was spelt out formally, it - and the group looked at it's role, but it was essentially - it was well understood that the - that the building developers would potentially be the bits of the plan that would go ahead, in other words there was direct financial incentive to property owners to put in DAs.

But the revitalisation plan covered a whole lot more than just building buildings, street scape was an obvious one, town squares, aspects of business, what sort of businesses you would want and where, parking, traffic flows, etcetera. So this group was to attempt to look at moving the whole process forward, not just the building of buildings. And to that end, Council itself employed consultants to cost the infrastructure parts of that plan which were not directly associated with individual building of buildings and that was also done prior to the forming of this committee.

THE COMMISSIONER: Did the committee have any powers? What sort of - - -

MR MICHELL: Initially the committee had no powers, it was a group I think, rather than a formal committee. But it had - after it had been going for some months, Council staff who were on the group suggested that the committee should be upgraded to official Council committee status and that was done I think in November 2000, and at that point the committee then at least had the power of its minutes going to Council, but such committees have essentially no powers other than to recommend or suggest that certain actions be taken or not taken.

Public Hearings Transcript – April 3 2003 (cont.)

THE COMMISSIONER: All right.

MR MICHELL: The committee itself had - had no powers as I don't think any other committees of Council in a sense have powers.

THE COMMISSIONER: What kinds of recommendations did the group make, or the committee make, broadly I mean?

MR MICHELL: It ranged over a number of areas, it went through the entire original consultant's study plus the second one which had costed infrastructure and updated the infrastructure study to things which were relevant, it still believing highly relevant, gave them priorities etcetera. I guess it rapidly emerged to perhaps some people's surprise that all of the different - shall we say, competing interests involved, property owners, business and residents. As has always been my experience on such committees, found that they had an enormous amount of common interest and they may have had different thoughts on how things should be achieved.

But the committee rapidly moved to some areas which it believed were of a high priority with a total consensus and one of those was to most rapidly move to an agreement adoption of the former street-scape should exist in Dee Why. There was some highly practical reasons for that, you had developers building buildings and as part of that condition, having to reinstate footpaths etcetera and it was obviously sensible to have that sorted out so you knew what outcome you wanted overall. But there were also a lot of areas - the plan took of a view that a lot of activity should now happen on footpaths.

The footpaths which should be such that restaurants etcetera could use those and so there was quite a lot of street-scape work to be done and some traffic work to be done on re-directing traffic and parking etcetera. So I guess the committee's - whilst it was focussed on numbers of areas, one key area was the street-scape and not just the pavers etcetera, but how that was going to all work. To that end, the committee visited three other Council areas which had done similar things, Crows Nest, Concord and Leichhardt, to look at how they had done it, what they had done, and how they had got the different parties together to support it and how they had funded it, and that was not the only part, but a key part of where the committee had reached.

THE COMMISSIONER: So their recommendations were supported by evidence of what they thought was good examples of the sorts of things they were recommending etcetera?

MR MICHELL: Yes, very much and the Council staff involved, including the Dee Why Place Manager, I think was the guy's title, were totally in support and playing an active part in why the committee's thinking and on this matter, and so there was a - there was a strong consensus of new.

To the surprise of Mr. Michell, and against this history of achievement, the committee was disbanded. Mr. Michell's Submission contained the following commentary.

Submission 11

In September 2001 the annual Mayoral elections were held and Councillor Darren Jones was elected Mayor with Councillor Julie Sutton as Deputy Mayor. Coincident with these annual elections all Council committees lapse and have to be re-established. The Dee Why Management Committee was one of quite a large number of Committees whose names were listed on the agenda for the Council Meeting of Tuesday 9/10/2001 with a staff recommendation for re-establishment. When the agenda item for re-establishment of the various committees came up in the meeting (which was chaired by the Mayor Clr Darren Jones), Clr Peter Moxham, seconded by Clr John Caputo, moved that the Dee Why Management Committee be disbanded. The motion was carried with the supporting votes of Clrs Darren Jones, Julie Sutton and David Stephens (*the names of movers and seconders are from memory and should be checked against the Minutes of the meeting*).

This issue was taken up with Mr. Michell in the Public Hearings, with the following evidence being given:

Public Hearings Transcript – April 3 2003

THE COMMISSIONER: Why did it cease?

MR MICHELL: Well, I don't know, it was a surprise to me and to every other member of the committee. I received a letter as did everybody else thanking me for my contribution to the committee which had served its purpose and the only embroidered account on that was, I think, that the then - or the previous Mayor, Peter Moxham, was asked by the Manly - I was rung by the Manly Daily for my feelings about it and he obviously was as well and his comment, which obviously had some status, was that the committee had served its function and the work could now be taken forward by Council staff, the Dee Why Place Manager.

That certainly was not the position that I believe the committee had reached, and I don't think that individual did either, he resigned some months after and left the Council and was not replaced.

THE COMMISSIONER: So there is no Place Manager there now?

MR MICHELL: No, not that I'm aware of, but I could be corrected on that.

Another Submission spoke of Mayor's intervention to override the decisions of a consultative committee, which was not a council committee listed in Council's Submission (although it may previously have been), on threat of removal of the committee member.

Both Mr. Baxter, on behalf of the Brookvale Valley Community Group, and Mr. Brian Dunphy, made Submissions and gave cogent evidence on what were seen to be inappropriate appointments to Council committees.

Mr. Dunphy wrote:

Submission 238

The next issue I consider indicative of the poor process by which the Committee operated can be found in that the C Ward representative is Mr Eric Galloway, who now holds the position of President of the Union and who I understand was on the executive committee of the Union at the time of his appointment. At a meeting of the Committee held on 14 September 1998, Mr Galloway was in attendance as the proxy for Mr B Kirkwood of the Union. The effect of having Mr Galloway on the Committee was to create a bias in favour of the Union by having in effect four members and only two community representatives.

This bias was further exacerbated when Council voted in October 2001 to have all community representative positions on all committees declared vacant and applications invited for new members.

In turn, on March 21 2003, Mr. Dunphy gave the following evidence at the Public Hearings.

Public Hearings Transcript – March 21 2003

THE COMMISSIONER: You applied to represent B Ward on the Sportsfield Rectification Advisory Committee. Is that correct?

MR DUNPHY: That's correct.

THE COMMISSIONER: You were subsequently elected?

MR DUNPHY: Yes. Council accepted my nomination. It was the only nomination from B Ward. However, as I noted, it did take Council some 12 months to deal with the - deal with the matter.

THE COMMISSIONER: Okay. So nothing happened for the first 12 months?

MR DUNPHY: There was some things happening. There was a meeting of the committee which occurred prior to my appointment and also the - -

THE COMMISSIONER: Excuse me, I don't follow. How could there be a committee if people had not been elected to it?

MR DUNPHY: That's - my concern is the fact that there was this meeting held at which the C Riding representative attended along with other members of the Sporting Union and Councillors and it appears that there had not been a nomination from C Riding. So this gentleman who's on the executive of the Sporting Union said: well look, I'll be the C Riding representative and matters occurred at that meeting and then one of those was that my nomination was accepted.

THE COMMISSIONER: How were the six representatives - what is the process by which they were selected and who selected them?

MR DUNPHY: In the case of the community representatives, there was an advertisement placed in the local papers, the Manly Daily, and I responded to that as did my other A Riding representative, Mrs Linda Ward. Mrs Ward and I worked together over a number of years in the Soccer Association. It appears that there were only the two applications. I know in B Ward certainly mine was the only one and I believe Mrs Ward's was as well. As far as the Sporting Union is concerned, I guess the Council said: well, the Sporting Union represent the various playing groups and therefore we'll give them 50 per cent of the delegates.

THE COMMISSIONER: Did the Sporting Union put up three names to Council and the Council then accepted or didn't accept those names?

MR DUNPHY: I can't comment on that, other than to say that the President of the Sporting Union and the Secretary of the Sporting Union were two members of the committee. So it appeared to be just the top office holders of the Union. Whether the Union sort of decided that themselves, I can't say.

Public Hearings Transcript – March 21 2003 (cont.)

THE COMMISSIONER: Okay. Thank you. When you were selected to go on the committee, what did you understand your period of tenure to be?

MR DUNPHY: Until September 2003.

THE COMMISSIONER: Has it been - - -

MR DUNPHY: No. I was terminated last year in circumstances that showed that Council were feeling uncomfortable about the line of inquiry I was making with regards to the financial statements prepared for the levy itself.

THE COMMISSIONER: Isn't that unusual? I've seen the terms of reference of the committee which distinctly say that a person is appointed until the - - -

MR DUNPHY: I made some inquiries with the Minister and the Minister advised me that it was within the power of Council to terminate any committee during its term of office.

The Brookvale Valley Community Group wrote:

Submission 300

7 REPRESENTATION ON THE BROOKVALE PARK ADVISORY COMMITTEE
 The Plan of Management originally provided for one representative from the Brookvale Valley Community group, 3 from the League Club, 2 citizen representatives the mayor and three ward councillors. A third citizen representative position was added to the Committee composition as a result of our groups complaints that our group had inadequate representation. This selection however was not perceived by the local community to represent their interests.

Regrettably council continues to fill the 3 "citizen representative" positions with persons who have blatant connections with the League and represent their interests. This is contrary to the stated intention of the Plan of Management and in doing so we believe council has overlooked more eminently qualified applicants.

Currently a second genuine community representative has been appointed to the committee due however to the fact that he was the only applicant.

Again, when the issue was taken up in the Public Hearings, Mr. Baxter, the Group's representative gave the following evidence:

Public Hearings Transcript – April 3 2003

THE COMMISSIONER: The Brookvale Park Advisory Committee, can you tell me when and how that was formed?

MR BAXTER: I'm not sure when it first formed. It was - there was one established definitely with the previous plan of management. It was to have two - well, the three councillors from the Ward, the Mayor, two citizen representatives and one representative from our community group whom we could nominate. We were unhappy at the time that the two citizen representatives we felt really were there chosen, in that they represented the league interest and not the broader community interest.

After complaining, Council moved to create a third position and again that third position went to someone whom we consider wasn't a genuine community representative. The submissions, the people who applied for that position, there were seven. Staff ordered them in order of their recommendation. The first person got on, he was again someone who has consistently represented the league's interest. The second person was someone whom - Julie Woodfield, whom we considered a worthwhile community representative. She didn't get on, the councillors moved that the sixth person be put on in her stead.

So again we don't feel that that was a totally appropriate process given that staff who presumably made a reasonably independent assessment on the merits of the candidates recommended otherwise. More recently the Mayor has moved that for some reason that the - Peter Moxham be added to the group, I'm not sure why, but he's suddenly popped out of the blue and he's now on - sits on that advisory committee.

THE COMMISSIONER: So how many councillors?

MR BAXTER: Well, the three Ward councillors, the Mayor and now Peter Moxham. So before the previous Mayoral election it was - the Mayor was from our Ward so that was three and since then I think, I'm not sure of the date when Moxham was added, but now there is potentially five councillors. It is also of concern as to why they would have voting rights, I guess, given that they have a second stab in the Council Chambers.

THE COMMISSIONER: I've just been given the background to the composition of the advisory committee, as it read it it says: Mayor, ex-officio. The three councillors representing B Ward. So you are now saying there is five councillors?

MR BAXTER: Peter Moxham was added on. I'm not sure when it - if it was at the last meeting or before the last meeting, last - September last year.

The foregoing strongly suggests, that whilst Council may have an award-winning community consultation framework, it is not carrying this framework into effect.

Good governance requires that both aspects be in place.

The absence of these means that the Council is not giving effect to the public participation requirements of the Act.

Staff Issues within Council's Administrative System

5.4.1 Staff Behaviour and Staff Employment Security

5.4.1.1 In order to provide a better understanding of the issues which are contained in this part, it is appropriate to set out in some detail, extracts of the legislative background under which Councils operate.

In so saying it is important to emphasise the roles and functions of the Councillors, as the Elected Body; and the staff, as the Corporate Body; and to differentiate between these roles.

For that purpose the following is extracted and paraphrased from the Act:

Section 222 provides that the elected representatives, called "Councillors", comprise the governing body of the Council.

Section 223 provides that the role of the Governing Body is to direct and control the affairs of the Council in accordance with the Act.

The role of the Councillors, as members of the governing body, is expressly set out in Section 232 (1)

Local Government Act 1993 – Section 232 (1)

232 What is the role of a councillor?

- (1) The role of a councillor is, as a member of the governing body of the council:
- to direct and control the affairs of the council in accordance with this Act
 - to participate in the optimum allocation of the council's resources for the benefit of the area
 - to play a key role in the creation and review of the council's policies and objectives and criteria relating to the exercise of the council's regulatory functions
 - to review the performance of the council and its delivery of services, and the management plans and revenue policies of the council.

The Act differs greatly from its predecessor, the Local Government Act 1919. This was made clear in the explanatory notes to the then Local Government Bill put to Parliament, as contained in the second reading speech. The notes included the following:

Explanatory Notes to Local Government Bill

The roles given to councillors attempt to balance the ultimate accountability of the councillors to their electors with their responsibility to oversee the proper, effective, fair and efficient operation of the council in its provision of services and facilities, and its regulatory activities. As a member of the council, the councillor's role will be to participate in making decisions on resource allocation, in policy development, and in the review of the council's performance. As an elected person the councillor will represent the interests of residents and ratepayers, provide community leadership and guidance and facilitate communication between the community and the council.

5.4.1.2

The separation of the roles of the Elected body from the Councillors appeared either not to be fully understood, or not to be supported, by some Councillors. The issue was taken up with Councillor Jones during his evidence given at the Public Hearings on March 27 2003. Councillor Jones appeared to have an insufficient understanding of some of the underlying tenets of the Act, providing the following evidence when speaking about the appointment of staff:

Public Hearings Transcript – March 27 2003

MR JONES: Well, before that --- [The Act] --- the Councillors had a role in determining who the Directors were going to be by normal voting. The Act in 1993, took those opportunities away from the elected Council and gave them purely to the General Manager. ...

I think it is a negative step. In other words, the promulgators of that legislation were saying to me in a covert way that Darren Jones and the rest of your peers in Local Government, aren't capable of being able to make a proper administrative decisions.

The big difference being, they sit in a little ivory castles. People such as myself that employ people and rely upon my business acumen to be able to make a living, seems to be disregarded by someone that shelters in the Public Service.

5.4.1.3

Section 335 expressly embodies the principles referred to in the explanatory notes into the Act, providing for the General Manager,

Local Government Act 1993 - Section 335 (1)

(1) The general manager is generally responsible for the efficient and effective operation of the council's organisation and for ensuring the implementation, without undue delay, of decisions of the council.

Particular functions are also given to the General Manager by the Section, including, the day-to-day management of the Council.

From the foregoing it will be seen that the Act intends to expressly separate the role of the elected body from the administration, which is undertaken by the governing body. This paradigm is of prime importance in understanding the relationships between the staff and the Councillors, between the staff and the public, and between the staff.

5.4.1.4 Section 439, requires that every Councillor, member of staff and delegate of a Council act honestly and exercise a reasonable degree of care and diligence in carrying out his or her functions under the Act or any other Act.

It might be noted that Councillors, staff and delegates exercise functions under a number of Acts. So far as this Inquiry is concerned, perhaps the most relevant of these acts is the Environmental Planning and Assessment Act 1979.

5.4.1.5 To reinforce the duties imposed by Section 439, Section 440 of the Act requires that every Council prepare or adopt a Code of Conduct to be observed by Councillors, members of staff and delegates of Council.

The Council has adopted its own Code of Conduct, which is referred to in greater detail elsewhere in this chapter and in this Report.

The Code details the standards of conduct to be observed and provides mechanisms for dealing with breaches.

The Code of Conduct has been amended during the term of the current Council, and the Inquiry has been provided with copies of each code applicable during this period.

5.4.1.6 Relevant parts of the current Code of Conduct affecting the relationships between staff and the Councillors and staff and the public are set out below.

The Code expresses its purposes as being to assist Councillors, members of staff and delegates:

Warringah Council Code of Conduct 2002 (1.1)

- To fulfil their statutory duty to act honestly and exercise a reasonable degree of care and diligence;
- To fulfil the obligations placed on, and the behaviour expected of, all Councillors, Council staff members and delegates of the Council, in the exercise of their duties, functions and powers;
- To provide a practical means of identifying and resolving situations which involve conflict of interest or improper use of their positions; and
- To act in a way which enhances public confidence in the system of local government.

5.4.1.7 The Code casts responsibilities on Councillors and staff, generally, to:

Warringah Council Code of Conduct 2002 (1.3.1)

A Councillor, member of staff or delegate must:

- Always seek to resolve matters in the public interest;
- Not act contrary to the law;
- Not act unreasonably, unjustly or oppressively or in a discriminatory manner;
- ...
- Treat each other and members of the public fairly and equitably and with respect, courtesy, compassion and sensitivity;
- Refrain from any form of conduct, in the performance of their public or professional duties, which may cause any reasonable person unwarranted offence or embarrassment or give rise to the reasonable suspicion or appearance of improper conduct or partial performance of their public or professional duties;
- ...
- Not act in a manner that would bring Council, Councillors, members of staff or delegates into disrepute.
- Not act on, or allow decisions to be influence by, friendships or associations with, or likes or dislikes for, any other person.

Councillors, members of staff and delegates must:

Warringah Council Code of Conduct 2002 (1.3.2)

- Not take advantage of their official position to improperly influence other Councillors, members of staff or delegates in the performance of their public or professional duties for the purpose of securing a private benefit for themselves or for any other person; and
- Not by virtue of their official position accept or acquire a personal profit or advantage of a pecuniary value (other than of a token or nominal kind) other than as permitted by the Act.
- ...
- Not use information gained by virtue of their official position for the purpose of securing a private benefit for himself or herself or for any other person;

Councillors must:

Warringah Council Code of Conduct 2002 (1.4.1)

- Not discuss with, lobby, direct, or influence a member of staff on the content of, or recommendation in or processing procedure or timing of, any report to the Council by a staff member or consultant.

Staff must:

Warringah Council Code of Conduct 2002 (1.4.2)

- Always act in the public interest and act fairly and impartially;
- ...
- Report on all matters in accordance with the adopted policies of the Council treating all matters with equal importance and not give preferential treatment or consideration to any operation based on the identity of the applicant.
- Not discuss with any councillor on the content or proposed recommendation in any report in progress on any development application or matter to be reported to the Council for decision or to be determined under delegated authority.

5.4.1.8 The Code acknowledges that Councillors, members of staff and delegates have distinctly different roles to play in Council. Again the Code reinforces the differentiation between the roles of Councillors and staff.

The Code expresses the aims of this part as:

Warringah Council Code of Conduct 2002 (2.1)

- Provide clear communication channels between Councillors, delegates and staff to ensure the speedy provision of accurate information;
- To maintain the independence of staff to report on matters, in accordance with Councils policies, decisions and directions and through professional training

In turn the objectives of that part are to:

Warringah Council Code of Conduct 2002 (2.2)

- Provide a documented process on how Councillors can access Council records;
- Ensure all Councillors have access to all documents necessary for them to exercise their statutory role as a member of the governing body of the Council;
- Ensure that all Councillors receive impartial advice to help them in the performance of their civic duty in an orderly and regulated manner;
- ...
- Provide a clear and consistent framework for the reporting of, and appropriate application of sanctions for, breaches of this policy.

5.4.1.9

The current Councillors were elected to Council on September 19 1999.

Whilst this Report focuses on matters, that have arisen during the term of the current Council, matters preceding this term are relevant for consideration on a number of bases including:

- Whilst it is implicit from the Terms of Reference that the focus, so far on it relates to the Councillors, be on the current Councillors, no such direction is implied so far as the Terms of Reference relate to aspects involving the governance of the Corporate Body.
- Certain actions, which were taken prior to the election in September 1999, particularly affecting staff, were in train at and following the election. Alternatively if complete, the actions had effects which continued after the elections.
- The elections had effect only on the Elected Body, that is, the Councillors. The staff in the Corporate Body were unaffected by the elections and continued in their roles after the elections.
- Certain of the then existing Councillors were re-elected.

- The nature of some concerns involving both Councillors and staff, which had arisen prior to the elections, were also manifested after the elections. Accordingly, the election did not of itself bring about a beneficial change in the relationships between staff and Councillors and staff and the public.

Rather the evidence, which has been provided to the Inquiry, suggests that these relationships had deteriorated.

5.4.1.10 The Financial Position of Council at 1999

In the year 1998/99 the Council had reported a deficit of just under \$2.3M. In the previous year it had reported a deficit of over \$11M.

Council had been putting processes into effect to overcome these problems. These processes had a direct affect on staff.

A major restructuring of Council's staff commenced in 1996. It resulted in many positions being declared redundant and the departure of many senior staff.

It has been asserted that the restructuring was used as an opportunity to rid Council of staff who were vocal in their criticism of management or of Councillors.

Certainly, Council lost the services of a number of senior staff, some of whom, it might be noted, went on to become General Managers of other Councils.

The restructure led to the appointment of three new Directors and eight new Senior Managers.

In the ensuing two years two of the Directors left, three of the Managers resigned, three were "paid out" on various pretexts and one, whilst promoted to Director level was subsequently "paid out".

In one division of the Council five of the six staff, who reported directly to the Manager, resigned in the same period.

This represented a huge attrition of staff at a senior level.

The Inquiry has heard that the departure of such staff was almost entirely due to the culture of Council and the manner in which staff were treated.

In addition to this, Council's General Manager, Mr. Thompson left Council in May 1998.

Mr. Thompson had been Council's General Manager since the inception of the Act, and had formerly been the Shire Clerk since 1985.

Accordingly, as at September 1999 and in the period thereafter, Council had lost or was about to lose a substantial portion of its senior staff.

5.4.1.11 The Inquiry received a number of anonymous Submissions, which raised issues affecting current staff.

At first view some of the matters alluded to were prospectively of concern.

Anonymity brings with it the inability to test the credit of the person making the allegations. Rather, such Submissions require that an independent investigation of the matters raised be undertaken. Such an investigation could easily turn into a witch-hunt.

Persons affected by allegations contained in anonymous Submissions are unable to seek redress against the maker, should any allegation be untruthful or scurrilous. In those circumstances the use of such Submissions is always open to abuse. In pursuing such Submissions the Inquiry could, of itself, further an abuse. Such actions would leave the Inquiry open to criticism, from which it could not protect itself.

Given the Inquiry was subject to time and resource constraints, such an investigation in the absence of compelling evidence was considered to be unjustified. None of the anonymous Submissions provided compelling evidence, which would justify an investigation being undertaken by the Inquiry.

In view of these concerns, it was felt that limited credibility could be placed on anonymous Submissions. Whilst some attempt was made to test independently some of the allegations, which were made, it was ultimately accepted for the purpose of this Inquiry that no reliance should be placed on allegations contained in anonymous Submissions, and accordingly this Report does not draw from or rely on such Submissions.

5.4.2 The Relationships Between Councillors and Staff

5.4.2.1 The Inquiry was contacted by a number of former staff, after Public Notices were placed in newspapers calling for Submissions.

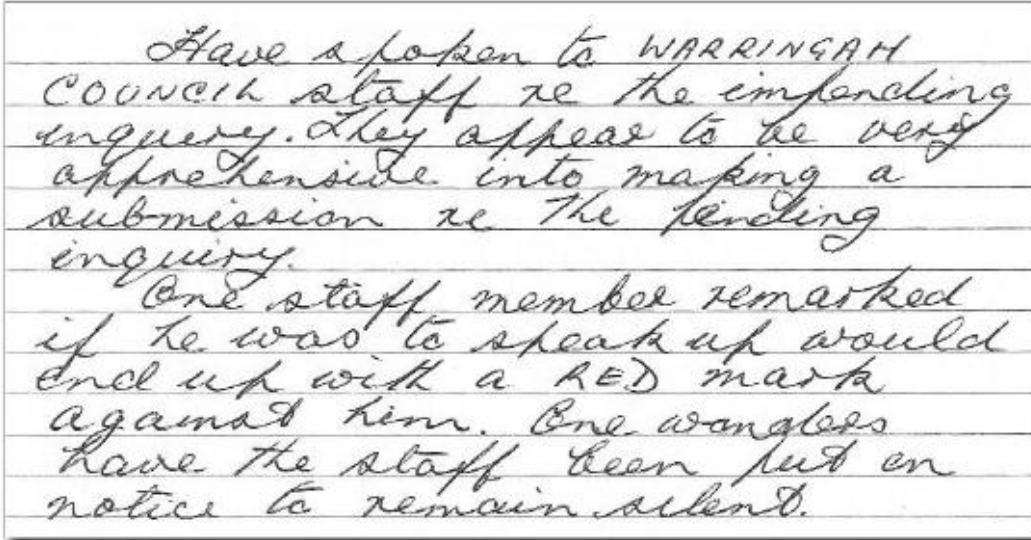
Commonly these people indicated concerns over their treatment as staff of the Council. Mr. Vincent De Luca and Mr. David Barr and others made reference to issues regarding staff in their Submissions to the Inquiry.

Issues which were raised in these discussions included allegations of improper conduct on the part of Councillors and senior staff. Specifically former staff advised that they had made disclosures under the Protected Disclosures Act to the Council or to other investigatory bodies.

Whilst many of these people were happy to refer to other staff as having suffered similar treatment or as having suffered treatment which they regarded as unacceptable, they were reluctant to provide a written Submission, which might be available on the Inquiry's website, or to speak at the Public Hearings in circumstances where their evidence might be available to the public.

Mr. David Luff said in his Submission:

Submission 282



Have spoken to WARRINGAH COUNCIL staff re the impending inquiry. They appear to be very apprehensive into making a submission re the pending inquiry.

One staff member remarked if he was to speak up would end up with a RED mark against him. One wonders have the staff been put on notice to remain silent.

Contact made by, or on behalf of, staff indicated a reluctance to make formal Submissions. Principally their reasons for this reluctance, were twofold:

- that giving such evidence might affect their continuing or future employment in local government, or
- a fear of repercussions, as they lived in the Council area.

Some members of the public also raised concerns over possible repercussions. In the circumstances it was considered appropriate to take up these concerns with the Council, in a letter written to Council's General Manager Mr. Blackadder.

In responding, Mr. Blackadder indicated that he was satisfied that staff would comply with Council's Code of Conduct, which prohibited unjust, oppressive and discriminatory treatment of the public, and which required that the public be treated fairly and equitably. He was not as forthcoming regarding concerns expressed about Councillor's behaviour.

Regretably this led to a circumstance where a clear indication could not be given to the public and relevantly, to former or current staff. This was unsatisfactory, given the events set out in this section and the demeanour of some of the Councillors manifested at the Public Hearings. These matters are referred to elsewhere in this Report.

5.4.2.2 Current staff were encouraged by Mr. Blackadder to make Submissions to the Inquiry.

This was specifically acknowledged by Mr. Moody, the Municipal Employees Union representative in his evidence at the Public Hearings on April 9 2003.

Public Hearings Transcript – April 9 2003

MR. BROAD: ... To your knowledge has the General Manager of the Council encouraged the staff to come forward in respect of submissions to the inquiry?

MR. MOODY: He certainly has. On more than one occasion too, he's had more than one occasion through myself, through the delegates and through the Council's internal e-mails. ...

Council's Director of Public Office, who is responsible for the direction of staff, was not so enthusiastic in his encouragement of staff, giving the following evidence on March 24 2003:

Public Hearings Transcript – March 24 2003

THE COMMISSIONER: ... Has the Council actively encouraged staff to make submissions to the Inquiry?

MR. SYMONS: I wouldn't say, it has actively encouraged. They have ben [sic] informed that the Inquiry has been on, the General Manager has circulated memos and memorandum to staff, but I wouldn't say that it has been active encouragement of submissions, but certainly there has been no suggestion at all that people should not make submissions if they felt inclined to do so.

THE COMMISSIONER: So there was no encouragement, it was just information to staff that they could do it?

MR. SYMONS: Essentially, that is correct in my view, yes.

Despite Mr. Blackadder's approaches, staff were clearly not forthcoming. No Submission was received from any individual member of the Council's current staff.

Mr. Paul Hogan a union delegate with the Council was approached to provide an indication of views held by current staff. It was never suggested that staff did not harbour concerns. Rather no member of staff was forthcoming.

The attempts to obtain the views of current staff emphasised the reluctance of current staff to take up any issues directly with the Inquiry. Ultimately, no member of staff provided a Submission or spoke at the Public Hearings over staff concerns.

The only evidence providing views on behalf of the current staff at the Public Hearings came from Mr. Moody, an organiser from the Federated Municipal and Shire Council Employees Union of Australia and from Submissions.

5.4.2.3 Subsequently the Inquiry was provided with the results of a survey, which had been undertaken in 2002, Submission 349. This survey is referred to in Council's Submission to the Inquiry. The matters which are highlighted in the survey supports the conclusion that staff were reluctant to come forward.

The Inquiry also received copies of Minutes of reports by Council's Trust Harassment and Standards Project Team after the conclusion of the Public Hearings. No member of this team came forward to give evidence at the Public Hearings.

Only one person was willing to appear at the Public Hearings and speak on staff matters. The Inquiry was approached by a number of former staff who wanted to give evidence, but were fearful of recriminations if they did so in public. Two such people provided evidence at a closed Hearing. In order to secure the integrity of their evidence, orders were made to prohibit the disclosure of evidence so given or the identity of the speakers. Since they appeared at a closed Hearing their evidence could not be considered in terms of the deliberations of the Inquiry. These people did not point to any further information that was on the public record that might have assisted the Inquiry in explaining why staff were so reluctant to make Submissions. No such assistance was forthcoming.

In order to form a view on the veracity of allegations contained in the Submissions made by Mr. De Luca and Mr. Barr, a review of some of Council's Human Resources files was undertaken at Council's chambers.

Other evidence obtained by the Inquiry came directly from Council files, and from Mr. Wayne Moody.

In evidence given to the Public Hearings, Mr. Moody was careful to distinguish between the attitudes of "outdoor" staff and "indoor" staff.

5.4.2.4 Many of the Submissions received by the Inquiry made adverse reference to relationships or perceived relationships between Councillors and staff.

Many contained reference to these perceptions, when expressing concerns over development approvals affecting adjoining or nearby properties.

In his Submission to the Inquiry, Mr. David Barr provided a chronology of the process which was undertaken regarding the grant of a right of way over part of St Davids Avenue Park in favour of a property owned by Songkal Pty Ltd at 701 Pittwater Road Dee Why.

Councillor Jones had disclosed a Pecuniary Interest in this company, as a shareholder, in returns lodged with the Council.

In November 1998, Council's then General Manager, Mr. Smith, was delegated authority to negotiate the contract for grant of the easement on behalf of the Council. The contract was in the form of an option exercisable by Songkal Pty Ltd. When this company failed to exercise its option, the Director of Public Office, Mr. Symons, wrote to the company inviting it to extend the option.

No resolution had been passed, or delegation given, to permit this action.

The Mitchell Report contained a lengthy analysis of applications submitted by Councillor Caputo regarding properties 20, 20A and 20B Ryrie Avenue Cromer.

It is not necessary to repeat the detail in this Report, other than to comment that it is difficult not to conclude that it evidences preferential treatment being afforded by the staff to Councillor Caputo. It should be noted that a reference by the Mitchell Report to ICAC regarding this matter was considered by ICAC and no sense of corruption was found.

The matters involving 701 Pittwater Road Dee Why were not exhausted by the matters involving the option.

Subsequently on October 31 2000, Songkal Pty Ltd submitted a development application affecting the site.

On February 6 2001, in the face of a continued failure on the part of Songkal Pty Ltd to provide necessary information, Council resolved that the application would be considered without further delay.

Despite this resolution, Council's then General Manager, Mr. Smith, authorised a further extension of time to be given to Songkal Pty Ltd to provide information.

Coincidentally Councillor Caputo's development application for the properties in Ryrie Avenue Cromer were affected by the same resolution. The actions of Mr. Denis Smith were seen by some to have also benefited Councillor Caputo's development application, which had then been outstanding since 1998.

Whilst reference to some matters may be criticised upon the basis that they either, preceded the current term of the elected body, or that they do not relate to the current General Manager, it should be noted that Councillors Jones and Caputo still form part of the elected body.

None of this is to suggest any improper behaviour by Councillors Jones and Caputo. In fact an ICAC review of the matter involving Councillor Caputo has cleared him of any wrong-doing.

What is relevant to the Inquiry is the fact that some members of the community have thought that some Councillors have received beneficial support from staff members. All of this has been aired in the public domain. It has led to a view, formed by some sectors of the community, that Councillors have been treated differently in relation to development applications than other members of the community.

This perception has materially affected the confidence of the community in the fairness and impartiality of the Council's decision-making. In this sense, the issues related to St David's Avenue Dee Why and Ryrie Avenue Cromer are directly connected to the specific terms of reference of this Inquiry.

Concerns of this nature are still present.

5.4.2.5 In its Submission to the Inquiry, Council advised that an Independent Hearing and Assessment Panel was to be introduced in April. This panel has been operating since April 23 2003 (Section 7.4).

In its Submission to the Inquiry, Council emphasised the role of the Panel as:

Submission 288

The purpose of the Panel is to bring an independent view to consideration of major and, sometimes, controversial development applications.

...

The Panel will comprise of specialist persons selected for their legal, planning, and environmental qualifications, along with community nominated representatives.

With the broad concerns of the community about the business relationships of some Councillors to the property industry, it is vital that IHAP is viewed as a completely independent body. The appointment of the campaign manager of one of the Councillors, who has a reputation for being pro-development, as a community representative immediately casts doubts in the public mind.

The important point to make in relation to allegations of Staff-Councillor collusion is that the possibility that such collusion has taken place has coloured the community's view of how the Council operates. In turn, this has lowered community confidence in the capacity of the elected representatives to fulfil some of their governance duties with impartiality.

5.4.2.6

Ms. Cheryl Collis wrote a lengthy and detailed Submission to the Inquiry. She gave evidence at the Public Hearings on March 31 2003 of a telephone conversation with a member of staff in the following terms:

Public Hearings Transcripts – March 31 2003

MS COLLIS: ... He had said to me that it was getting nastier and it was being – the pursuit against me was from very powerful – someone in a very powerful position at the investigation of my neighbour.

When I said: do you mean someone on Council, he said: yes. I said: Well, what if I nominate one or two people that I think may be responsible and – which I did and on the second – at the second name that I put up, I was given an affirmative that the person was driving the campaign and was pushing the Compliance Officer to do something about 73 King Street. ...

In so doing, Ms. Collis was confirming statements in her written Submission, in which she named the Councillor.

A review of the matters contained in her Submission reveal a continuous campaign of harassment over a number of years.

Many other Submissions echoed concerns of interference with processes at the behest of Councillors.

The Inquiry received a Submission detailing a direction given by a Councillor to works staff to remove a tree from a waterway.

It was removed by staff the next day (Saturday), with no prior approval, no budget, no environmental assessment and contrary to the requirements of the Department of Land and Water Conservation.

In another Submission the author advised that the Chairperson of a committee, of which he was a member, instructed staff to act contrary to the decisions made in the committee. The author also advised that staff gave false information to committee members to cover the fact that they were acting on the instructions of a Councillor, and not in accordance with Council's Policy.

Again the author records staff as saying that they were afraid to do their job due to fear of retribution or dismissal instigated by a Councillor.

The Inquiry received a Submission from Mr. Wayne Robinson who also spoke at the Public Hearings on March 25 2003.

Mr. Robinson's sad but amusing Submission, detailed actions taken by the then General Manager, Mr. Denis Smith, to remove a painting which had been painted by his 13 year old daughter at the behest of a Councillor. The painting contained a small caption which might have been seen as critical of the Councillor.

Having observed the demeanour of Councillors and some of the staff during the Public Hearings, it is plausible to conclude that some Councillors would give directions to staff.

5.4.3 The Relationships Between Staff and Councillors

5.4.3.1 Previously it has been noted that certain allegations were made concerning the former General Manager and his links with certain Councillors. It has been observed that these allegations could not be tested because Mr. Denis Smith did not appear at the Public Hearings, and so the Inquiry did not have the chance to find out his views of what happened. There is evidence, submitted by both Councillors Smith and Colman, that a threat supposedly issued by the developer of the Ardel site was relayed to the Councillors.

Councillor Colman gave evidence of being called to a meeting with the then General Manager in September 1999 at which Mr. Smith told him that if he did not support the Ardel Development the developer would seek to make him personally liable for costs.

The suggestion that the Councillors could be personally liable for costs by the developer is simply baseless.

Councillor Colman, whilst dismissive of the event, confirmed that the threat had been made.

Whilst Councillor Colman may have been dismissive of the threat, the threat of being sued most certainly hung over the head of Councillor Smith, who chose not to pursue the questions put at the meeting of November 23 1999, and withdrew them.

The alleged relaying of a threat from a developer by a staff member has relevance to the behaviour of some Councillors in subsequent years. Both Councillors involved were newly elected, and neither was conversant with how serious such a threat by a developer might be. The fact that the threat was allegedly delivered by a staff member then coloured their view of the relationship of the Elected Body to the Corporate Body.

5.4.3.2

The threat allegedly made to the Councillors could not have been exercised. The only way that such a liability might arise would be pursuant to a “surcharge order” made under Section 435 of the Act by a Departmental Representative. Councillor Smith’s knowledge of the right to impose a surcharge and the circumstances in which such an order might be imposed were pursued in evidence on April 1 2003 when the following questions were put:

Public Hearings Transcript – April 1 2003

MR. BROAD: ...Yes. Now, you also refer to the meeting in October 2001 and to a reference of one of the councillors when he stated, "I hope you enjoy your surcharge". Can I ask you a couple of questions about your understanding of what surcharging is? Now, at that time did you understand that you could be readily surcharged at the whim of Council?

MR. SMITH: No, I didn't.

MR. BROAD: Did you know exactly what surcharging was either in 1999 or at the later period in 2001?

MR. SMITH: Not in the early 1999. To me it was a big word and at that time frightened of big words. Later on we - well, I say "we". I mean I found out what surcharge meant and that was that action could be taken against you if in fact you did something illegally and to the point where you could be made liable in a monetary sense. That's my understanding.

MR. BROAD: Of course you would understand that that is not something that Council can do. Rather it is a matter for a representative of the Department of Local Government.

MR. SMITH: I didn't know that.

MR. BROAD: Do you know that now?

MR. SMITH: Now you've told me.

MR. BROAD: At that time were you aware of any of the procedural requirements which had to be met?

MR. SMITH: In terms of?

MR. BROAD: To have any surcharge declared?

MR. SMITH: No.

MR. BROAD: Were you aware of the basis that you had to be, for instance, liable for culpable negligence or misconduct before such a charge could be made?

MR. SMITH: No.

MR. BROAD: Did you understand that before today?

MR. SMITH: Other than - no, no, to be honest.

Council's Meeting of November 23 1999 was not the only time that Councillor Smith was threatened with being surcharged. Later he was threatened by two Councillors. However this is not relevant to this part of the Report, and is dealt with in Section 3.

The fear of being subject to a surcharge order affected the manner in which Councillor Smith carried out his functions as a Councillor. Councillor Smith conceded this in the following terms:

Public Hearings Transcript – April 1 2003

MR. BROAD: Now, have these sort of threats hung over your questioning of matters coming before Council?

MR. SMITH: Not now. I ask lots of questions these days on behalf of the community. I have them answered and if I'm not happy with that answer then I pursue it. The matter of surcharging doesn't seem to have raised its head in most recent times. That seems to have been dropped.

MR. BROAD: Did those threats hang over your head in earlier times affecting your decision-making or your inquiries in respect of matters before Council?

MR. SMITH: Not now.

MR. BROAD: No, did it in earlier times?

MR. SMITH: Then, yes, yes, they did.

MR. BROAD: Did you not pursue matters because of your concerns in respect of these matters?

MR. SMITH: Yes.

5.4.4 Governance of the Staff Within the Corporate Body

5.4.4.1 In its Annual Report for 2001-2002 Warringah Council reported that it employed 507 staff. Its employee costs were reported as \$31.168 million.

In May 2000 the Trust, Harassment and Standards Project Team of the Council described the behavioural model that characterised this staff in the following terms:

Submission 349

The Team believes that the behavioural model exhibits the following traits: blaming and defensive management, lack of accountability and responsibility, inconsistent decision-making, lack of leadership, and a willingness to ignore agreed standards to meet short term or expedient solutions.

This report went on to say:

Submission 349

It was the unanimous view of the Team that this behavioural model had been exhibited publicly by and practised within Council by all the elected members of Council over many years to the present day. Consequently, the relationship between elected officials and staff is exemplified by a lack of trust, inability to agree on and apply standards, which leads to harassment.

The Team regards the public behaviour exhibited by the Councillors as an inappropriate behavioural model and regards this as its primary concern as it is the behaviour that is easily modelled by management and staff.

In October 2002 the findings of the *Organisational Culture Survey* were released.

The report stated:

Submission 349

- Leaders are seen to avoid making business decisions due to potential ramifications from either Councillors or more senior management.

Under the heading *Councillor Interactions With Staff*, the report stated:

Submission 349

One of the most widely reported problems within Warringah Council relates to the 'bad behaviour' of Councillors and their perceived 'interference' in Council operations. Many examples were given of inappropriate interactions, perceived "directives" to engage in unprofessional (and in some cases allegedly unethical) activities, interference in management decision making, and so on.

There is widespread concern that management does not seem to be prepared to "stand up to Councillors" or to make it clear that they have overstepped boundaries.

It was also pointed out that poor Councillor behaviour and public bickering have significant impact on staff as they feel that they are often "tarred with the same brush".

In seeking to respond to these representations, (ie. from constituents) and the demanding expectations of constituents, Councillors can often seek to 'short cut', work around or alter the appropriate procedures and processes. Again, whilst legally these approaches by Councillors to staff are only 'requests', the status of Councillors is such that staff perceive these approaches more in the nature of directives.

5.4.4.2 The Protected Disclosures Act expresses its objectives as being to encourage and facilitate the disclosure of corrupt conduct, maladministration and serious and public waste in the public sector.

This Act seeks to encourage such disclosures by protecting persons from reprisals and by providing for proper investigation of complaints.

The Inquiry received a Submission from Mr. Russell Smylie and subsequently heard evidence from him during the Public Hearings.

On Friday February 12 1999 Mr. Smylie made a disclosure under the Protected Disclosures Act to Council's then Mayor, Councillor Caputo. The disclosure related to Council's then General Manager Mr. Smith.

The matters comprised in the disclosure were serious and deserved a proper investigation.

On Monday February 15 1999 Mr. Smylie's employment was terminated.

Mr. Smylie advises that he was later notified that the disclosure was without substance and that no further action would be taken.

5.4.4.3 Council provided its files regarding certain further Protected Disclosures. Material, apparently referable to the disclosure made by Mr. Smylie, was provided.

The material appears to be incomplete.

In forwarding this material and Council's files regarding other Protected Disclosures, Council's Director of Public Office, Mr. Symons wrote:

Extract of Letter from Mr Symons to the Commission dated May 1 2003

On 16th March 1999 I received a memo from the General Manager which included reference to a Protected Disclosure made to the Mayor, and which requested my, amongst others, response to certain matters contained in the Disclosure. I am not aware of who made that Disclosure, but provide for your information a copy of my personal file material relating to my response to the memo from the General Manager. Staff have not been able to locate, nor does anyone seem to have any knowledge as to where to locate, the Disclosure made to the Mayor, nor the result of the investigation instigated by the Mayor.

During 1999, I together with the other members of the Executive Team (i.e. Directors) were verbally informed by the then General Manager Mr Denis Smith, that a Protected Disclosure had been made to him. We were not informed obviously, who made the disclosure, and again staff have not been able to locate, nor does anyone have any knowledge as to where to locate, that Disclosure, nor the result of any investigation.

The Inquiry has not been able to form an opinion whether the matters disclosed by Mr. Smylie were adequately addressed.

In one sense the events related to Mr. Smylie are remote from current day. They took place prior to the current term of the elected body. In another sense they indicate an inability of Council to both fulfil its obligation under the Protected Disclosures Act and to review its functioning.

The Inquiry approached the Council following the conclusion of the Public Hearings to provide details of and the investigations undertaken regarding Protected Disclosures.

Council was able to provide three files, which have been reviewed. Additionally Council referred to another matter, which appeared to relate to a Protected Disclosure. Separately, the Inquiry has been able to ascertain that at least five other such disclosures were made to ICAC. It appears that ICAC resolved not to investigate these matters.

5.4.4.4

After obtaining permission from the author, the Inquiry has reviewed a disclosure made to ICAC in early 2000. The disclosure attached copies of correspondence passing between Council and the author. The matters that flow from this correspondence include allegations of improper conduct on behalf of senior staff members in seeking to terminate the employment of a member of staff. The information is insufficient for the Inquiry to form a judgement on the matter.

Having reviewed the material, which was provided to ICAC, the Inquiry is concerned that the member of staff was being used as a scapegoat to cover Council's failings to provide its annual accounts on time.

The disclosure attached correspondence passing between its author and the Council. It alleged that certain fictitious material prejudicial to his position had been released into the public domain. Further, it raised concerns that material said to have supported allegations made against the author may simply not have existed.

The correspondence passing between the author and Council reveals that within two days of these allegations being put to Council, an offer of settlement was put, to the author. This offer was conditional upon his resignation.

A meeting had been called between Council's representatives and the author. Council was placed in a position where, if it wished to pursue its allegations against the author, it would have to put up its evidence, that being notes of certain meetings. Mr. Symons, whilst initially agreeing to provide his notes, subsequently withdrew this offer, on "legal advice".

5.4.4.5 A deed of settlement, drafted by Council's solicitors accompanied the offer of settlement.

Relevantly the Deed raised none of the issues which had been the subject matter of the dispute. Particularly it made no allegations against the former employee.

5.4.4.6 On September 22 2000 Council received a letter from the Ombudsman's Office which advised that the Ombudsman had received a complaint falling under the Protected Disclosures Act.

The Ombudsman, after describing the nature of the allegations, sought Council's answer to four specific questions.

On October 9 2000, the Director of Public Office, Mr. Symons, responded on behalf of Council.

Whilst the response might be considered to be curt, there is nothing to suggest that Council failed to respond in the terms which were required.

The file relating to another disclosure made by a member of staff was provided. This disclosure related to a period prior to the term of the current elected body. No issues appear to arise in Council's investigation of this disclosure which appear to bear on the current Inquiry.

5.4.4.7

Many Submissions received by the Inquiry raised staff issues. This was acknowledged by Council's General Manager, Mr. Blackadder, in the following terms:

Mr. Blackadder's appearance on March 19 2003.

Public Hearings Transcript – March 19 2003

MR BLACKADDER: ... There were 22 submissions which referred to staff issues, they concerned performance of staff influenced by councillors, favouritism, failure to enforce DA conditions. ...

Whilst this report does not adopt the categorisation provided by Mr. Blackadder, it is clear that a substantial number of Submissions which were received by the Inquiry specifically referred to staff.

Many Submissions particularly referred to staff in favourable terms, some contrasting their approach and the assistance provided by them to the conduct of Councillors.

Other Submissions contained criticism of staff in both general and specific terms. Some Submissions named particular staff.

It was made clear in the opening address of the Public Hearings that the focus of the Inquiry was directed at issues of governance affecting the efficiency and effectiveness of Warringah Council. It was emphasised that the Inquiry was not a trial of individuals. The point was repeated on several occasions during the Public Hearings.

Whilst the Inquiry requested that speakers not name particular members of staff, at times this request was not always adhered to. Additionally Council staff had been named in written Submissions.

In order to ensure that staff were able to respond to comments made of them the following arrangements were put in place:

So far as possible staff called to speak at the Public Hearings were expressly invited to respond at the conclusion of questions put to them.

The evening session on March 27 2003 was expressly put aside for staff to respond and an invitation was given to them to attend.

An opportunity to provide a written response during or following the conclusion of the Public Hearings.

Some staff did take up these opportunities.

It is again appropriate to refer to the Terms of Reference, in order to deal with issues involving the staff and the public.

The Terms of Reference required an Inquiry into the efficiency and effectiveness of the governance of the Council.

The Inquiry was accordingly called upon to obtain a view of the public's perception of the Council staff, rather than to conduct an investigation.

5.4.4.8 Three themes emerged from the Submissions regarding the adverse perceptions held by the public.

- That staff make improper use of Council's resources
- That staff exhibit arrogance towards the public
- There exists a lack of control exercised over Council staff

In a number of instances the views expressed by the public appear to have good foundation.

Mr. Trevor Otton, a former Police Officer provided a lengthy Submission and spoke at the Public Hearings regarding the prosecution of a parking matter, mounted by Council.

The offence alleged that Mrs. Otton had not parked within marked lines in a car park. At the time of the alleged offence there were no lines marked in the car park.

The prosecution was quite baseless as the offence simply could not exist.

Despite this being drawn to Council's attention early in the proceedings, Council continued with the prosecution. The matter raises concerns over the inability of staff to properly review the matter; despite being called upon to do so at an early time, or even subsequently as the prosecution proceeded.

These concerns pale into insignificance when compared to Council's attempt to support its case. After obtaining a copy of photographs provided by the Council, which were in the prosecution brief, Mr. Otton issued a subpoena directed to the Council requiring production of the Council's file.

The file revealed that Council staff had photographed the car park some months later, after the lines had been marked, and these photographs had been provided to the police prosecutor as part of his brief.

There can only be one conclusion reached from the conduct of Council's staff, the inclusion of the photographs was an attempt to pervert justice.

Whilst a parking offence is not a particularly serious matter, it must be remembered that perverting the course of justice is a criminal offence, and the actions of the Council staff reflect very badly upon the governance of the Corporate Body.

The Council provided a response to this matter in a Briefing Note (Volume 3, Appendix 2). Council seeks to excuse its actions upon the basis that the person issuing the parking ticket ticked the wrong box on the form. This Submission is irrelevant, and demonstrates a continuing inability of Council to accept legitimate criticism.

Any instance of this nature raises substantial concerns over the governance exercised by the corporate body.

5.4.4.9 This was not the only matter where Council's conduct in legal proceedings was raised. Mr. Kerr, a Director of Adavale Investments Pty Ltd, made a Submission to the Inquiry and spoke at the Public Hearings.

Mr. Kerr detailed events surrounding projects at Cromer and Manly Vale and the conduct of the Council in proceedings instituted by the company, on each occasion, in the Land and Environment Court and Council's dealings surrounding the proceedings. In so doing, Mr. Kerr questioned Council's approach. In one instance shortly prior to the Hearing, Council accepted that it could entertain an application for review after a lengthy period when it had vehemently denied that it could do so.

In the other matter, Council had failed to indicate that it would offer no evidence until the first day of an anticipated four-day Hearing.

This approach is simply unacceptable. Again it demonstrates serious concerns about the corporate governance of the Council.

In evidence given to the Inquiry, Mr. Kerr detailed the costs directly incurred in the latter proceedings in the following terms:

Public Hearings Transcript – March 21 2003

MR BROAD: ... Can I explore that a little bit with you? You have spoken about the delays in lodging an appeal with the Land and Environment Court in obtaining a hearing. In this case, you have just spoken about, you actually got an approval on the first day of the hearing.

MR KERR: Correct.

MR BROAD: Do I assume that up until that time, you had to prepare the case as though it were to run?

MR KERR: Absolutely.

MR BROAD: So for that purpose, did you have to retain consultants?

MR KERR: Yes.

MR BROAD: My understanding of the Land and Environment Court is this, that the proceedings that you would have brought would have been known as Class 1 proceedings.

MR KERR: I'm not sure.

MR BROAD: They were an appeal against a refusal of a development that it is usual for the court not to make an order for costs.

MR KERR: Correct.

MR BROAD: Adverse to a party. In other words, do I - were you ultimately left in this position that you had prepared a case for hearing, that you had retained consultants to prepare reports, that you had exchanged reports with Council, that you had to retain your consultants to reply to the Council reports, that you had retained legal representatives. They involved a solicitor. Did they involve a barrister?

MR KERR: Yes, they did.

MR BROAD: That in retaining your barrister, you retained the barrister on the basis that the barrister would appear for 4 days.

MR KERR: Correct.

MR BROAD: That in leading up to the hearing, you were involved in conferences with your barrister.

MR KERR: Yes.

MR BROAD: Did your barrister adopt the usual approach of saying: I have taken a brief for 4 days. Although I'm only here for 1 hour, I will still charge you for the 4 days that I've set aside.

MR KERR: I don't think he charged us for the whole 4 days from memory.

MR BROAD: Did he charge - - -

MR KERR: But he charged - - -

MR BROAD: - - - an additional amount over the 1 hour?

MR KERR: I think so.

MR BROAD: Did you obtain an order for costs requiring Council to pay your costs?

Public Hearings Transcript – March 21 2003 (cOnt.)

MR KERR: We didn't receive it. No. We were advised that it's a very difficult thing to obtain anyway.

MR BROAD: It's unusual for the court - - -

MR KERR: Yes. And we didn't really want to sort of upset too many people I guess either.

MR BROAD: So you were put to substantial expense when on the first day, Council presented no argument.

MR KERR: Correct.

It must be remembered that in preparing the matter for hearing, the Council bore similar costs. As a sidelight it might be noted that Council in its Submission advised that during the current term of the elected Council, its legal fees had been \$4.6M against a budget of \$2.5M.

Another instance, highlighted in a number of Submissions pertained to Mrs. Nan Adler. Mr. Barr detailed the conduct of Council in its pursuit of Mrs. Adler. The details were also outlined in other Submissions including those of Mr. De Luca and Mr. Darby.

A copy of the judgement of the Land and Environment Court has been reviewed. It is apparent that Council staff acted unreasonably in their pursuit of Mrs. Adler. In so doing Council's resources have been improperly used on an apparently minor application to increase the commercial space of Mrs. Adler's ski shop. Evidence available to the Inquiry suggests a campaign of harassment metered against Mrs. Adler, including requirements to undertake four separate traffic assessments inspections of Mrs. Adler's shop. Pursuit of trivial complaints and allegations, including:

- Allegations that a parking space was 2 inches short, although previously passed
- That a counter had been moved
- That a delivery truck was 3 tonnes rather than the permitted 2 tonnes.
- Ultimately Council's actions cost Mrs. Adler \$150,000 for a 150m² site.

Other members of the public provided written submissions and spoke at the public hearings of Council's failure to properly present cases in The Land and Environment Court. Some of these matters are dealt with in Section 7.4.

On a different note, Mr. Wayne Robinson spoke of his attempts to warn Council staff of engineering problems relating to the design and construction of light poles along the beachfront. Mr. Robinson detailed his attempts to highlight design and construction flaws to the Council, and Council's refusal to consider his Submission.

Improper use of resources not only involves misapplication of resources at the outset, but also includes, in the view of the Inquiry, a failure to take adequate steps to correct errors such as those highlighted above when they are drawn to Council's attention.

This was not the only evidence given to the Inquiry falling into this character. Mr. William Williams in speaking to the Inquiry highlighted obvious inadequacies in stormwater management, suggesting Council was accepting an uninsured risk approving developments in flood prone areas with a lack of proper consideration. The photographs provided by Mr. Williams strongly evidenced his concerns.

5.4.4.10 Other Submissions dealt with what is perceived as arrogance towards the public.

This was a recurring theme. In his evidence at the Public Hearings Mr. Kirk May provided the following evidence:

Public Hearings Transcript – April 7 2003

THE COMMISSIONER: ... You also make reference to the way in which your communications with the staff took place in this matter. Again without naming names, you talk about their professional attitude. I wonder if you could just tell me, in a summary sort of way, what worried you about that.

MR MAY: No response to my telephone calls, minimal response to my emails and a blatant and I think a petulant disregard to my concerns about the process of my matter and I've stated to you in my letter where I believe the cause of that response lies directly. I don't think it lies broadly within that department.

THE COMMISSIONER: Can you tell me a little further what - - -

MR MAY: I think people - people further down the line are generally - generally treat you with humility and in a proper, fair and reasonable way but my experience with the - those individuals named at the other end I'm most unhappy and if I were an employer I would not be happy with that standard of conduct. I'd be most unhappy given the responsibilities.

THE COMMISSIONER: Did you complain to anyone about that? Who did you complain to? I don't mean the person but was it General Manager or Councillors or?

MR MAY: No, because I think up until now, I believe it's inappropriate in a professional matter to be personal, but given this general issue, community issue, I firmly believe I had to name these individuals. But prior to that, it's just not my matter. It's been a professional, a business matter and I've always sought to avoid that.

Mr. Martin Meanwell describes the attitude of staff as follows:

Submission 106

My attempts to get information from council staff were frustrating and sometimes impossible. The attitude of the staff was one of arrogance. They acted as though I had no rights to question the application...

The author of another Submission referred to herself as being:

Submission 191

fobbed off, lied to and even intimidated.

5.4.4.11

A great number of the Submissions which were received by the Inquiry related problems encountered by the public when raising concerns or raising complaints with Council staff.

Likewise many Submissions raised complaints about the manner in which Council staff deal with, or in many cases, failed to deal with the concerns or complaints. In many Submissions members of Council's staff were named.

Major recurrent themes associated with complaints affecting staff in Submissions received by the Inquiry were:

- A failure to act on complaints
- A failure to provide a response to complainants
- The conduct of staff in their dealings with the public

Perhaps the most succinct and concerning comments made regarding staff was provided by Mr. Kerry and Mrs. Patricia Timms quoting a Council Officers comment on a site inspection, in the following terms:

Submission 182

Architect plans were discussed with council officer before we purchased 27 Curl Curl Parade. We were advised the plans complied with all council regulations and should have no problems obtaining development consent. Planning approval was received. Building alterations were commenced. Council officer came on site and demanded that we agree to major alterations to our back deck or a stop work order would be issued. The council officer's comment "I can always find something if I want to issue a stop work order. I came here to get you to change this and I was not leaving until I did so."

Having regard to the concerns over complaints which lay in the background, the Inquiry wrote to the Council seeking 'Any Policy adopted by the Council for dealing with complaints made by members of the public, and if varied over the period from September 20 1999 to January 15 2003, a copy of each version adopted during such period'.

Council responded to this request in the following terms:

COUNCIL RESPONSE TO REQUEST FOR DOCUMENTS

The Council does not currently have a formally adopted Complaints Management Policy.

At present all complaints are referred to the relevant Director for investigation and response with advice to the complainant as to the outcome or action on the complaint. On some occasions a complaint will be escalated to the General Manager or the Public Officer for investigation, particularly where the complaint involves a staff member or involves suggestions or claims of improper conduct by a staff member.

The Council's administrative procedures require a response to all correspondence within 15 working days and that can be either a final response or, if that is not possible, an acknowledgement of the correspondence and the actions being taken.

During 1998 a draft policy was developed which, whilst not being formally adopted by the Council, has provided guidelines and procedures which are being followed by the Council at present. I attach (Attachment A) a copy of that Draft Policy.

Staff are currently in the process of reviewing the Draft Policy and have prepared a revised Draft Customer Complaints Management Policy (Attachment B). This draft is being assessed by managers within the Council and is expected to be finalised in early April 2003.

In its letter to Council, the Inquiry also sought statistical details showing (or tending to show) the number of, nature of and manner of resolution of complaints received by the Council in the period from September 20 1999 to January 15 2003.

In turn Council responded in the following terms:

COUNCIL RESPONSE TO REQUEST FOR DOCUMENTS

Complaints received by the Council are file-coded to the subject matter of the complaint and the systems in place for the above period do not allow for extraction of the statistics sought. To do so would be an extremely long and involved physical search of past records.

It is also a matter of interpretation of a "complaint" and when a matter changes from being a request for service to being a complaint. The ICAC publication on complaints handling provides a very useful definition which has influenced the draft Policy document referred to in Item 8 and enclosed with the letter.

For several months staff have also been preparing for the introduction of an information management and recording system (DataWorks) which will commence rollout across the Council in April this year. That system will have search facilities which will enable statistics to be produced and analysis and resolution of complaints including escalation systems for senior managers to monitor the attention to, and resolution, of complaints.

Given the Council's complaints history this response was quite astounding.

In a subsequent letter dated March 18 2003, Council's Director of Public Office, Mr. Symons, did indicate

Council Letter - March 18 2003

As a matter of internal policy, any complaints received regarding a particular staff member are referred to the General Manager for attention.

Apart from this Council was unable to provide details of any complaints handling policy.

Council's apparent inability to accept that it was the recipient of complaints may also be inferred from its approach as again highlighted by Mr. Symons in the same letter, when describing Council's computerised service request system "Inform":

Council Letter - March 18 2003

As mentioned in my letter of 10 March 2003, matters like those above are coded to the relevant subject matter and not coded to a "complaints" file.

...

Requests entered into the Inform system are not coded as to whether or not they are a "complaint". Rather it is a service request record system.

The Inquiry pursued this matter with Council's General Manager in the Public Hearings, in the following terms

The question of an appointment of an internal ombudsman to deal with complaints was subsequently taken up by Mr. Blackadder in his reply on April 10 2003. Mr. Blackadder referred to an investigation that commenced on December 6 2002 which indicated his desire to examine alternative complaints management policies "including an internal ombudsman". In his earlier evidence, Mr. Blackadder had said that the appointment of an internal ombudsman had been considered, but that this consideration had not been disseminated to the Councillors.

At the conclusion of evidence in reply Mr. Blackadder advised that Inquiry that he had taken a decision to introduce an Internal Ombudsman as soon as one can be recruited.

It is the Inquiry's view that such an appointment may assist to restore public confidence in the Council and may, if other appropriate steps are taken serve to assist in Council itself dealing with concerns and complaints. Ultimately it will be necessary for the Council to gain the public's confidence in the entirety of its processes, not merely those which relate to complaints handling procedures and policies before it can be said to have secured public confidence in it.

Fundamental to dealing with the concerns and complaints which will inevitably be raised with Council are governance mechanisms which will ensure:

- Probity
- Accountability
- Continuity in the manner in dealing with matters
- Timely response

In order to achieve this, Council must also adopt a policy for dealing with complaints, a system which allows tracking and auditing of complaints, as well as sufficient and properly trained staff.

5.4.4.12 Mr. Russell Smylie made a Submission to the Inquiry and subsequently gave evidence during the Public Hearing on April 9 2003.

The particular matters underlying Mr. Smylie's departure from Council have been examined elsewhere and are not relevant to this part.

Shortly after his termination, Mr. Smylie brought proceedings alleging that he had been unfairly dismissed. These proceedings were later settled, with Mr. Smylie and Council executing a Settlement Agreement. The Agreement provided for payment of \$27,594.32 which was identical with the amount sought by Mr. Smylie in his claim. It comprised 26 weeks pay.

The claim brought by Mr. Smylie alleged matters, which if published, would have caused embarrassment to the Council. Similarly, the disclosure of matters contained in the disclosure would have caused embarrassment to the Council.

Having reviewed Council's file and having heard from Mr. Smylie, the Inquiry has formed the view that the decision to terminate Mr. Smylie's employment arose from the Protected Disclosure made by Mr. Smylie.

Accordingly, apart from the prospects of Council successfully defending the proceedings instituted by Mr. Smylie, there were cogent reasons for Council to find a means of settlement, lest the matters outlined above be ventilated in the proceedings.

The Settlement Agreement contained provisions, which are common to settlements reached in Court proceedings, providing that the payment was being made without admission of liability, and providing releases by either party for all claims against the other.

The Agreement further provided that the terms of the Agreement not be disclosed.

Whilst this course is common in Court proceedings it was surprising to see that Council was entering into Deeds of Release containing a confidentiality clause with other staff when staff had become redundant, been terminated accordingly, and paid the amount calculated to be due to them. This was particularly so, as it appeared that no Court proceedings had been brought by them.

The Inquiry obtained a copy of one such Deed with permission of the person involved which demonstrated the lengths the Council thought were appropriate to ensure confidentiality, it contained the following:

Deed of Release

8.	CONFIDENTIALITY
8.1	This Deed is confidential. Each party must not disclose to anyone the terms of this Deed unless the other party first agrees in writing.
8.2	Neither party must disclose to any person, including but not limited to, the media or any member of the public, any information or documents relating to the circumstances of the Employee's Cessation of Employment, the negotiations between the parties, the Investigation Process or any other matter relating to or incidental to the Employee's Cessation of Employment, the negotiations between the parties or the Investigation Process.
8.3	Without limiting the above, the Employee agrees not to disclose the terms of this Deed or any of the matters referred to in clause 8.2 to any elected members of the Employer or any of the Employer's existing or former staff; or to the Ombudsman, the Department of Local Government or the Independent Commission Against Corruption (except to the extent the Employee is called upon to give evidence).
8.4	Clauses 8.1, 8.2 and 8.3 do not prevent either party disclosing information to his or its lawyer or accountant, or from giving evidence where called upon as part of an ICAC inquiry or otherwise where the law says information must be disclosed (for example, in a tax return).
9.	PROTECTION OF CONFIDENTIAL INFORMATION
	The Employee acknowledges and agrees that the Employee remains under an ongoing duty not to use or disclose any confidential information belonging to the Employer for as long as that information is not available in the public domain.
	NO DISPARAGEMENT AND RETRACTION
10.1	The Employer and Employee agree not to bring each other into disrepute in any way.
10.2	The Employer will provide the Employee with a letter in the form attached as Schedule 2 to this Deed which may be used for the purpose of seeking other employment but not for general publication or disclosure.
11.	BENEFIT OF THIS DOCUMENT
	As well as the Employer, each other member of the Group has the benefit of this Deed and may independently enforce it against the Employee.

There is another interesting aspect to this Deed. It will be seen that the last clause refers to “the Employer” and “each other member of the Group”. The Deed settled a claim in relation to the termination of an employee. The employee had of course been employed by the “Council” that is the Corporate Body, under a contract of employment. The Council is described as the “Employer” in the Deed. Despite this, the Deed contained the following definition in the interpretation clause:

Deed of Release

... Group means the employer and its Councillors (including former Councillors), employees (including former employees) and agents. ...

In consequence the former employee’s silence was being bought by

- the employer,
- the councillors,
- the former Councillors,
- existing employees part employees, and
- anyone who might be able to describe himself, herself or itself as an “agent”.

This approach is difficult to reconcile, particularly so, as Local Government is intended to operate under a paradigm of “openness”.

Good governance has not been served by gagging former employees, nor by dismissing them in the circumstances which have been outlined.

In May 2000 Council’s Trust Harassment and Standards Project team reported:

Submission 349

Trust within Council is a long-term goal. It will not be achieved unless there is a dramatic change to the organisational culture and behaviour that has predominated within Council for many years.

Council’s 2002 Organisational Culture Survey of staff outlined the two most commonly reported negative things about Council as:

- Councillor interference and assorted bad behaviour, and
- Poor management and leadership style and practices.

The Inquiry did not receive evidence of recent removal of staff, in the nature outlined in this part, and is therefore unable to say whether Council still requires staff to enter into Deeds of Settlement and if so whether Council still requires that such Deeds contain the confidentiality clauses highlighted in this part. When Council's Director of Public Office was questioned on this topic he gave the following evidence:

Public Hearings Transcript – March 24 2003

MR. BROAD: ... Recently, when I attended Council's Chambers, I looked through a number of the Human Resources files. In some of those files there were deeds, or agreements entered into between staff who were leaving Council and Council. Is it the usual practice of Council that when a member of staff is leaving, to require them to execute a separate agreement?

MR. SYMONS: The files I think - and the ones you are referring to are staff who were under contract of employment - - -

MR. BROAD: I think some were, yes.

MR. SYMONS: And it is normal as part of - when I say it is normal - it was normal in respect of the - those staff whose employment ceased before the end of their contract, and they were paid some compensation for the termination of their contract that there was a confidentiality agreement entered into, that restricted the disclosure of what the terms of the settlement would be.

MR. BROAD: If, as you said earlier, the staff were paid what was calculated to be owing to them, whether under their contract or if they were not under contract according to the Award, why would there be a necessity to have a clause which required non-disclosure of that?

MR. SYMONS: The decision or the process to do that was taken on advice from the lawyers who handled the termination of those contracts on behalf of the Council, that the terms and conditions of the termination should remain confidential as were the terms and conditions of their contracts.

MR. BROAD: Did they assign - do you recall whether they assigned a reason in their advice for that course to be adopted?

MR. SYMONS: I don't, Mr. Broad, I don't recall.

The Inquiry is of the view that it is inappropriate for Deeds of Settlement between Council and staff following their departure from Council and staff following their departure from Council to contain confidentiality clauses prohibiting disclosure beyond those matters contained in Section 12 (7) of the Act, and recommends accordingly.

The Inquiry is further of the view that the use of such deeds should be limited to circumstances where court proceedings have been brought or threatened, in writing, by the employee.

5.4.5 Protection of staff and outcomes if an administrator was appointed

5.4.5.1 Section 255 of the 1993 Local Government Act provides that the Governor has power to declare all civic offices, that is the office of Councillor or Mayor, to be vacant if:

- There has been a public inquiry concerning the Council and
- After considering the results of the inquiry, the Minister has recommended that the Governor make such declaration.

Section 256 permits the Governor to appoint an Administrator. The Governor may make further orders as the Minister recommends as necessary in the circumstances.

When the Administrator takes office, persons holding civic office cease to hold office and the Administrator acquires all the functions of the Council – (Section 258). Regard should be had to the definition of ‘Council’ appearing in the dictionary to the Act which defines Council in the following terms:

Local Government Act 1993 – Dictionary - Definition of Council

(a) means the council of an area, and includes an administrator, and

It is important to emphasize that the appointment of an Administrator serves only to remove Councillors and the Mayor from holding civic office. It does not serve to remove the General Manager or any staff from their positions.

Whilst by virtue of Section 334 of the Act, the General Manger is appointed by the Council (the elected body) all other staff are appointed by the General Manager, albeit the General Manager is required to appoint certain senior staff in consultation with the elected body.

Accordingly, the appointment of an Administrator does not affect the tenure of the General Manager or staff.

Likewise, the appointment of an Administrator does not affect the manner in which the corporate body carries out its functions.

Given this, if the appointment of an Administrator is a consequence of the recommendations of this Inquiry, such appointment would not bring with it a direct effect on the staff.

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