



CRIMINAL JUSTICE COMMISSION

COMPLAINTS AGAINST LOCAL
GOVERNMENT AUTHORITIES IN
QUEENSLAND — SIX CASE STUDIES

JULY 1991



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QUEENSLAND**

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Dear Sirs,

In accordance with Section 2.18 of the Criminal Justice Act 1989-90, the Commission hereby furnishes to each of you its Report into the investigation of complaints against Local Government authorities in Queensland.

Yours faithfully

SIR MAX BINGHAM QC
Chairman

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COMPLAINTS AGAINST LOCAL GOVERNMENT AUTHORITIES IN QUEENSLAND - SIX CASE STUDIES

A. INTRODUCTION

The Criminal Justice Commission has become increasingly concerned by the large number of complaints received by it regarding the operation of local authorities in Queensland. From the tenor of many of the complaints it is apparent that high levels of concern and overt cynicism with regard to the administration of these authorities are shared by many members of the public. It seems that a broad cross-section of the community has unfortunately come to expect a lack of accountability, favouritism and bias as an inevitable by-product of dealings with many Council officers and elected officials.

Within Queensland there are presently 134 local authorities with total revenue and expenditure of \$1.6 billion per year, exclusive of loan funds and grants. The Brisbane City Council as the largest Council in the State expended some \$700 million as part of its budget for the 1989/90 financial year.

As at 31 May 1991, 198 complaints detailing some 370 allegations had been received. These complaints accounted for approximately 8.7% of all complaint matters dealt with by the Commission. The substance of each allegation was examined and investigated by Commission officers.

An analysis of the results of the investigations has enabled the Commission to identify areas of concern in need of immediate redress. It has also disclosed that many of the problems encountered have been common to the administrations of local authorities throughout Queensland. Of those investigations completed, six have been selected as the case studies which form the basis of this Report. Each study includes detailed findings and recommendations made by the Commission. General issues and problems which have emerged as common to each of the studies are identified in the final section of the Report, along with anti-corruption measures and recommendations for the prevention of crime.

B. THE PURPOSE OF THIS REPORT

One of the statutory functions of the Commission is the responsibility to render advice and assistance to the community concerning the detection and prevention of

official misconduct.¹ The Commission is mindful of the significance of this role and hopes that by educating the various local authorities as to appropriate work practices and ethics, the incidence of official misconduct and corruption in local government in this State can be significantly reduced. In drawing attention to a range of matters in which standards have fallen far short of those required of public officials, the Report is intended to alert all those persons with an interest in or responsibility for local authority matters, including Council officers and auditors, to actual and potential problem areas and present a positive contribution to the process of ensuring greater accountability by local authorities.

C. THE JURISDICTION OF THE CRIMINAL JUSTICE COMMISSION

The Criminal Justice Act 1989-1990 empowers the Criminal Justice Commission to investigate allegations of corruption and official misconduct by public officials and others who, by their conduct, adversely affect or could adversely affect the honest and impartial discharge of duties by public officials.

The offence of official corruption is created under Section 87 of the Criminal Code (Queensland) and punishable on conviction by imprisonment for up to seven years. In essence, Section 87 provides that any person who holds any public office and, being charged with the performance of any duty by virtue of that office, corruptly asks, receives, or obtains any property or benefit of any kind for himself or any other person on account of some action by him in the discharge of the duties of his office, commits the offence of official corruption.

The Criminal Justice Act provides that the responsibilities of the Commission include the investigation of official corruption in units of public administration and the investigation of all cases of alleged or suspected official misconduct by persons holding appointments in units of public administration [cf: Sections 2.15(f)(iii) and 2.20(2)(c)(ii)].

Section 2.23(1) of the Act defines the general nature of official misconduct. It provides, inter alia, that official misconduct is:

- (a) Conduct of a person, whether or not he holds an appointment in a unit of public administration, that adversely affects or could adversely affect, directly or indirectly, the honest and impartial discharge of functions or exercise of

¹ Criminal Justice Act 1989-1990, Section 2.20(2)(f)

powers or authority of a unit of public administration or any person holding an appointment therein.

- (b) Conduct of a person while he holds or held an appointment in a unit of public administration that involves the discharge of his functions or exercise of his powers or authority in a manner that is dishonest or not impartial.

The definition also specifically incorporates conduct which constitutes a breach of trust or involves the misuse of information or material acquired in an official capacity.

In the case of holders of appointments in units of public administration, the conduct must constitute a criminal offence or a sufficiently serious disciplinary breach to provide reasonable grounds for termination of employment.

The term "Unit of Public Administration" is defined under Section 1.4(f) to include every corporate entity that is constituted by an Act, or that is of a description of entity provided for by an Act, which in either case collects revenues or raises funds under the authority of an Act.

For the purposes of determining jurisdiction to conduct investigations into matters involving local authorities, the Criminal Justice Commission found that the relevant local authorities were units of public administration and that members, officers and employees of the local authorities were holders of appointments in units of public administration, in terms of the Act.

In investigating the allegations of official misconduct, Commission staff had reference, in addition to those sections of the Criminal Justice Act previously addressed, to the following legislation:-

- . Local Government Act 1936 as amended;
- . City of Brisbane Act 1924 as amended;
- . Criminal Code (Queensland)

D. CASE STUDIES

The case studies presented detail investigations into complaints involving two large Councils, two medium-sized Councils and two small local authorities. In making its selection, the Commission has sought to represent a cross-section of local

authorities and convey an indication of the scope of matters relating to local authorities which have been the subject of complaint to the Commission.

As the purpose of this Report is intended primarily to be educative rather than punitive, the names of individual local authorities and persons involved, or other identifying information, have not been included.

All investigations were undertaken by one or other of the multi-disciplinary teams of investigators attached to the Commission. These teams are composed of lawyers, accountants and selected police officers on secondment from the Queensland Police Service, with appropriate support staff. In most cases, the work of the investigative teams was supplemented by the conducting of closed hearings to which various Council aldermen, employees and contractors were called to give evidence on oath.

The Commission, in considering issues in relation to possible disciplinary charges of official misconduct or other charges, must make determinations at the conclusion of its investigations subject to a certain standard of proof. The Criminal Justice Act is silent on the question of the standard of proof to be applied although Section 2.43(1) of the Act is of assistance. The Section provides:

"A Misconduct Tribunal is not bound by rules or the practice of any Court or Tribunal as to evidence or procedure in the exercise of its jurisdiction, but may inform itself on any matter and conduct its proceedings as it thinks proper".

There is clear authority² that such a clause distinguishes disciplinary proceedings from criminal proceedings. Thus a Tribunal constituted to hear disciplinary charges of official misconduct would not be required to apply the criminal standard of proof beyond reasonable doubt and could make its findings on the balance of probabilities according to the civil standard. The Commission considers that, by analogy, it is not required to apply the criminal standard of proof in making its investigative findings or in proceedings before it.

The civil standard of proof varies according to the gravity of the finding to be made. Sir Owen Dixon in Briginshaw -v- Briginshaw (1938) 60 CLR 336 defined the standard of reasonable satisfaction necessary before findings should be made and in so doing, nominated a series of factors which could effect a variation of the standard of proof. At pages 361-362 he stated:

"Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the

² Per Carter J in Re: Seidler (1986) 1 Q.R. 486 at P.491

reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether an issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect references ... This does not mean that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest, and the reasonable satisfaction which in a civil issue may, not must, be based on a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained".

The Commission also finds support for its view that the requisite standard of proof for matters which it investigates is that of "reasonable satisfaction" in the adoption of that standard by inquiries such as the Royal Commission appointed to inquire into the loss of the Australian naval ship "Voyager" and the recent Commission of Inquiry into certain allegations concerning Mr Justice Vasta, conducted by Sir Harry Gibbs, Sir George Lush, and the Honourable Michael Helsham.

CASE STUDY A

This investigation involved the large local authority of a primarily urban coastal community and was commenced as a consequence of an allegation made to the Commission by a Member of Parliament on 26 July 1990 on behalf of a resident and ratepayer of the local authority.

Allegations

The substantive complaint was that the Council in question had dealt exclusively with a certain car maintenance company as a result of gifts of liquor made to the Council employee responsible for fleet maintenance and repairs.

Profile of Subject of Complaint

Mr A was identified as the purchasing officer against whom the allegation was made. He had been employed by the Council in that capacity for a period in excess of 12 years and was responsible for the organisation of repairs to Council plant and equipment on reference from the Workshop foreman. Mr A had authority to authorise purchases of up to \$1,000.

Investigation

Interviews were conducted with Council employees and officers and employees of the car maintenance company and relevant documentation seized.

Two days of hearings were conducted before the Chairman.

A comprehensive analysis of Council documents, involving 1200 computer records, was undertaken. A detailed financial profile of Mr A for a period of 3 years was also developed.

Chronological Summary of Facts

- | | |
|----------------|---|
| 1973 | Company commences dealings with Council as preferred supplier. |
| c.1978 to date | Mr A commences employment as a Purchasing Officer with the Council and attends company in social capacity at least once |

per week. Alcohol is consumed on these occasions. Preferred supplier status of company is continued.

1986-1987 Evidence that Mr A is observed in presence of 3 directors of company at company premises. Allegation that Mr A was handed a roll of money by one of the directors.

It also appears that on four or five occasions throughout this period the private vehicle of Mr A was worked on by company employees without job cards being completed for work performed.

October 1988 - Council does \$280,000 worth of business with company.
November 1990 Many of the invoices (98% of 1448) were for less than \$1,000. The company has now maintained monopoly supplier status for a period in excess of 10 years, with Council business now valued at more than \$100,000 per year.

May - Purchase of boat by Mr A. for \$18,000. Irregular cash
December 1990 payments made throughout the period.

Relevant Legislation

The criminal offences considered for the purposes of the inquiry were those of official corruption, bribery and secret commissions (Sections 87, 88 and 442B of the Criminal Code)³ and offences under the Local Government Act, Sections 17(5) and 17(6)⁴. Charges of official misconduct under the Criminal Justice Act were also considered.

The Issues

1. Was there evidence of corrupt conduct or official misconduct on the part of Mr A ?

It emerged from the evidence that for over 12 years, Mr A had been visiting the company at least once a week and sometimes more frequently. Alcohol was consumed on those occasions. Whilst a former employee of the company testified that alcohol was available to staff and presumably to Mr A at no charge, this was contested by both Mr A and a director of the company, Director B, who testified

³ Annexure B(i),(iv)

⁴ Annexure A(iii)

that the alcohol was replaced by the person who drank it. Interviews with the other two directors of the company elicited a similar response to that of Director B.

Evidence was received that Mr A was observed approximately three or four years ago, in the presence of the three directors of the company, at the company premises. Mr A was handed a roll of money by one of the directors. The amount of money was unknown. The witness did not know the purpose of that payment and the purpose was not established by other evidence. The incident was denied by Mr A and all three directors of the company.

A former employee of the company gave evidence of having worked on Mr A's vehicles on four or five occasions and stated that job cards, which provided the basis for calculating the cost to the customers, were not completed for this work. The witness also stated that job cards were not completed with respect to work performed for other acquaintances of the directors. The office manager of the company could not recall seeing a job card for Mr A's vehicle. Mr A and Director B denied the provision of free services, but indicated that Mr A had been provided with services at a discounted rate, which was a rate advertised and made available to all Council employees.

A financial analysis of Mr A's private expenditure revealed that he had expended almost \$10,000 in cash between May and December 1990 towards the purchase of a boat. The expenditure could not be explained by reference to known sources of legitimate income of Mr A or his wife. The money had been paid on irregular occasions by sums varying from \$500 to \$3000, in \$50 or \$100 bills. The boat was purchased from friends of Mr A at an agreed total price of \$18,000.

Mr A explained that the payments emanated from funds which he received on the death of his father in 1983. He stated that the money had been found in cash by his brother and himself. His share was \$10,000. The money had not been recorded in any place or banked, but was used and then replaced when he sold an asset. Curiously, in October 1987, four years after his father's death, he borrowed money from a finance company for the purchase of another boat approximately half the price of the most recently purchased boat.

By way of explanation for the irregular nature of the payments, he stated that the friends from whom he purchased the boat allowed him to pay it off interest free over a number of months as they did not require the total sum to be paid at the outset.

For a period of more than twelve years, the Council through Mr A dealt exclusively with this company. Mr A admitted that the company had developed a monopoly over Council business and that he had made no real effort to investigate any other

supplier, even after approaches had been made by competitors offering their services.

2. Was there evidence of corrupt conduct on the part of the company and its directors?

It was clear on the evidence that the company had enjoyed a monopoly over Council business as a result of the relationship formed with Mr A. A comparison of invoices and orders taken from the Council with the orders and job cards produced by the company revealed that errors in favour of the company were common and invoice prices had been increased by sums of either \$100 or \$300 without explanation. Only one example was found where the error favoured the Council. The practice of increasing prices for Council work was confirmed by Director B. Mark-ups on parts supplied, taken from a sample of 50 job cards, varied from 100% to almost 500%. The evidence from competitors was that normal mark-ups ranged from 35% to 65%, and that mark-ups in excess of 100% would render their prices non-competitive. Care was apparently taken to ensure that the total cost of a job did not exceed \$1,000 - Mr A's expenditure limit.

The usual practice was for one of the directors to settle the costings for each individual job. Job cards were completed in the first instance by mechanics, while the office manager of the company issued the invoices to the Council after telephoning Mr A to confirm order numbers. The invoices disclosed total job costs only, so that neither Mr A nor other Council officers were in a position to be aware of the practice of the company with respect to on-costs and overcharging from the documentation supplied to the Council.

As Mr A admitted that he made no real effort to investigate other suppliers, there was no check upon the competitiveness of the total job costs.

3. Was the Council system properly administered and subject to adequate controls?

The Council workshop system required all vehicles in need of service to be examined by mechanics in the workshop, with the foreman deciding whether the work was to be performed within the workshop or externally. Mr A was responsible for the placement of external work, after obtaining estimates of cost. It was then his responsibility to submit an official order to the repairer. Items valued at up to \$1,000 could be directly authorised by him. Expenditure between \$1,000 and \$5,000 required three quotes prior to being authorised by a senior officer [not Mr A]. It appears that the workshop never enforced the inspection requirement as approximately half of the Council's vehicles serviced by the company were

delivered there by operators for repair without notification to the workshop foreman or Mr A.

Orders were never completed or submitted by the Council to the company prior to repairs being carried out. Estimates or quotes were not provided. All order forms were clearly stamped as confirmation orders, signifying that the service had been requested without documentation being completed.

Invoices were processed in bulk by the office manager of the company on a weekly or monthly basis. On processing the invoices, the office manager phoned Mr A for order numbers. No details of prices or work performed were given to Mr A. Upon delivery of invoices to the Council, Mr A completed orders to ratify the work billed as represented by the invoices. Mr A would also backdate a Council invoice form and suitably endorse it to create the impression that entries had been made in chronological order. The documentation was then forwarded to the accounts section and the invoice was paid.

Table A on page 12 illustrates the operation of the system.

Mr A was responsible for approximately 50% of all orders processed by the Council, although he was one of seventeen purchasing officers. He was spoken of by his superiors as a diligent and efficient officer. The orders to the company accounted for more than \$100,000 per year, which represented only a portion of total expenditure on maintenance of plant and equipment.

Complaints regarding the monopoly situation by competitors of the company went unheeded by the Council administration, which appears not to have investigated the claims raised or to have queried the pattern of expenditure. None of the reasons advanced for exclusively preferring the company, e.g. its size, supply of stock and its ability to provide quick service at competitive prices, could be sustained.

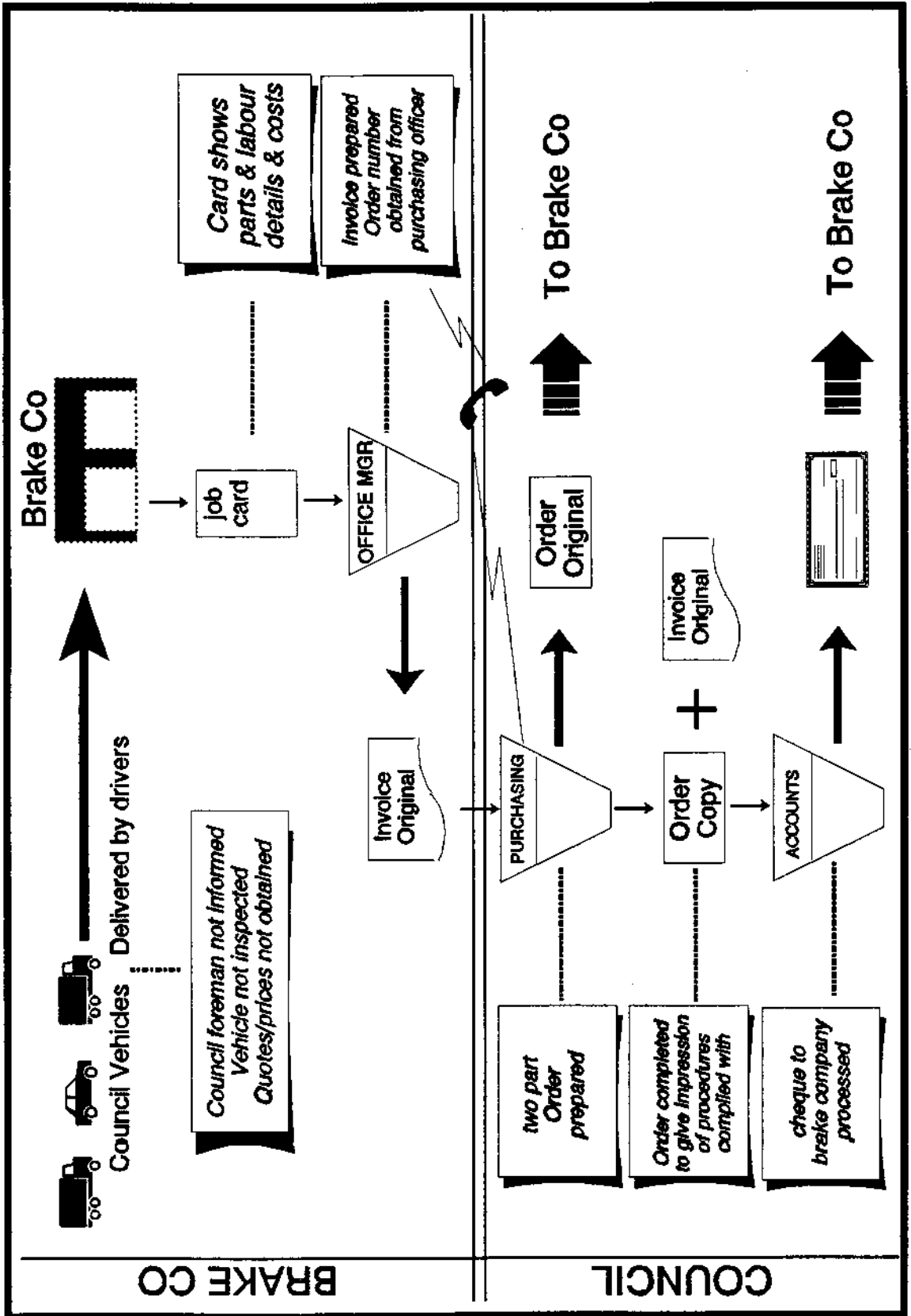
The Commission's Findings

- **The purchasing officer, Mr A, was not impartial in the discharge of his duties and his partiality resulted in one company securing a monopoly of Council business which the company exploited, and which resulted in the Council failing to secure value for funds expended. Prima facie evidence of official misconduct is thereby indicated.**

- **The Council system was not properly administered and internal controls proved inadequate, viz: appropriate procedures for the placement of repairs with private suppliers were not complied with. Controls in the accounting system were not triggered by the unusually high number of confirmation orders or anomalies as between other orders written by Mr A, and administrative procedures proved ineffective in addressing concerns raised with the Council regarding the monopoly situation.**

Mr A enjoyed an ongoing relationship with the officers of the company. He regularly had social drinks at the premises. His vehicle was serviced at reduced cost, if not without charge. He ensured that business was directed to the company and administered the necessary paperwork in a way which facilitated the relationship, whilst giving the appearance of abiding by the necessary procedures. The cash payments amounting to \$10,000 remain suspect, although there is no evidence to contradict Mr A's version of events on the point.

While it is possible that Mr A may have received a benefit in return for the monopoly he extended to the company, there is insufficient evidence upon which to base a prosecution against him for official corruption or receipt of secret commissions under the Criminal Code, or for an offence under s.17(5) of the Local Government Act based upon non-disclosure of a financial interest, as it cannot be established with any degree of certainty that he actually received any benefits, or, if any receipt could be proven, that this was conditional upon his furthering the company's interests or resulted in his own duties being improperly carried out. It must be borne in mind that the company had enjoyed preferred supplier status for many years prior to Mr A taking up the position of Purchasing Officer and he, on one view, merely continued to perpetrate the status quo. The administrative system had clearly broken down and Mr A cannot, on any interpretation of the facts, be viewed as solely responsible - the irregular account keeping practices must have been the subject of at least tacit approval by the accounts branch; the plant operators circumvented the designated system by delivering vehicles to the company and the workshop supervisor did not insist on making a prior assessment; any number of Council employees, from drivers to accountants, would have known that only one company was being utilised for the work, seemingly in perpetuity and in the face of complaints from competitors, yet nothing was done to address the situation.



Despite what suspicions may reasonably arise regarding alleged payments of money, gifts of alcohol and free car servicing, it cannot be established with any degree of certainty that Mr A had a vested interest in the status quo such as to render him liable for criminal prosecution. Put at its highest, it can only be said that Mr A had been in possession of money the source of which could not be reliably identified. The lack of impartiality displayed in favouring the company concerned, coupled with the evidence of the falsification of Council documentation, would certainly be sufficient, however, to justify disciplinary proceedings by the Council against Mr A. Charges of official misconduct under the Criminal Justice Act could not be preferred as the Council is not subject to the jurisdiction of the Misconduct Tribunal constituted under the Criminal Justice Act.⁵

There is no doubt that the officers of the company cultivated the goodwill of the purchasing officer and profited from the relationship. Their practice of overcharging the Council over a long period of time reflects adversely on their business morality, but does not of itself constitute a criminal offence. There is insufficient evidence relating to the alleged benefits extended to the Council officer by the company to support any criminal charges against the company officers.

Recommendations

- **The Council should conduct a thorough review of its system for obtaining outside servicing of plant and equipment. Any such review should take account of the problems faced by staff in dealing with the practicalities of day-to-day operations.**
- **The Council should review and examine in detail all exclusive relationships with suppliers and in particular, the relationship between purchasing officers and suppliers. The value obtained from suppliers for funds expended should also be carefully examined.**
- **The Council should review its system of internal auditing to ensure that adequate controls are in place so that abnormal patterns of ordering, authorisation and purchasing are detected and investigated at an early stage.**
- **The Council should establish procedure for the timely and adequate investigation of complaints of partiality from competitor companies/businesses, keeping in mind that the Criminal Justice Commission has an overriding mandate to investigate such complaints.**

⁵ Criminal Justice Act 1989-90, Section 2.36

- **The Criminal Justice Commission would have recommended that the position of the Purchasing Officer be prescribed as subject to the jurisdiction of the Misconduct Tribunal and that he be charged with official misconduct. The maximum penalty following conviction for a charge of this nature is dismissal. As the Purchasing Officer has resigned from the position, this course of action would serve no useful purpose beyond highlighting the problem in the interests of public education, which is the expressed purpose of this Report.**

CASE STUDY B

By letter dated 6 March 1990 the Director General, Department of Housing and Local Government, referred to the Commission a number of complaints which had been made to the Premier and Minister for Economic and Trade Development and Minister for Arts, the Honourable W Goss MLA, by members of a Shire Ratepayers Association. That letter contained various complaints which were directed primarily against the Shire Chairman but included complaints against other Councillors and the Council in general.

The Council administers a small rural shire with a country town situated in its geographical centre. It has recently experienced some expansion through subdivision.

Allegations

The substantive allegation addressed in this case study is that the Shire Chairman and two other Councillors had used their official positions over a number of years to obtain from the Council grass slashing work for their private contracting businesses. The other allegations investigated could not be substantiated.

Profile of Subject of Complaint

The Chairman of the Shire had been a Councillor since the late 1950's and Chairman since the early 1970's. His experience on the Council could thus fairly be described as extensive. The other Councillors had also served on the Council for considerable periods of time.

Investigation

Eighteen witnesses were interviewed and files, documents and various financial records were obtained. Nine witnesses were called before the Commission during the course of a two-day private investigative hearing. Three notices to produce were served upon the Council requiring production of a wide variety of documents and a comprehensive financial analysis relating to contracted grass slashing work was performed. Whilst the documents the subject of the notices were made available to the Commission, a great many man hours were expended by Commission investigators in evaluating and collating the Shire Council's records, which could at best be described as loosely maintained in a less-than-perfect

system. Substantial financial records were also obtained from a number of banking institutions in respect of several individuals and one company.

The Facts

(i) Analysis of Payments Made

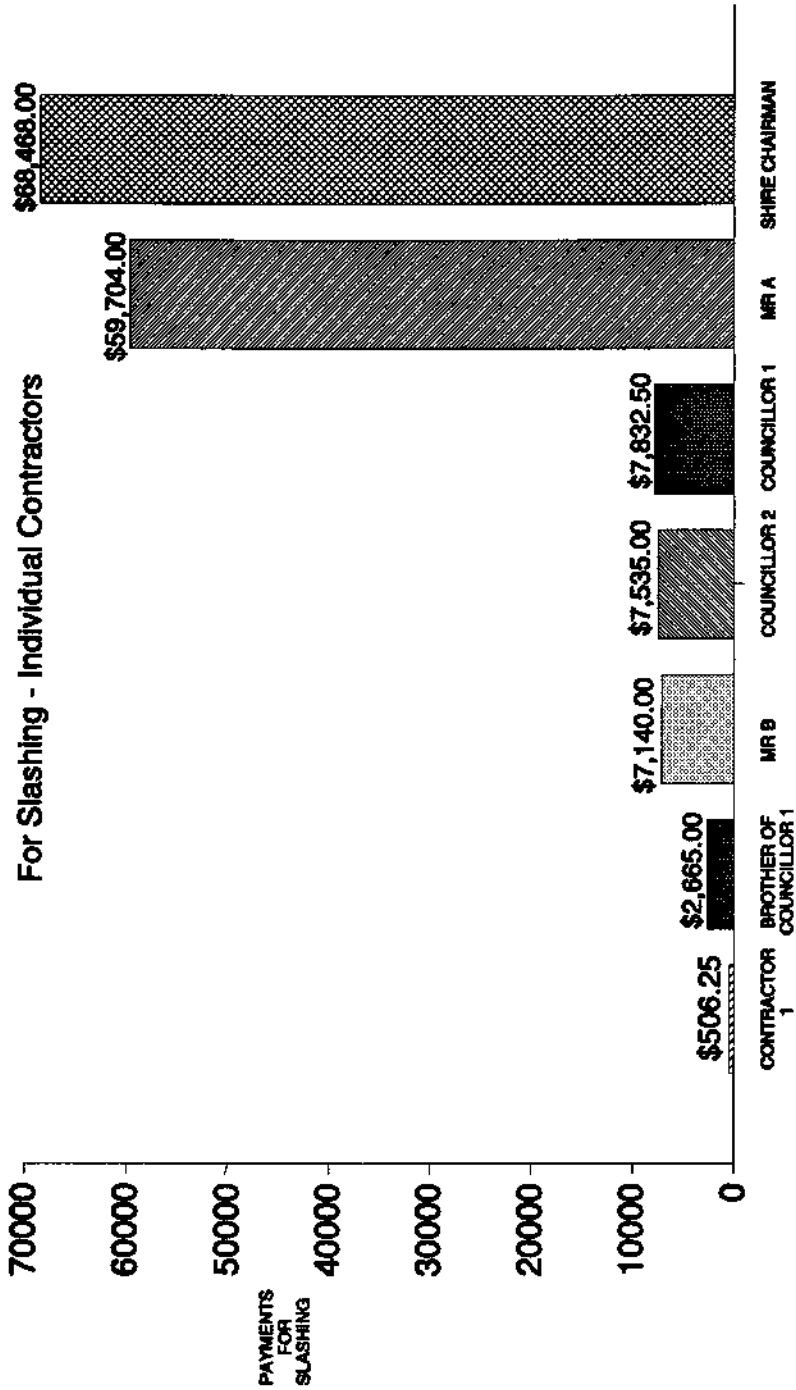
An analysis of the documents provided disclosed that in the five year period between 1 July 1985 and 30 June 1990, a total of \$153,850.75 was paid to private contractors by the Council for slashing work. The payments were made to seven individuals or enterprises. Of that amount, by far the majority of the payments were made to the Shire Chairman and another person, who for the purposes of this report will be referred to as Mr A. A total of \$68,468.00 was made payable to the Shire Chairman's unregistered business while \$59,704.00 was made out directly to Mr A. The next highest payment for slashing work was made to another Councillor, but for a significantly less amount, namely \$7,832.50. The sum of \$7,140.00 was paid to a Mr B, whom the evidence later disclosed was working on behalf of the Shire Chairman.

The table overleaf (Table B) illustrates the payments made to private contractors for slashing work by the Shire Council in the period 1 July 1985 to 30 June 1990. The payments made to the Shire Chairman and Mr A constituted 44.5% and 38.8% respectively of the total money expended by the Council for this work. Upon the Commission conducting a Companies Register search of the name of the Shire Chairman, it was revealed that he and Mr A were co-directors of a private company.

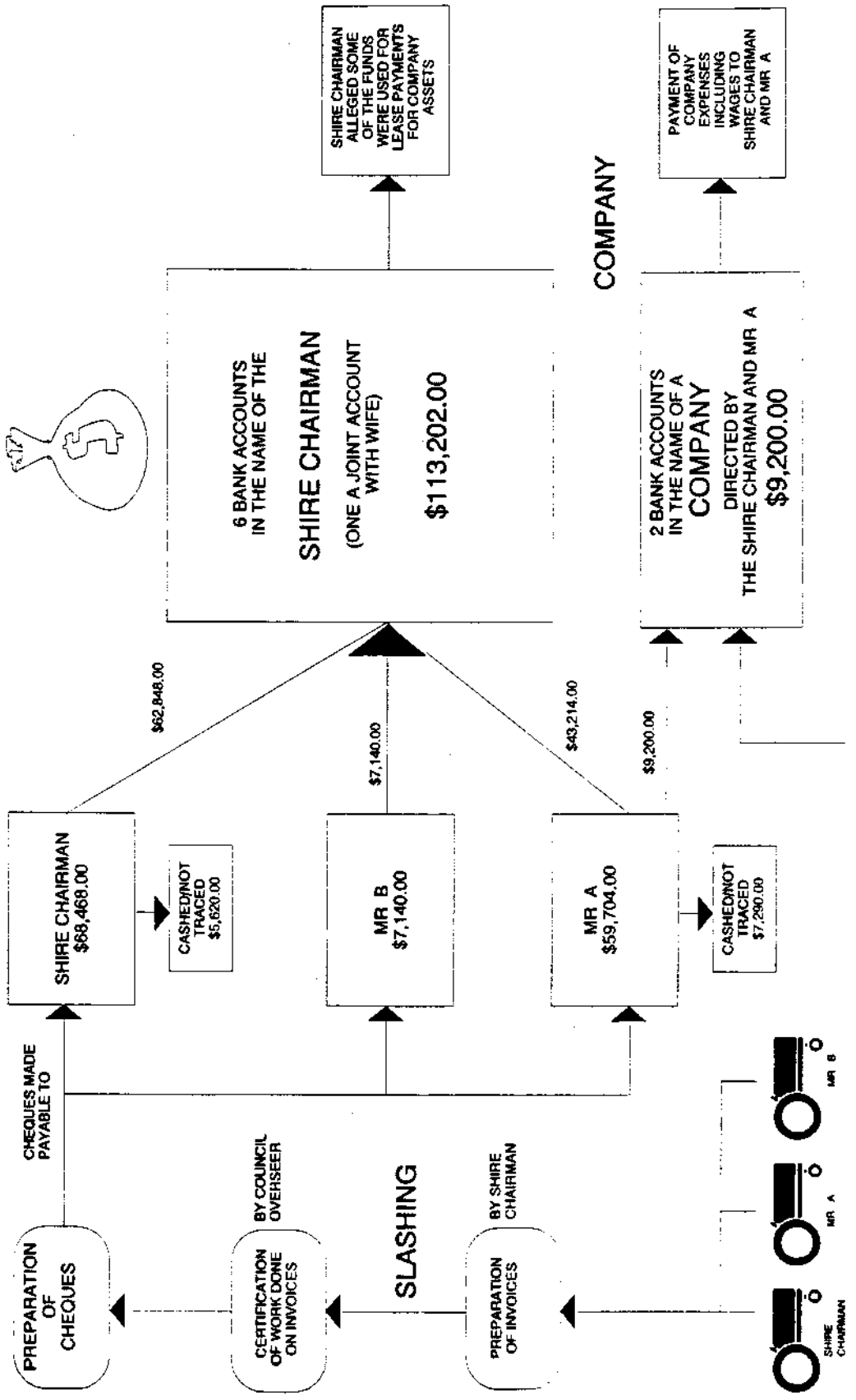
In response to a further notice to produce, the Council provided payment vouchers, cheques, payee invoices, and Council order forms relating to payments for slashing work. These documents, together with a review of bank accounts held by the Shire Chairman, Mr A and Mr B, were analysed. It emerged that many of the cheques were cashed, however of the \$59,704.00 paid to Mr A by the Council, \$43,214.00 was deposited into bank accounts operated either by the Shire Chairman or the Shire Chairman and his wife. A further \$9,200 was deposited into the private company. All of the \$7,140.00 made payable by the Council to Mr B was deposited into an account jointly held by the Shire Chairman and his wife.

The table on page 18 (Table C) illustrates the passage of funds paid by the Council to the Shire Chairman, Mr A and Mr B and the subsequent deposits into various bank accounts.

Total Payments By Council 1 July 1985 to 30 June 1990



FLOW OF PAYMENTS FOR SLASHING WORK
BANKING



It was the practice of the Council to have cheques signed by the Clerk or his delegate and counter-signed by a Councillor. In the case of cheques made out to the Shire Chairman for slashing and other work, 79 of the 103 cheques drawn in his favour and deposited into his account were co-signed by him as a member of the Shire Council. This represented \$61,120.40 or 89.27% of the total payments to the Shire Chairman for slashing work. Of the 49 cheques drawn in favour of Messrs A and B and deposited into the Shire Chairman's account, 39 were signed by the Shire Chairman, a total of \$38,994.00.

The pecuniary interest register held by the Council disclosed that the Shire Chairman had made one declaration of a pecuniary interest in slashing work for the Shire in March 1984. The declaration was made in respect of himself and his private unregistered business. At that time he withdrew from discussion on the hiring of his equipment and refrained from voting on the issue.

(ii) Allocation of Work

As stated previously, the Commission called for all documents concerning slashing work conducted for the Council. Whilst records were provided concerning the payments made to creditors for such work, the Council records were deficient in many respects. There were no records provided which indicated -

- that there was a need for grass slashing work to be carried out by private contractors;
- which areas were allocated to private contractors;
- how private contractors were selected;
- what controls, if any, existed with regard to slashing work completed by private contractors;
- what checks, if any, were made to ensure that the work was actually undertaken.

The only records produced in relation to quotations being called for grass slashing work related to the calling for expressions of interest by the Council Overseer in 1988. The expressions were lodged with the Council in June/July 1988, when ten parties indicated an interest. Only one, Mr B, subsequently received work for the first time. The balance had either worked for the Council before or did not receive any work as a result.

Others who did not lodge an expression of interest, including the Shire Chairman and another Councillor, continued to receive work from the Council.

After receiving all expressions of interest, the Council Overseer analysed the Council's position and recommended that the Council purchase additional equipment, as he had formed the view that the Council would need to make only minimal use of private contractors if it accepted his recommendations. The Council approved the recommendations.

Despite the Overseer's assessment, the amount of money expended by the Council on slashing work in the 1989/90 financial year was the greatest of the five years examined by the Commission.

(iii) Council Minutes

From the minutes produced to the Commission, it appears that grass slashing work was discussed on at least four occasions by the Council in recent times. The minutes do not disclose any declaration of pecuniary interest on any of these occasions. The Commission noted with interest that a particularly unusual motion was carried by the Council on 8 March 1989, when it was held that all slashing [work] be placed under the control of the Overseer and that it would then be his responsibility to allocate work to private contractors.

(iv) Evidence at the Investigative Hearing

The Shire Clerk of the Council was called to give evidence. As the chief administrative officer of the Council, his duties included the taking of minutes, the preparation of correspondence and reports, and the provision of advice under the Local Government Act. He was also primarily responsible for the payment of creditors. He stated that the private slashing work conducted for the Council was mainly undertaken by the Shire Chairman, Mr A, Mr B, and two Councillors. Although, for a number of subjective reasons, he had formed the opinion that the Shire Chairman and Mr A knew each other, he had seen no evidence to confirm that the Shire Chairman or Mr A knew each other on either a business or personal basis, and he did not know of any business relationship insofar as work performed for the Shire Council. He was aware of no connection between the Shire Chairman and Mr B.

The Shire Clerk, who commenced work with the Council in the late 1970's, confirmed that the call for expressions of interest in June 1988 was the only time that such a call had been made in his time with the Council. When pressed as to

the reason for such a unique event, he stated that he thought there might have been a concern that private contractors were being used in circumstances where there was really no necessity to do so. He also suggested that the Council may have been interested in sharing the work around and indicated that the responsibility for allocating work to private contractors fell upon the Council Overseer. The Shire Clerk ultimately conceded that there may have been some concern regarding the amount of work which had been undertaken by the Shire Chairman.

As to the method by which creditors were paid, the Shire Clerk confirmed that each invoice provided to the Council would be signed by a responsible officer, certifying that the relevant goods or services had been provided. Upon reviewing these documents, the Clerk would sign the cheque and arrange for a member of Council to co-sign it, usually the Shire Chairman. He did not consider that the integrity of the internal auditing system was weakened by the co-signatory being the same person as the payee on the cheque. Furthermore, he did not believe that there was anything in the Local Government Act or Regulations that precluded such a practice.

The Clerk agreed that as the system operated, there would appear to be no connection between the Shire Chairman, Mr A, and Mr B on the face of Council documentation, as all invoices had been submitted in the name and on behalf of each individual. In the absence of any pecuniary interest declaration by the Shire Chairman in the business of Messrs A and B, there would be no objective evidence available by way of Council records from which members of the Council or any interested parties could conclude that the Shire Chairman and Messrs A and B were in any way connected.

The Council Overseer was also called. His duties included attendance at Council meetings, the management of the outside workforce, the selection of private contractors and the allocation of slashing work to them, and the authorisation of payments to those contractors. He was directly answerable to the Shire Clerk. He had been employed by the Council since early 1988. At the time he joined the Council there was no documentation in existence which indicated what areas of the Shire needed slashing or how the private contractors came to be employed by the Council. The Overseer relied on the advice of his foreman, who had been with the Council for many years. Consequently, the slashing work continued to be conducted as it had in the past. He stated that after an area was allocated to a contractor, it was the contractor's responsibility to maintain the area and submit an invoice in due course. No system existed to ensure that the work had been performed in accordance with the invoices submitted, the net effect being that upon their submission, invoices would be paid.

The Overseer stated that not long after he commenced with the Council, pressure had been applied to the Council, in particular from the Ratepayers Association, to give others a chance to perform the contract slashing work. The matter had become something of a public issue and consequently he invited expressions of interest in conducting slashing for the Council.

After analysing the position, his recommendation that the Council purchase additional equipment was accepted and despite additional equipment being purchased, private contractors continued to be extensively used. Even after the submission of the expressions of interest, the Overseer persisted, with the exception of Mr B, in using the same contractors (including two Councillors). By way of explanation for the increased contracting, he stated that the Shire had been subjected to excessive rain and flooding and this accounted for the upsurge in the slashing work required. Table D overleaf illustrates the total payments made by the Shire Council for slashing in the period July 1985 to 30 June 1990.

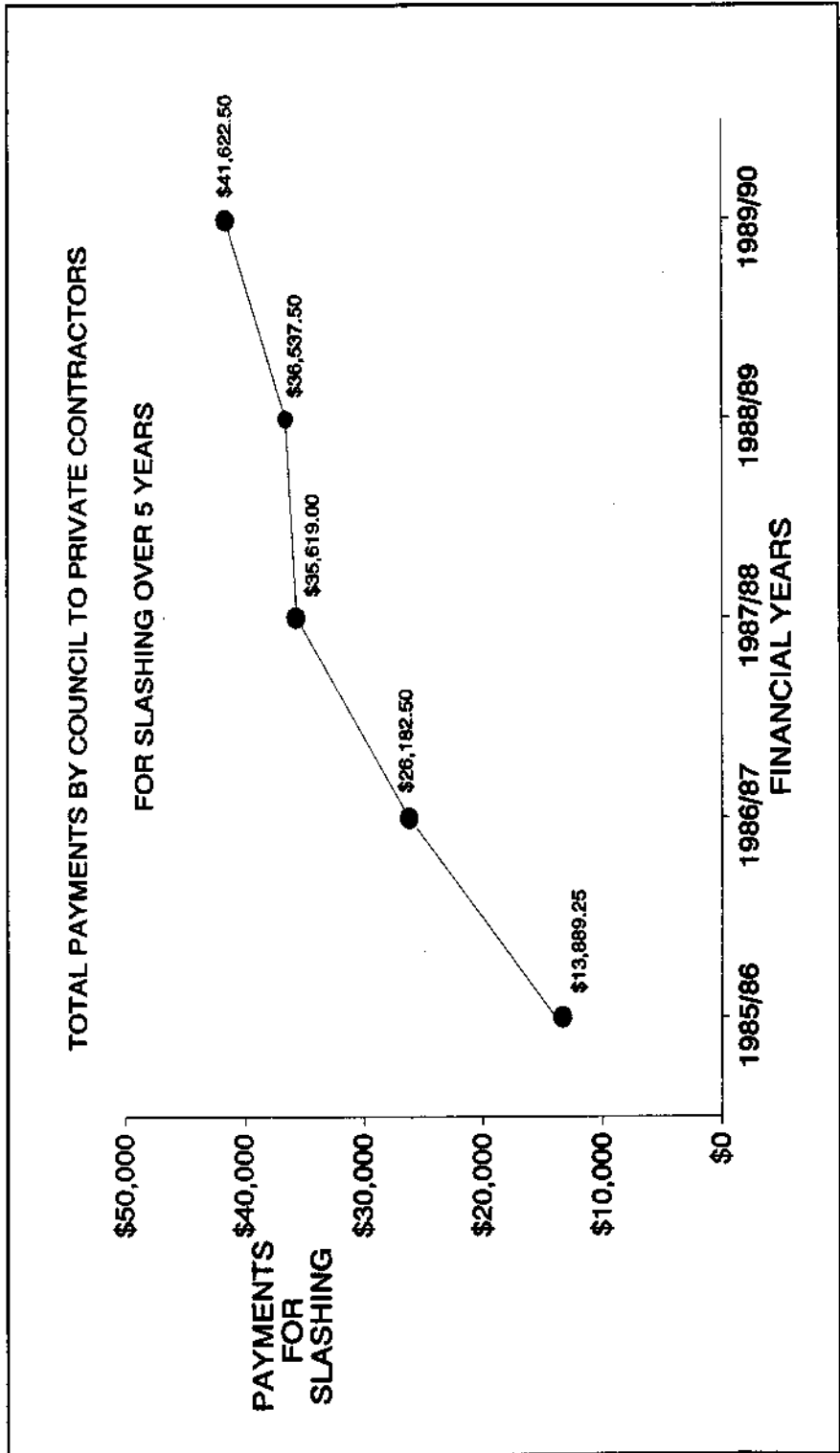
The Overseer denied that the Shire Chairman had applied pressure to him at any time to force him to continue giving work to the Shire Chairman, Mr A, and Mr B. He stated that he had formed the view that Mr A and Mr B worked for the Shire Chairman as invoices in Mr A's and Mr B's name were submitted to him by the Shire Chairman. He did consider it unusual, however, for the Shire Chairman to submit invoices in the names of his employees.

Were Messrs A and B employed by the Chairman?

The Shire Foreman confirmed that he used Messrs A and B on occasions to assist him, but could not say whether they worked for the Shire Chairman and was not aware of any business relationship between the Shire Chairman and Mr A.

Mr B maintained that he had never worked for the Council and that he had worked exclusively for the Shire Chairman. The Chairman lodged the accounts with the Council and any money that was paid to him [Mr B] was by way of a personal cheque from the Chairman. He had never given authority to the Chairman to deposit cheques made out to him into the Chairman's account.

Mr A stated that any slashing work performed either by him or the Chairman for the Council was done on behalf of their company. Under cross-examination he eventually confirmed that he had received regular wages from their company and that many of the payments on the leases of their equipment were made by the company. Mr A left the Chairman to make all the claims for payment by the Council. He merely provided the hours worked at the end of any given week. He expressed surprise at the amount and number of cheques which had been made out



to him by the Council and thought they were in excess of the amount of hours worked by him, although Mr A could not provide any records or further material which would support this conclusion.

Whilst he stated that he had never seen any cheques made out to him by the Council, he was on a number of occasions asked by the Chairman to endorse several cheques to the Chairman. He maintained that he was not precisely aware of the name of the payee or the amount of these cheques. The Commission obtained possession of a number of Shire Council cheques which were made out to Mr A as payee. On the back of some of these cheques an endorsement had been made to pay them to the account of the Shire Chairman. They appeared to be signed by Mr A. When these cheques were produced to Mr A he denied that the signatures endorsing the payment to the Shire Chairman were his, even in the face of expert forensic evidence confirming that the handwriting of the endorsement was his.

The Evidence of the Shire Chairman

The Shire Chairman agreed that he had conducted slashing work for the Council for many years. He volunteered that in respect of that work he had made a declaration of a pecuniary interest in March 1984. In June 1988 when Council moved to call for expressions of interest in conducting such work he was supportive of the idea although he did not move the motion. He stated that by that time he no longer wished to be doing this type of work for the Council and was happy for someone else to step into his shoes.

The system operated whereby the Council Overseer would direct him as to what work needed to be done in the Shire. Upon the Council minute of 8 March 1989 being put to him, the Chairman stated that the motion in question was moved in order to enable someone to be selected to enter into a contract with Council to conduct the slashing work. He denied that up until that time he had exercised control over the allocation of such work and that the motion was designed to place control back into the hands of the Overseer.

Concerning his relationship with Messrs A and B, the Chairman testified that Mr A was not working for him but that some of the money paid to Mr A by the Council went towards payments of leases on their company equipment. When asked why the invoices were lodged by him [the Chairman] in Mr A's name, he could offer no explanation other than to advise that this was the arrangement they had reached as between themselves.

The Chairman agreed, however, that Mr B was his employee. He "did not know" why the Council paid Mr B directly and maintained that the Council members knew that Mr B was working for the Chairman. When asked how the members would have known, he stated that although he had not told anyone, they would have gathered that Mr B was working for him as Mr B was using the Chairman's tractor.

The Chairman acknowledged that there was no declaration in the pecuniary interest register that he had an interest in Messrs A's and B's work, even though the majority of payments to these persons by the Council were ultimately paid into the Chairman's accounts. At no stage did he declare a pecuniary interest in their work at any of the meetings where slashing work was discussed by Council and was of the view that it was unnecessary to make such a declaration of interest. He could see nothing wrong with the practice of a payee counter-signing a cheque, "provided everything was in order".

It emerged that of the many cheques made out to Messrs A and B and deposited into the Shire Chairman's accounts, very few had been endorsed for payment to the Shire Chairman. Upon giving evidence before the Commission, the manager of the bank used by the Chairman conceded that unendorsed cheques marked "not negotiable" should not have been accepted by the bank for deposit into an account other than one in the name of the payee. He could offer no satisfactory explanation for this course of events other than to suggest that as the Shire Chairman was well known he was able to have the cheques credited to his account.

Relevant Legislation

The nature of the allegations made by the Ratepayers Association concerned conduct which, if proven, could constitute official misconduct, within the meaning of that term under the Criminal Justice Act.

In addition, offences under the Criminal Code were considered by investigators, namely offences of official corruption, forgery, false pretences and misappropriation⁶. Offences arising under Section 14(4)(i) of the Local Government Act with respect to the non-declaration of pecuniary interests were also considered.

⁶ Annexure B(i)-(iii),(v)

The Issues

1. Was there evidence of corrupt conduct or other official misconduct on the part of the Shire Chairman or Shire Councillors?

In the case of the Shire Chairman two matters arise for determination. First, did he use his influence on the Council to ensure that both he and Mr A obtained the majority of slashing work conducted by private contractors? Secondly, did he attempt to conceal his relationship with Mr A and to a lesser extent Mr B because he feared that this would cause concern amongst other Council members and the community which might lead to the loss of slashing work?

There is certainly evidence to support the proposition that the Shire Chairman used his position to enable himself and Mr A to obtain responsibility for the bulk of the slashing work. The Shire Overseer was presented with invoices in Mr A's name via the Shire Chairman. It seems that rather than making a positive decision to employ Mr A, the Shire Overseer allowed the Shire Chairman to select whomsoever he wished to conduct this work. Furthermore, evidence given by the Commission's financial expert indicated that the decline in payments to the Shire Chairman from the Council for slashing work coincided with an increase in such payments being made out to Mr A.

In addition, the Shire Overseer stated that when he took up the position he merely inherited an existing system in which the Shire Chairman and an associate in a joint enterprise conducted most of the contract slashing work for the Council. It is also relevant that after expressions of interest were received by the Council the only new person to obtain contract slashing work was someone employed by the Shire Chairman. The fact that the Shire Chairman did not submit an expression of interest gives rise to the clear inference that he had no need to.

Considered together, these facts tend to indicate that the Shire Chairman had some considerable influence in the allocation of slashing work to private contractors.

The second proposition viz: that the Shire Chairman concealed his connection with Messrs A and B, is also supported by the evidence. Regardless of whether the Shire Chairman acknowledged that Mr A worked for him or not, the fact remains that a substantial amount of money made out to Mr A by the Council found its way into the Shire Chairman's accounts. Similarly, Mr B was working on his behalf yet invoices were submitted to the Council in Mr B's name by the Shire Chairman, and cheques were made out to Mr B by the Council in response to those invoices. Whilst it might be argued that if the Shire Chairman truly wished to conceal the connection he would have had Messrs A and B submit the invoices, it must be considered that in allowing them to do so, the opportunities for the Chairman to

intercept cheques from the Council which were made out to Messrs A and B would be significantly reduced.

Mr A, with some justification in the Commission's view, believed that the work that he was doing was on behalf of the joint company. Mr B said that he at all times worked for the Shire Chairman and merely expected to be paid wages by the Shire Chairman.

The Shire Chairman stated that at the time the Council called for expressions of interest in slashing, he wished to cease performing such work for the Council. Despite this stated intention, he continued to do contract work until approximately mid-1990 and denied that the cessation of his interest at this time was in any way connected with the commencement of this Commission's investigation. He offered conflicting opinions as to whether suitable residents were available to take up the contract work of the Council.

2. Were administrative systems within the Council relating to the performance of slashing work by private contractors adequate?

The record systems operating within the Council were clearly deficient in that they failed to record the methods by which private contractors were selected, what areas they were responsible for or directions given by the Overseer in relation to slashing work. There were no records kept of work completed by contractors, nor any proof obtained that work claimed for by contractors had actually been performed. As a consequence, officers of the Commission experienced considerable difficulty in locating any relevant Council records. On the face of the records, no patent connection between the respective creditors of the Council is disclosed. The records merely note the payee, the reason for the payment, and the amount of the payment. In fact, the relevant Council employees did not know that the Shire Chairman and Messrs A and B were connected with regard to the performance of slashing work. Both the Foreman and the Shire Clerk were unaware of such a connection. The Overseer believed that there was a relationship, however this conclusion was subjective, being formulated on the basis that the Shire Chairman submitted the invoices. It was not based on any information received from the Shire Chairman.

3. Were financial controls within the Council adequate?

It was the practice of the Council to have cheques in payment for services such as grass slashing signed by the Clerk or his delegate and counter-signed by a Councillor. This procedure accords with the requirements of Regulation 9 of the

Local Government Audit Regulations, 1962. The Regulations do not expressly prevent a payee from being a signatory of a cheque. The majority of the cheques, almost 90% of the total payments to the Shire Chairman for slashing work, and the majority of cheques drawn in favour of Messrs A and B, were signed by the Shire Chairman. Neither the Shire Clerk nor the Shire Chairman expressed any concerns regarding this.

There was no system in operation to ensure that private contractors were actually performing the slashing work being billed and that the Council was obtaining value for money.

The Commission's Findings

- **There is evidence that the Shire Chairman used his official position to further his private financial interests in that he used his position to obtain work from the Council and deliberately concealed the connection between himself and Messrs A and B.**
- **The recording system within the Shire Council with respect to the awarding of grass slashing contracts and the monitoring of the performance under the said contracts was inadequate. The normal checks and balances within the internal auditing system were necessarily compromised by the co-signatory of cheques also being the payee.**

The evidence obtained by the Commission, and particularly that given by Mr A, raised the possibility that the Shire Chairman may have committed the criminal offences of forgery, false pretences and/or misappropriation on the basis of the following allegations -

Mr A suggests that the endorsements on the back of certain Shire Council cheques were not made by him. The logical inference which arises from such an allegation is that the Shire Chairman was responsible for the endorsement, as the proceeds of the cheques were deposited into the Shire Chairman's accounts.

Mr A claimed that the cheques made out to him by the Council represented an amount of work far in excess of that completed by him for the Council. It could therefore be suggested that the Shire Chairman, who was responsible for lodging invoices in Mr A's name, had falsely pretended that the work was completed by Mr A and thereby obtained money fraudulently from the Council.

Mr A claimed that the arrangement between him and the Shire Chairman was that cheques for work performed by him for the Council were to be collected by the Chairman and paid into the company account. He alleged that much of the money due to him for slashing work had not been paid to him by the Chairman. This allegation gives rise to the suggestion that the Shire Chairman had misappropriated the proceeds of these cheques from their joint company.

There are, however, unsatisfactory aspects to the evidence which militate against such charges being laid on the basis of Mr A's testimony in the absence of corroboration, namely Mr A's allegation of forgery in the face of expert opinion to the contrary; the absence of documentary evidence held by Mr A or the Council in support of the allegation of false pretences; the absence of documentary proof of any arrangement entered into between Mr A and the Shire Chairman in respect of payments for contract work and Mr A's expressed hostility towards the Chairman. Mr A indicated during the course of his evidence that the Chairman was responsible for the financial ruin that had befallen him upon the termination of their business relationship.

Upon consideration of all the circumstances, the Commission formed the view that the evidence of Mr A was not sufficiently reliable in the absence of corroboration to justify proceedings against the Chairman with respect to any of the abovementioned charges.

There did emerge, however, sufficient evidence that the Chairman had used his position to ensure that he and Mr A secured the bulk of the privately contracted slashing work in the Shire. A brief of evidence, based on the Commission's findings, is to be forwarded to the Director of Prosecutions with a request for advice as to possible criminal offences committed by the Chairman, and any further action required.

Upon considering disciplinary charges of official misconduct under the Criminal Justice Act it is open to find on the evidence that the Shire Chairman has discharged his function or exercised his power as a holder of the office of Shire Chairman in a manner that was not honest or not impartial. It is also arguable that he engaged in conduct which involved a breach of trust placed in him by reason of his holding the appointment in a unit of public administration. Such arguments are based on the proposition that the Shire Chairman failed to disclose any interest in Messrs A's and B's work and that by submitting invoices in their names and ensuring that payments were made in their names, he practised a deceit upon the Council in that the Council was lead to believe that others, and not he, were responsible for much of the slashing work conducted. Such conduct, if proven,

could constitute a disciplinary breach which would provide reasonable grounds for termination.

The Shire Chairman did not stand for re-election at the recent Local Government elections. Had he done so and been re-elected the Commission would have recommended that his appointment be declared, under Section 2.36(3) of the Act, to be subject to the jurisdiction of the Misconduct Tribunal and a charge of official misconduct brought against him.

Matters concerning private slashing were discussed by the Council in the presence of the Chairman at various meetings, albeit on very few occasions over the years. He at no time withdrew from these meetings nor declared a pecuniary interest with respect to work performed by Messrs A and B, although he does state that in 1984 he declared an interest on his own behalf with respect to the hiring of equipment. Whilst it was undesirable, because of his interest in slashing work, that the Shire Chairman figure in these discussions, his conduct was not such as would offend the provisions of s.14(4)(i) of the Local Government Act in this respect, as upon examination of the minutes of the Council meetings it was confirmed that the matters discussed were not of a type which were caught by the pecuniary interest provision.

Note: The original allegation the subject of this case study included a suggestion that other Councillors had also mis-used their positions. During the course of the investigation, the Commission was mindful of the allegation, however no evidence was uncovered to substantiate the allegation of official misconduct against any other Councillor.

Recommendations

- **Council procedures relating to the provision of work to private contractors should be reviewed and tightened where necessary to ensure that proper records are maintained, and invoices particularised; that tenders, quotations and expressions of interest are used to select private contractors; that regular inspections of work occur and payments are made only when responsible officers are satisfied that the work has been completed, so as to ensure that public monies are not wasted due to a fundamental lack of proper checks and balances.**
- **The pecuniary interest provisions of the Local Government Act are grossly inadequate and should be amended to broaden their application to cover pecuniary interests of members, including interests in contracts, not presently addressed by the provisions.**

- **To ensure appropriate safeguards are maintained in the management of Council funds, Regulation 9 of the Local Government Audit Regulations, 1962 should be amended to include a proviso that the payee of a local authority cheque cannot sign or counter-sign that cheque. The Commission rejects any suggestion that such a requirement would create any undue delay or increased workload, provided arrangements are settled with officers to sign cheques at appropriate times.**
- **Financial institutions should be advised to adhere strictly to the requirement that cheques marked "Not Negotiable" should not be accepted without endorsement. As a crime prevention measure, the practice would operate to protect both the public and the financial institutions themselves; the law as it presently stands provides that financial institutions who accept such cheques must bear the liability for them.**
- **That all employees of local authorities are reminded that their responsibilities are not limited solely by or under the Local Government Act and attendant Regulations, but include a duty to the authority and its ratepayers to ensure that the authority is run fairly and efficiently.**
- **A brief of evidence is to be forwarded to the Director of Prosecutions requesting advice as to possible criminal offences committed by the Shire Chairman in failing to sufficiently disclose his interest in the work performed by Messrs A and B.**
- **The Criminal Justice Commission would have recommended that the position of the Shire Chairman be prescribed as subject to the jurisdiction of the Misconduct Tribunal and that he be charged with official misconduct. The maximum penalty following conviction for a charge of this nature is dismissal. The Shire Chairman has now retired from the position and, as in the previous Case Study, this course of action would serve no useful purpose beyond highlighting the problem in the interests of public education, which is the expressed purpose of this Report.**

CASE STUDY C

This case study relates to a medium-sized local authority, situated in a coastal area.

The original complaint was received by the Commission on 22 August 1990 in a letter from the principals of three businesses who had unsuccessfully tendered for a contract to maintain refuse tips for the Council. In the course of the investigation into alleged irregularities in the tendering procedure adopted by the Council, further matters emerged for consideration regarding the process used to purchase furniture for the Council's new administration building.

Allegations

The allegations in relation to the tender for maintenance of the refuse tips were that:-

- (i) the contract ultimately awarded to the successful tenderer was predicated on an entirely different premise to that indicated in the tender as advertised. The unsuccessful tenderers should therefore have been given the opportunity to re-tender.
- (ii) the unsuccessful tenderers would have been able to discharge their responsibilities under the contract for a lower price than the successful tender.
- (iii) possible corruption and favouritism had been shown in the tendering process as the successful tenderer [referred to as Mr B] and an Alderman [referred to as Alderman S] were good friends and business associates.

Upon embarking on an investigation into the abovementioned allegations, Commission investigators became aware that a contract in the total sum of \$74,048 had been awarded to a local manufacturer for the supply of furniture without any tenders being invited. S.19(4)(i) of the Local Government Act requires public tenders to be called before entering into any contract the value of which exceeds \$50,000. The contract in question had been entered into after the manufacturer submitted four separate quotes, each below \$50,000, seemingly in order to enable the Council to circumvent the tendering process. This arrangement had been agreed upon by Alderman S and the Town Clerk.

It was also suggested that in awarding both the refuse tip maintenance and furniture supply contracts, the Council did not require securities for performance, contrary to the requirements of Section 19(4)(iii) of the Local Government Act.

Profile of Subject of Complaint

Specific complaints in connection with the tendering practices of the Council were made against, inter alia, the Mayor; a serving Alderman; the Town Clerk, (now retired); the local earth-moving contractor, Mr B, who was successful in tendering for the refuse tip contract; and Mr Y, a local furniture manufacturer and the supplier of furniture for the new Council building.

Investigation

Twenty-three (23) persons were interviewed in the course of the investigation. The Council voluntarily produced all documentation required for examination by the Commission.

A one-day hearing of the Commission was held at which seven people gave evidence.

Chronological Summary of Facts

A. Refuse Tip Contract

- February/March 1990 The local authority receives report on estimated resource and expenditure required to service three outlying dumps in the Shire, following an adverse report on the condition of the sites by the Department of Environment and Heritage.
- The Council's Chief Health Surveyor estimates that the dumps could be serviced in 24 hours a week at a cost of \$38 per hour.
- The Council invites tenders for plant hire to operate at the three outlying dumps on an 8 hour day, 3 days per week basis.
- April 1990 Tender submitted by Mr B. Quotes 8 hours per day at \$44 per hour.
- 10 May 1990 Public Services Committee of the Council meets. Meeting attended by Alderman S and the Mayor. Agenda (previously advised) lists the contract prices of the tenders to be considered and contains a

recommendation that the Council accept the lowest-priced quote, that of Company C.

Alderman S moves at the committee meeting that Mr B's tender be accepted. Another alderman amended the motion to recommend that the City Engineer make further inquiries as to the ability of the lowest tenderer, Company C, to carry out the required maintenance of the dump sites.

23 May 1990

Alderman S successfully proposes at the Ordinary General Meeting of the Council that Mr B's tender be accepted and that the amending motion of the previous Public Services Committee Meeting be deleted from the minutes.

June 1990

Mr B was formally advised of the acceptance of his tender. Mr B telephones the Council and confirms that he is to work three days per week.

Mr B recalls that there was a meeting attended by himself, the Mayor, the City Engineer and Alderman S, wherein changes to the contract conditions and specifications were agreed. The Mayor and Alderman S deny being involved in such a meeting and the City Engineer stated that he was not involved in any sense with alterations to the contract.

Mr B alleges that, as a result of the meeting, the terms and conditions of the proposed contract were amended to include an additional dump and an agreement was reached to the effect that Mr B would extend the hours worked with no increase in rates.

Initial specifications and conditions of contract are prepared. These include only three (3) dumps but differ from the original tender conditions stated in the advertisement in that they specify:-

- (i) The contract is to be performed three hours, five days per week, 52 weeks per year at \$44 per hour [Total of \$34,320]; and

June 1990 (cont.)

- (ii) Additional work to the value of \$24,300 per annum is included for the filling and covering at each tip and hire of trucks.

Total value of contract now \$58,600 per annum.

Mr B meets with the Town Clerk to sign the contract, but refuses to do so. He argues the contract is not in accordance with the agreement previously reached.

As a consequence, the Town Clerk consults with the Mayor who advises him to "fix it up".

Mr B and the Town Clerk then agree to the following alterations:

- (i) the addition of a fourth dump; and
- (ii) the amendment of the performance and cost clause to read:

"the contract will be performed three hours, five days per week, 52 weeks at \$44 per hour at each tip".

Total value of contract now \$161,700 per annum.

Mr B advised by Town Clerk to proceed with the work on the amended basis as agreed, pending formal amendment to the contract.

1 July 1990

Final contract for period of one year executed by Mr B, the Town Clerk and the Mayor.

B. Furniture Contract

June 1990

Subcommittee appointed to investigate purchase of furniture for new Council building planned to open October 1990. Alderman S is committee member.

Subcommittee delegates the responsibility of location of furniture to an architect.

July 1990

Quote received from company of a local businessman, Mr Y, to supply furniture. Council issues purchase requisition to Mr Y's company to supply furniture.

Relevant Legislation

In addition to the as provisions of the Criminal Justice Act with respect to official misconduct, the possible commission of the offence of receiving secret commissions under Section 442B of the Criminal Code was considered⁷.

Subsection 19(4) of the Local Government Act, relating to tendering requirements of Councils was also considered⁸.

The Issues

- 1. Was there evidence of the commission of a criminal offence, official corruption or official misconduct by any persons the subject of complaint?**

A. Refuse Tip Contract

Mr B's tender was accepted although it was not the lowest tender submitted. A recommendation was made to investigate the ability of the lowest tenderer to perform the task, however there was no formal investigation performed in this regard, due to time constraints.

Both Alderman S and Mr B denied that they had a pre-existing relationship. Mr B, upon cross-examination, denied that he had made any payments to anyone to secure the contract. No other evidence was uncovered to suggest that there was a pre-existing relationship between the two men.

It cannot be denied, however, that the terms and conditions of the contract were drastically altered, to the benefit of Mr B, without any of the persons allegedly involved, except Mr B, being able to recollect the circumstances of the meeting where the changes were affected.

The persons allegedly involved in the meeting were extremely vague as to how the alterations to the contract occurred. The Mayor stated that he could not recollect a

⁷ Annexure B(iv)

⁸ Annexure A(iv)

meeting with Mr B, although he remembered the events surrounding the final changes to the contract conditions. As stated previously, the Council Engineer stated he was not connected with the alterations to the contract. Alderman S denied attending any meeting to discuss additions to the contract.

The Council Health Surveyor stated that the original advertisement was never intended to include the extra work. Upon examination of all the circumstances, it is open to conclude that a subsequent agreement was reached between Mr B and members and officers of the Council to include the additional site and to arrange for the provision of fill and cover and the hire of trucks.

The Town Clerk made the changes to the contract after Mr B pointed out that the draft contract differed from what had been agreed upon. The Clerk consulted with the Mayor and Alderman S with regard to the changes, but did not refer them to the City Engineer or the Health Surveyor.

Fundamental alterations were made to the terms of the contract which had serious financial consequences for the Council. The City Engineer had estimated the annual cost of maintaining the four dumps for budget purposes at \$72,000. With the changes, Mr B's contract with the Council was valued at \$161,700. The contract was not offered for re-tender, despite the fundamental changes. The Engineer and the Health Surveyor both viewed the contract as a windfall for Mr B. They were not aware of alterations to the contract until after the event. Both the Mayor and the Town Clerk agreed, in retrospect, that the contract should have been re-tendered.

The Mayor and Alderman S stated that they did not consider re-tendering in the circumstances, because they were anxious for the situation relating to the dumps to be addressed as soon as possible. Alderman S expressed particular concern in this regard. The Town Clerk indicated that he believed there was an error in the original conditions of the contract and when pressed by Alderman S to make changes, he believed it was therefore in order to do so. There was no evidence that corrupt payments were made to any person in relation to the awarding of the contract.

Doubt remains, however, as to whether the changes to the contract were ratified by the Council. As stated previously, there is no record in the Minutes of Council meetings of any such ratification, although the Mayor, Alderman S and the Town Clerk all gave evidence to the effect that the changes had been ratified at a Council meeting.

B. Furniture Contract

Four separate quotes were received from the local company of Mr Y for furniture valued at a total of \$74,048. The quotes were submitted in July, with the building being due to open in October. The relevant provisions of the Local Government Act require the calling of tenders for contracts exceeding \$50,000.

The Town Clerk gave evidence that he did not consider it was necessary to call tenders for the contract as he was not aware that the contract would exceed \$50,000. He also stated that, in view of the short time before the new building opened, he believed that it was an emergency situation as provided for by Section 19(4)(i) of the Local Government Act. Alderman S gave evidence that he had discussed the matter with the Town Clerk, who had advised that no tender was required. Alderman S also stated that the Town Clerk had suggested that the quotes be split to avoid the tendering process. The City Accountant confirmed that the Town Clerk had so advised Alderman S, however, the Town Clerk could not recall making any such suggestion. The supplier, Mr Y, gave evidence that it was his decision to provide four separate quotes for the furniture.

The Mayor was aware of the contract, but not aware of the amount involved until after the contract was awarded. There was no evidence of any pre-existing relationship between Mr Y and any Council officer or member, nor was there any evidence of any corrupt payment made by Mr Y to anyone in relation to the contract.

2. Was there any breach of the Local Government Act regarding the refuse tip or furniture supply contracts?

Upon embarking on a tendering process, Section 19(4)(ii) of the Local Government Act permits the Council to accept the tender which, in view of all the circumstances, appears most advantageous. Such fundamental alterations were made to the terms of the refuse tip contract in the course of the negotiating phase with Mr B that it was not possible to determine whether the tender as it ultimately stood was the most advantageous to the Council, in comparison to the other tenders submitted. While the emergency provisions of Section 19(4)(i) of the Local Government Act would permit the Council to enter into a contract without tendering, there was no evidence of any emergency in the case of the refuse tip contract, other than the desire of Alderman S to resolve the matter.

Whilst there was undoubtedly a deadline for the opening date of the building which would necessarily impact on the contract for the provision of furniture, arrangements for the purchase of this furniture were not put in train until June. The Council was aware of the projected opening date prior to June, but did not act to

formalise the purchase of furniture before this time. Furthermore, Section 19(4)(iii) of the Local Government Act requires the Council to take security for the performance of any contract valued at \$50,000 or more. The Town Clerk confirmed that security for performance was not taken in either of the contracts under consideration.

The Commission's Findings

- **Favouritism was shown to Mr B in extending preferential treatment to him. The conduct of the Town Clerk in this matter, and in events surrounding the awarding of the furniture contract to Mr Y, fell far short of the appropriate standard required of such a high-ranking local government officer.**
- **Fundamental changes were made to the terms of the contract relating to servicing of the refuse tips. As a consequence, the contract which was entered into by Mr B and the Council was entirely different to the contract for which tenders had been called. In order to comply with the requirements of Section 19 of the Local Government Act, the contract should have been re-tendered. Under the circumstances, the Council was not in a position to make a sound decision regarding the viability of the contract.**

While the circumstances surrounding the initial decision of the Council to award the refuse tip contract to Mr B are unclear, there is no evidence of any payment, favouritism or other improper motive for the initial decision to award the contract to Mr B. The Commission considers that it is highly probable that there were discussions relating to changes to the contract prior to Mr B's refusing to sign it on the basis that it did not reflect the agreement that had been reached.

The contract was altered as a consequence of an agreement reached during this meeting between Mr B and members of the Council, including the Mayor, and changes were made as the result of a request by Mr B to the Town Clerk to alter the wording to reflect the agreement reached at the meeting.

It appears that favouritism was shown to Mr B by accepting his request to alter the contract without re-tendering. Mr B, by being given an increase in the work to be performed and being permitted an increase in the contract price without any competition, was given preferential treatment over other tenderers, who were not given an opportunity to re-tender. It was incumbent upon the Mayor and the other Alderman to consider re-tendering the contract when it became apparent that there were substantive changes proposed to be made to its terms and conditions.

Alderman S was apprised of the massive cost increase incurred as a result of the alterations to the contract and should have been aware of the importance of ensuring that the Council was spending its funds wisely.

The role played by the Town Clerk is also significant. The Town Clerk had extensive experience in local government and was responsible for advising the Mayor and Aldermen as to the appropriate course of action. He should not have accepted Mr B's request to change the contract so readily and should have referred the matter to the City Engineer and the Health Surveyor, as they were responsible for maintenance of the refuse tips.

With reference to the furniture contract, although there is no evidence of any improper reason for the awarding of the contract to Mr Y's company, tenders should have been called as the contract was valued at more than \$50,000. It was the responsibility of the Town Clerk to advise the Council of this requirement. Neither he nor Alderman S were able to offer any satisfactory explanation for failing to call tenders in the circumstances.

The Commission considers that the purchase of the furniture was not an emergency purchase within the terms of Section 19(4)(i) of the Local Government Act; in all likelihood, the hastily-arranged contract was entered into as a consequence of Council inefficiency in not making appropriate arrangements to order the furniture earlier. There was unsatisfactory conduct on the part of Alderman S and the Town Clerk in disregarding the tendering requirements of the Local Government Act and, as a consequence, a breach of Section 19(4) of that Act did occur.

A further breach of Section 19(4) of the Local Government Act occurred by reason of the failure of the Council to take security for the performance of both contracts. In this regard, the Town Clerk is found to be primarily responsible.

In summary, there is evidence that the Council breached Section 19(4) of the Local Government Act in failing to re-tender the contract for the refuse tips and in failing to take security from both contractors for performance of the respective contracts. The Town Clerk had a duty in these matters to advise the Mayor, the aldermen and the Council regarding the relevant requirements of the Local Government Act and, as chief administrative officer of the Council, to ensure that the provisions of the Act were abided by. This he failed to do.

Recommendations

- **The Director-General of the Department of Local Government should be advised that prima facie evidence of breaches of the Local Government Act has been brought to light.**
- **The Director-General of the Department of Local Government should remind aldermen and senior officers of local government authorities by notice in writing of their duties and obligations under S.19(4) of the Local Government Act.**
- **The Director-General of the Department of Local Government should consider recommending an amendment to Section 19 of the Local Government Act to allow contracts which have been made in breach of the tendering provisions of that Act to be voidable at the option of persons who have been prejudiced.**
- **The Criminal Justice Commission would have recommended that the position of the Town Clerk be prescribed as subject to the jurisdiction of the Misconduct Tribunal and that he be charged with official misconduct. The maximum penalty following conviction for a charge of this nature is dismissal. The Town Clerk has now retired from the position and as in Case Study B, this course of action would serve no useful purpose beyond highlighting the problem.**

CASE STUDY D

This investigation involved the small local authority of a largely rural coastal area experiencing some coastal development.

By letter dated 17 April 1990, the Commission received a complaint alleging misconduct against a Shire Councillor [referred to as Councillor A]. The letter was signed by the Shire Chairman and the Shire Clerk, in discharge of their respective duties under Section 2.28 of the Criminal Justice Act to refer all suspected matters of official misconduct to the Criminal Justice Commission. The complaint was lodged following a discussion involving many of the Councillors regarding the matters of concern later raised in the letter to the Commission. The Shire Chairman had held a position within the Council for twenty years and the Shire Clerk had occupied his position for eighteen months.

Allegations

In the matters addressed by this case study, the Shire Councillor was alleged to have taken part in discussions at a Council meeting relating to a rezoning application submitted by him after having disclosed a pecuniary interest in the matter; and to have carried out unauthorised work on a boat ramp in the division of the Shire which he represented. This work was undertaken in conjunction with a roadworks project he was carrying out for the Council. The Councillor incorrectly stated the amount owing for the roadworks as including the value of the work performed on the boat ramp and, as a consequence, received payment for work not authorised by the Council.

Profile of Subject of Complaint

Councillor A is a self-employed businessman who owns and runs a concrete and earthmoving business. He had served continuously as a Shire Councillor from 1988 until his defeat in the 1991 Local Government elections.

Investigation

Thirteen (13) people were interviewed in the course of the investigation and Council records and the business records of Councillor A were examined. Eight (8) witnesses gave evidence at a two-day hearing of the Commission.

Chronological Summary of Facts

- October/
November 1988 Council considers the matter of its involvement in the upgrading of a natural boat ramp in the Shire and resolves that the local Progress Association should be advised that the Council would contribute towards this upgrading if the Progress Association obtained all necessary approvals.
- April 1989 The Department of Harbours and Marine advises that the application must be in the name of the Council.
- May 1989 The Council resolves that it would not submit the application. Councillor A present at the meeting.
- August 1989 The Council budget for 1989/90 provides for upgrading of the access road to the natural boat ramp.
- September 1989 The Council considers an application by Councillor A to rezone a forty (40) acre block owned by him. The value of the property would have been increased by \$30,000 if the application was successful.
- Councillor A declared a pecuniary interest and left the meeting, but remained outside the door and later rejoined the meeting and took part in a discussion of issues relating to the rezoning. [There is conflicting evidence concerning the circumstances surrounding his further involvement in discussions].
- December 1989 Upgrading of road carried out by Councillor A under contract from the Council. Four invoices were received from Councillor A, including one for \$1235 for truck and loader hire for loading and carting of road base for the road.
- The Council Overseer signed the necessary order form for the work and Councillor A was paid by the Council.
- Upgrading of the boat ramp apparently also occurred at this time.
- January 1990 Ratepayers complained to the Town Clerk about upgrading of the boat ramp and access road.

February 1990 A formal letter of complaint is received by the Council from ratepayers regarding the upgrading of the boat ramp.

March 1990 Letter of complaint is tabled and acknowledged at Council meeting. Letter is tabled for discussion at next Council meeting as Councillor A claims it contained inaccuracies and had been tabled for discussion without adequate notice.

Councillor A, in discussions with the Shire Clerk, allegedly admits overstating the costs of truck and loader hire and carting of road base. This admission is disputed by Councillor A. Further discussions take place regarding this matter.

In late March, the Council meeting considered the ratepayers' letter. The Shire Clerk informs the meeting that the Council had not expended any money on the construction of the boat ramp. Councillor A was asked by the Chairman if he had charged the Council for work on the ramp. There is some dispute as to the reply given by Councillor A. In any event, it is clear that the Council is by now aware that a portion of the funds ostensibly expended on road access had in fact been diverted to upgrade the natural boat ramp. Ratepayers advised accordingly.

After this meeting, the Chairman asks Councillor A, in the presence of the Shire Clerk and another Councillor, to produce an amended account for the road upgrading and refund the excess charges. Councillor A agrees to do so.

Within a few days, Councillor A gives the Shire Clerk a cheque in refund for \$713, but later retrieves the cheque. He then gives the Shire Clerk an amended account dated 28/3/90 for \$522.50, a handwritten note, and \$713 in cash which he indicated was the amount overcharged. A receipt issued and letters relating to this matter were forwarded to the Criminal Justice Commission, the Auditor-General, and the Director-General of Local Government.

Relevant Legislation

Section 7 of the Local Government Act requires all members of local authorities to take an Oath of Office to impartially fulfil the duties of the office⁹. The operation of Section 14(4) of the Act¹⁰ is designed to preclude members of local authorities from participating in discussions or voting on issues in which they have pecuniary interests. Both provisions were considered in the context of this investigation, in addition to Section 427(1) of the Criminal Code¹¹, which creates the offence of obtaining money by false pretences. The provisions of the Criminal Justice Act with respect to charges of official misconduct were also considered.

The Issues

1. Were there any breaches of the Local Government Act by Councillor A?

Although he declared an interest in the matter relating to the property rezoning and left the meeting, the circumstances under which Councillor A later took part in the discussion relating to the application are unclear. Councillor A stated that he was recalled to the meeting to clarify particular points, whilst other persons present at the meeting dispute this. The others allege that Councillor A interjected in discussions relating to road widths.

Councillor A knew that the boat ramp had been constructed in December and he had billed the Council for its construction. Despite this, he took part in Council discussions and voted at meetings where matters relating to the boat ramp were raised. The money had not yet been reimbursed to the Council. Councillor A clearly had a financial interest in discussions relating to wrongful payments to himself.

2. Was there evidence of the commission of a criminal offence, or of official misconduct by Councillor A?

Councillor A submitted an invoice for twelve hundred and thirty-five dollars (\$1,235) for truck and loader hire for carting road base. Those costs included in

⁹ Annexure A(i)

¹⁰ Ibid, (ii)

¹¹ Annexure B(iii)