



LEGISLATIVE COUNCIL

STANDING COMMITTEE ON
FINANCE AND PUBLIC ADMINISTRATION

9th Report to the Legislative Council

INQUIRY INTO DEPARTMENTAL AND AGENCY
PERFORMANCE AND OPERATIONS

REPORT ON OMBUDSMAN
VICTORIA'S OCTOBER 2009
*REPORT INTO BROOKLAND
GREENS ESTATE —
INVESTIGATIONS INTO METHANE
GAS LEAKS*

MAY 2010



LEGISLATIVE COUNCIL
STANDING COMMITTEE ON
FINANCE AND PUBLIC ADMINISTRATION

INQUIRY INTO DEPARTMENTAL AND AGENCY
PERFORMANCE AND OPERATIONS

**REPORT ON OMBUDSMAN VICTORIA'S OCTOBER
2009 *REPORT INTO BROOKLAND GREENS ESTATE*
— *INVESTIGATIONS INTO METHANE GAS LEAKS***

MAY 2010

Ordered to be Printed

By Authority
Government Printer for the State of Victoria

CONTENTS

STANDING COMMITTEE ON FINANCE AND PUBLIC ADMINISTRATION.....	3
ESTABLISHMENT OF THE STANDING COMMITTEE	4
REPORT	5
1. INQUIRY BACKGROUND.....	5
2. PUBLIC HEARING	5
APPENDIX 1 – TRANSCRIPT OF EVIDENCE	9
APPENDIX 2 – OMBUDSMAN'S RESPONSE TO QUESTIONS TAKEN ON NOTICE.....	28

STANDING COMMITTEE ON FINANCE AND PUBLIC ADMINISTRATION

Committee Members

Mr Gordon Rich-Phillips – Chairman
Member for South Eastern Metropolitan Region

Mr Matthew Viney – Deputy Chairman
Member for Eastern Victoria Region

Mr Greg Barber
Member for Northern Metropolitan Region

Ms Candy Broad (until 13 April 2010)
Member for Northern Victoria Region

Mr Peter Hall
Member for Eastern Victoria Region

Mr Matthew Guy
Member for Northern Metropolitan Region

Mr Peter Kavanagh
Member for Western Victoria Region

Mr Brian Tee (from 13 April 2010)
Member for Eastern Metropolitan Region

Committee Staff

Mr Richard Willis – Secretary, Council Committees

Ms Susan Brent – Research Officer

Mr Anthony Walsh – Research Officer

Mr Sean Marshall – Research Assistant

Address all correspondence to –

Council Committee Office
Department of the Legislative Council
Parliament of Victoria
Spring Street
EAST MELBOURNE VIC 3002

Telephone: (03) 9651 8696
Facsimile: (03) 9651 6799

ESTABLISHMENT OF THE STANDING COMMITTEE

On 21 November 2007, the Legislative Council resolved to appoint a Standing Committee on Finance and Public Administration with a Membership of seven Members. The Council's resolution came into operation on 1 April 2008 and the Committee's inaugural meeting was convened on 7 April 2008.

In accordance with the establishing resolution, the following Members were appointed to the Committee:

- Mr Greg Barber - Australian Greens,
- Ms Candy Broad - Australian Labor Party,
- Mr Peter Hall – Nationals,
- Mr Matthew Guy - Liberal Party,
- Mr Peter Kavanagh - Democratic Labor Party,
- Mr Gordon Rich-Phillips - Liberal Party, and
- Mr Matthew Viney - Australian Labor Party.

At its inaugural meeting the Committee elected Mr Rich-Phillips as Chairman, and Mr Viney as Deputy Chairman.

The establishing resolution provides the Committee with a wide range of powers. Some key features of the Standing Committee include:

- The Standing Committee exists until the Parliament is either prorogued or dissolved.
- Members of the Committee may be substituted by another Member from the same political party.
- The Committee has the power to inquire into any matter or thing relevant to its functions, which is either referred to it by resolution of the Legislative Council, or determined by the Committee.
- The power to appoint sub-committees to inquire into matters.

REPORT

1. Inquiry Background

1. On 28 October 2008, the Committee resolved to inquire into and report on Victorian departmental and agency performance and operations for the previous financial year. The Committee subsequently agreed to modify its terms of reference to the extent that any investigations would not be limited to a particular financial year.
2. On 10 November 2009, the Committee resolved to invite Ombudsman Victoria to give evidence at a public hearing with respect to the Ombudsman's October 2009 *Brookland Greens Estate – Investigation into methane gas leaks* report.
3. In August 2008, methane gas was detected at 63 per cent volume for volume of air in certain houses on the Brookland Greens Estate in Cranbourne. The gas came from a former landfill site next to the development. Problems containing the gas were reported less than 12 months after the landfill ceased operation. The Ombudsman conducted an investigation into this issue, focussing on the approval for the landfill, the management of the landfill, Environmental Protection Authority (EPA) enforcement in relation to the landfill, planning decisions affecting the estate, and the safety of residents in the estate.
4. An overview of the Committee's public hearing with the Department, together with follow-up matters, is provided in the following pages.

2. Public Hearing

5. On 19 February 2010, the Committee received evidence from the following Ombudsman Victoria representatives:

- Mr John Taylor, Deputy Ombudsman; and
- Mr Glenn Sullivan, Director of Investigations.

2.1 Key matters raised in hearing

6. The following issues were discussed during the public hearing with the Victorian Ombudsman's Office:
 - The process undertaken during the Ombudsman's investigations, including public consultation, witness interviews, any constraints on the investigations, and progress on implementation of the report's recommendations.
 - The operation of local government tender processes involving the cities of Casey and Frankston with respect to landfill and gas extraction, including discussion of best practice guidelines such as those outlined by the Victorian Government Purchasing Board.
 - Recommendation 19 of the Ombudsman's report requiring the City of Casey to *'review its code of conduct and provide related training to ensure its officers do not exert undue pressure on a statutory authority or attempt to interfere with the decisions of a statutory authority.'* Specifically, discussion focussed on the failures of the then Shire of Cranbourne and the Environment Protection Authority to manage the landfill site.
 - The Ombudsman's positive assessment of the role and actions of the Country Fire Authority (CFA) in responding to the gas leak.
 - The powers and role of the EPA in monitoring the former tip site and its actions with respect to monitoring and addressing the gas leak.
 - The powers of the Ombudsman under the *Ombudsman Act 1973* to enquire into or investigate administrative actions by the Victorian Civil and Administrative Tribunal (VCAT).
 - The role of the VCAT in approving development on the former tip site.

2.2 Questions taken on notice

7. The following question was taken on notice by the Ombudsman Victoria (page references refer to the transcript in Appendix 1):

- To advise how tender processes operate under the *Local Government Act 1989*. (p. 3)
8. A copy of the response from Ombudsman Victoria is attached in Appendix 2.

Committee Room
5 May 2010

APPENDIX 1 – TRANSCRIPT OF EVIDENCE

CORRECTED VERSION

STANDING COMMITTEE ON FINANCE AND PUBLIC ADMINISTRATION
Inquiry into Ombudsman Victoria regarding October 2009 report into Brookland Greens
estate — investigations into methane gas leaks
Melbourne — 19 February 2010

Members

Mr G. Barber
Ms C. Broad
Mr M. Guy
Mr P. Hall

Mr P. Kavanagh
Mr G. Rich-Phillips
Mr M. Viney

Chair: Mr G. Rich-Phillips
Deputy Chair: Mr M. Viney

Substituted member

Mr B. Tee for Mr M. Viney
Mrs I. Peulich for Mr M. Guy

Staff

Secretary: Mr R. Willis
Research Officer: Ms S. Brent
Research Officer: Mr A. Walsh
Research Assistant: Mr S. Marshall

Witnesses

Mr J. Taylor, deputy ombudsman, and
Mr G. Sullivan, director of investigations, Ombudsman Victoria.

The CHAIR — I declare open the Legislative Council Standing Committee on Finance and Public Administration public hearing. Today's hearing is in relation to the inquiry into departmental and agency performance and operations. Specifically the committee is examining the Victorian Ombudsman's October 2009 report into the Brookland Greens estate methane gas leaks.

I welcome Mr John Taylor, the deputy ombudsman, and Mr Glenn Sullivan, director of investigations, Victorian Ombudsman's office. All evidence taken at this hearing is protected by parliamentary privilege as provided by the Constitution Act 1975 and further subject to the provisions of Legislative Council standing orders. Any comments made outside the precincts of the hearing are not protected by parliamentary privilege.

All evidence is being recorded by Hansard, and you will be provided with a proof version of the transcript in the next couple of days for any corrections.

For the hearing this morning we have a number of substitutions on the committee. We have Mrs Inga Peulich substituting for Mr Matthew Guy and we will have Mr Brian Tee substituting for Mr Matt Viney.

Mr Taylor and Mr Sullivan, would you care to make an opening statement before we proceed to questions.

Mr TAYLOR — No, we are happy to proceed to questions, Chair.

The CHAIR — Thank you. Can I start by asking about your report. Following the report last October I understand your office indicated you would be monitoring the implementation of the recommendations. Are you able to update the committee on that process?

Mr TAYLOR — Firstly, it is our practice to monitor all of the Ombudsman's recommendations, whether they are in a public report or whether it is direct with the agency. In this particular case it is too soon for us to have sought a further update, other than to say that all of the recommendations have been accepted by the various agencies involved, and implementation of some of those has taken effect, but we have not pursued the detail at this stage. Before the committee commenced I informed Mrs Peulich that our next report to Parliament will be next week, and that will be on the recommendations made in public reports for the years 2006 to 2008. That will be a practice of the Ombudsman to report to Parliament on the implementation of his recommendations in future.

The CHAIR — I will therefore ask you about a couple of specific points in your report, the first being on page 115, which deals with the issue of contract management, and specifically paragraph 649 and the associated recommendation — that is, recommendation 21.

Mr TAYLOR — What was the number of that paragraph?

The CHAIR — Paragraph 649.

Mr TAYLOR — Yes.

The CHAIR — And the recommendation with respect to the Casey and Frankston city councils relating to ensuring their tendering procedures are consistent with the Local Government Act and the Victorian Government Purchasing Board.

Mr TAYLOR — Yes.

The CHAIR — Can I ask, firstly with respect to the Victorian Government Purchasing Board, are those councils subject to the requirements of the VGPB?

Mr TAYLOR — No.

Mr SULLIVAN — My understanding is that they would be subject to the Local Government Act with respect to procurement.

The CHAIR — So what was the basis of your recommendation that they adhere to VGPB procedural guidelines?

Mr SULLIVAN — The Victorian Government Purchasing Board produces guidelines for all agencies. We felt they are particularly relevant not just to public agencies but to all councils as well and that there would be some benefit from councils also engaging in the spirit of those guidelines.

The CHAIR — Is there any obligation on local government to do that?

Mr TAYLOR — No, not at the present time.

The CHAIR — So in effect this is not an adverse recommendation, it is merely a recommendation — —

Mr SULLIVAN — A best practice recommendation, I think.

The CHAIR — The other element of that recommendation was a reference to Local Government Act requirements. In your text you have referred to a likely breach of the Local Government Act. Can you elaborate on the basis of that assessment that there was a likely breach of the act?

Mr SULLIVAN — And you are looking at paragraph 649 in particular?

The CHAIR — Yes.

Mr SULLIVAN — We looked at the tender process for the gas extraction contract. I understand there were two tenderers that had applied at that stage. The documentation we reviewed indicated that the council simply made a decision based on the pure cost alone. That seemed to have been the overriding consideration. We felt there was more to it than cost, for example, in respect of the environmental protections in this particular case, and on that basis felt the tender process had not been as thorough as it could have been, looking at other aspects beyond the cost.

The CHAIR — You have gone further than that, though, in your commentary in stating it was a likely breach of the act. Did you make a legal assessment or seek legal opinion?

Mr TAYLOR — Just in relation to that, throughout this investigation we employed an experienced barrister to advise us on each step. Yes, we did get legal advice in relation to that comment.

The CHAIR — And this reflects that advice?

Mr TAYLOR — Yes.

The CHAIR — Are you able to elaborate on the specific section of the Local Government Act? You may want to take that on notice, if you are able to.

Mr SULLIVAN — I am aware of the specific section but I am not able to refer to it at the moment. I am happy to take that on notice. I think it may be section 186.

The CHAIR — We would be happy if you could come back to us on that.

Mr SULLIVAN — Yes.

The CHAIR — The other matter I want to touch on at this point is your recommendation 19, which is on page 74. This recommendation states:

The City of Casey review its code of conduct and provide related training to ensure its officers do not exert undue pressure on a statutory authority or attempt to interfere with the decisions of a statutory authority.

I note that is not referenced in the text: there is no reference to any finding of undue pressure or any finding of interference. I am just wondering as to the basis of that recommendation.

Mr TAYLOR — There is commentary in relation to the EPA's failure to pursue its statutory responsibilities on a number of occasions. One was in relation to a permit, for example, and the risk of going to VCAT. It is clear that the council seemed to have the upper hand in that relationship over a number of years. We do not criticise any officer in particular, but it was clear that the relationship was imbalanced. Do you want to add to that, Glenn?

Mr SULLIVAN — The documentation that we looked at in respect of the initial works approval for the landfill indicated that there was undue pressure placed on the EPA by, as it was at that stage, the Shire of Cranbourne, which felt it had the upper hand in respect of some problems there had previously been with the first works approval being invalid, to the extent that the file notes indicated pretty much that the shire felt that it was in a position to, if you like, take advantage of the EPA in this particular matter given the EPA's poor track record in dealing with the works approval.

Mr TAYLOR — Of course that goes to the heart of the problems that we identified. If you turn the clock back nearly 20 years to 1992–93 when there were the issues about how the tip should be developed and whether it should be lined with clay or not, you see it was particularly in relation to the issue of spending extra money to line with clay that the council argued and in fact took the upper hand with the EPA and persuaded the EPA against its initial decision that the tip not be lined with clay. The argument the council put forward was that that would save them \$500 000. Now we know, some 18 years later, that the actual cost is likely to be in the range of \$100 million to remedy what could have been dealt with properly in the first place.

The CHAIR — Was that a failure of the then Shire of Cranbourne or was it a failure of the EPA?

Mr TAYLOR — I think it was a failure of both. They both had responsibility to manage the environment.

The CHAIR — But on the question, though, of undue influence, it is your office's view that it was the shire's failing?

Mr TAYLOR — Yes.

The CHAIR — The further reference to interference?

Mr TAYLOR — Again, you will see commentary in the report about the council at times being very assertive with the EPA and the EPA, because it had lost a case before VCAT, was concerned about the risk of losing again and therefore took, in effect, a subordinate role with the City of Casey.

Mr TEE — Can I just ask: when was that case roughly in terms of — —

The CHAIR — Mr Tee, we will just finish here. Sorry, I think you meant the Shire of Cranbourne at that point.

Mr SULLIVAN — It was the Shire of Cranbourne at that stage.

The CHAIR — But, again, is that the fault of the shire or the fault of the EPA?

Mr TAYLOR — I guess if you are looking to apportion responsibility, I think they were both wrong. They both made decisions and took actions that were not in the interests of the community or the environment.

The CHAIR — Thank you. I understand Mr Tee has a quick follow-up question.

Mr TEE — I just wanted to, in terms of the reference to the case — what was the case?

Mr SULLIVAN — The Camberwell case, which is cited throughout the report. I think it was a 1991 case.

Mrs PEULICH — Just quickly, I refer to the relationship between the EPA and the council and the assertion that the council appeared to have an upper hand in its relationship with the EPA. Yet you also mention in your report that the council failed to combine effectively with the EPA for the VCAT hearing because the EPA refused to become a party to the appeal despite requests from the council for it do so. The council in actual fact had to subpoena the EPA to give evidence. If it had the upper hand, why was it not the case that the EPA was then coaxed or cajoled to combine with the council to present a united case?

Mr TAYLOR — It is a good question. I think the EPA in essence was scared of getting involved in the court proceedings. They were not compellable — they could not be forced to combine with the council — and they simply took a back seat.

Mr SULLIVAN — Our investigation certainly identified that the council was making strong overtures to the EPA to become involved, and the EPA resisted those overtures.

Mrs PEULICH — So it is really not having the upper hand.

Mr SULLIVAN — We are talking about separate events here. In respect of my comments about having an upper hand, they were in relation to the initial works approval back in 1992 and what took place with the Shire of Cranbourne. The subsequent events which you are talking about relate to the 2004 VCAT case. Things have changed. We are not comparing apples with apples here.

Ms BROAD — Can I take you to page 25 of the executive summary where the Ombudsman in his report makes a number of observations. First of all, in relation to the CFA as the lead agency responsible, the assessment is made that — and it is highlighted in the side bar:

... the CFA, as the lead agency responsible for handling the emergency situation, performed commendably in the —
unfortunate —
circumstances.

Can I ask you to outline for the benefit of the committee the assessment that was done of the CFA's actions as the lead agency and how you came to that conclusion and whether there are any lessons to be learnt in relation to responding to any future emergencies of whatever nature which the CFA of course is called upon to do in a whole range of circumstances. It is very important for the whole community.

Mr TAYLOR — Firstly, this report is my report as I was acting ombudsman when I was requested by the acting Attorney-General to consider the investigation, and I was acting ombudsman when it was tabled. Otherwise the Ombudsman would have been very pleased to appear before the committee.

Secondly, the investigation covered every aspect of the organisation of the tip at Cranbourne from the early 1990s up until the incident and our investigation in 2008. Over 70 witnesses were interviewed. The great majority cooperated. In fact we only had to issue one summons, which was a positive thing. The only organisation that came out of the investigation, in my view, with its hands clean was the CFA. The CFA came into this, of course, late in the piece, only after the emergency was declared. Its handling of the situation in terms of on-the-scene handling with people, with the citizens who live there and with their command and control was very good. That is why we have complimented it. It was the lead agency, and it did a very good job. Everyone else involved in this, in my view, simply failed to do their job properly. We do make comment about the Office of the Emergency Services Commissioner. That is an important job, yet the Office of the Emergency Services Commissioner failed to conduct a review and only commenced one after we started asking questions. Do you want to add anything about the CFA?

Mr SULLIVAN — Just to say that for the CFA this was a fairly unusual type of emergency. It is fair to say that they had not had a lot of experience in dealing with these types of emergencies previously. Investigations indicated that they mobilised very quickly. They ensured they had the technical information and understanding and, as John indicated, they were also extremely helpful when you had the EPA and the City of Casey not cooperating. The CFA was in between them and was often ensuring that the public was made aware and was getting information first hand. To their credit, I think they did a good job in the circumstances.

Ms BROAD — Thank you. I am aware of the report's findings in relation to emergency services, so can I take it from your remarks that it was the CFA which had a lot of the human contact with people in dealing with the emergency? Are they the actions you are referring to?

Mr SULLIVAN — The CFA, in conjunction with the City of Casey and the EPA. DHS also had a role in dealing with the people and providing them with information so that they could understand and deal with the emergency, so there was a range and the CFA was right at the centre of that.

Mr TAYLOR — And had the lead responsibility. They coordinated all the response to the incident.

Ms BROAD — On the same page there are also some statements in relation to the EPA, some of quite a number in the report. At paragraph 120 you remarked that although the EPA was initially slow to respond to the detection of methane in the estate, from June 2008 onwards the EPA took a range of appropriate actions — that is my summary. Those comments seem to be indicating that after the initial slow response, as assessed by yourselves, you believe they then took appropriate actions, and you have summarised those actions there. Can

you outline for the committee in more detail how you came to that assessment of the actions the EPA took once they got going?

Mr TAYLOR — They only got going because the CEO, Mick Bourke, did not find out about what was happening at Cranbourne until June 2008. Once he became aware, there were steps taken to take effective action in conjunction with the council. Leading up to that, though, there were several years of inaction, which is set out in the report, where junior officers reported formally that there were concerns, going back to March 2006, in terms of gas leaking through the road, bubbling up in puddles on the road, and no action was taken by regional management at EPA. We name the officers responsible, and in particular the regional manager is no longer there. There was clearly a breakdown in communication within the EPA about what was happening at the, literally, ground level.

Ms BROAD — You have referred to the elevation of this issue, quite appropriately, to Mr Bourke. Can you outline to the committee what happened once it got to that level.

Mr SULLIVAN — Once Mr Bourke became aware of the issue I understand he engaged an international panel of experts to provide advice to the EPA. One of those experts was from Scotland. He was a Mr Shaughnessy, who is referred to in the report and whom we interviewed through our investigation. There were a number of other independent reports that the EPA engaged in obtaining expert advice. There were also the reports from the auditor, Mr Brian Eva, that were forming the basis for many of these concerns we reviewed. So a number of independent reviews were undertaken by the EPA at that stage but, as Mr Taylor indicated, it had certainly taken a long time for some of these issues to be brought to the attention of Mr Bourke. Certainly the auditor, Mr Eva, had made the EPA aware of his concerns in 2007. In an audit report he described an imminent environmental hazard in the estate due to gas leaking.

Ms BROAD — I am certainly aware of the content of the report in terms of what happened prior to it being elevated appropriately to Mr Bourke. I believe there are also some observations in the report, including the EPA's response, to ensure that if circumstances were to arise again, matters would be elevated in a much more straightforward manner in the organisation. Can you — —

Mr TAYLOR — The organisation has been restructured, their investigation procedures reviewed and updated and their reporting lines clarified. They have done a review of every tip in Victoria and made a commitment to continue that monitoring in case there is the risk of future incidents, although we are not aware of any other tip in Victoria that poses the same risk as Cranbourne did. There have been significant steps taken by the EPA.

Ms BROAD — Thank you.

Mr BARBER — Mr Taylor, I refer to the Ombudsman Act, part III, Functions and jurisdiction. Section 3(3) of part III says that:

Nothing in this Act shall authorize the Ombudsman to enquire into or investigate any administrative action taken ...

It goes on to say at subsection 3(aa):

by a board tribunal commission or other body presided over by a Judge magistrate or ... lawyer —

blah, blah, blah. Can you tell me how that would have constrained your investigation or your ability to make recommendations in relation to this matter?

Mr TAYLOR — The only area where that was relevant was our consideration of VCAT's handling of the decision in relation to the Cranbourne tip. However, once it became known that we had an interest in VCAT the president of VCAT, Justice Bell, offered every assistance. In doing so, through that we identified that there had not been a written determination of the earlier decision, that the transcript was ineffective and that their tape recordings were inadequate.

Whilst that provision does not permit the Ombudsman to investigate the actions of tribunals, there is no limitation on us investigating the administrative actions of the support areas of the tribunal. Despite having the cooperation of the tribunal, we had every right to look at their processes, and we did.

One of the interesting things, and I think it is one of the interesting anecdotes in an Ombudsman's life, is that it was Glenn's responsibility to actually sit down and listen to hours of tape recordings and find that in fact the sound system had been left on during an adjournment. During that adjournment we identified that the expert then talked about things that he did not tell the tribunal about as an expert. We have been critical of that.

Mrs PEULICH — Was that perjury?

Mr TAYLOR — No, it was simply failing to perform as an expert is required to before the tribunal. He did not lie about it, he was not asked questions about it, but it was his knowledge about the risks of the combustibility of methane gas, and he discussed that and an earlier case that he was aware of. One would have expected that an expert would have been open and frank with the tribunal in relation to all aspects of what we are talking about in relation to a tip.

Mr BARBER — Okay, so you have confirmed that that section of your act says that you can only really investigate and therefore make findings on the merest administrative aspects of how the tribunal runs itself.

Mr TAYLOR — Yes.

Mr BARBER — Whether their microphones were loud enough. You cannot look at any of the merits of their actual decisions.

Mr TAYLOR — No.

Mr BARBER — Whether they got it right or wrong.

Mr TAYLOR — Correct. But that is deliberate in terms of the separation of powers.

Mr BARBER — My word.

Mr TAYLOR — After all, if someone is unhappy with VCAT, as in this case, they could have appealed to the Supreme Court.

Mr BARBER — My word. However, if VCAT had affirmed council's original decision not to allow development on the buffer zone, we would not be sitting here, would we?

Mr TAYLOR — Correct.

Mr BARBER — Okay. Does it not then skew your report to a certain extent that you cannot blame or, as you said earlier, apportion responsibility to VCAT for its link in the chain, which was as crucial a link as many others? Therefore, what we get is a whole series of findings and commentary, and even recommendations, saying that council should have gone in harder, EPA should have been there and the expert witness should have fully volunteered every opinion or thought that he might have had. You then literally looked at council's legal advice and said that they got it wrong in not appealing VCAT's decision. To me it sounds as if the inability to scrutinise VCAT's role in all this forces you to effectively work around and blame everybody else for not being effective enough in convincing VCAT to reaffirm its original decision.

Mr TAYLOR — We can only do what the law allows us to do. The whole principle of our judicial system is that judges, magistrates and tribunal members are independent. They are subject to judicial review, and the Ombudsman's role is to look at administrative actions. We took the matter as far as we could. At the end of the day we are critical of the players, you are correct, and we are critical of the council for not appealing, although they acted on legal advice which we say was incorrect.

Mr BARBER — How can legal advice be incorrect? Everybody who goes to court reckons they are going to win, and usually half of them are wrong. The test of legal advice is when it is contested in court. I do not see how you can actually decide that legal advice is per se wrong.

Mr TAYLOR — The report sets out the grounds for why we consider the advice was wrong, and of course we gave the lawyer the opportunity to respond to our preliminary concerns. But isn't that what keeps the legal system going — differing views by lawyers?

Mr BARBER — No.

Mr TAYLOR — Why matters are appealed or not appealed?

Mr BARBER — No. The findings of the Magistrates Court in that case would have been the way to resolve this.

Mr TAYLOR — Absolutely, it could have, but that was not an area that we were entitled to or considered that we should look at.

Mr BARBER — But VCAT, when it is making its decisions, is not hearing an appeal of aspects of the council's decision. It is literally making a merits decision; it is standing in the shoes of the decision-maker. Here we had a decision-maker who said, 'Don't build on the tip'. As events turned out, another decision-maker, VCAT, also got to look at the matter.

An alternative world might have been where the minister called it in. If the minister had called it in, would you have been within your rights to then look at how they dealt with the decision and find fault or otherwise?

Mr TAYLOR — No, because if you continue to read that section of the Ombudsman Act, you will see that ministers are not within the jurisdiction of the Ombudsman.

Mr BARBER — Section 19, headed 'Deliberations of Ministers and Parliamentary committees not to be disclosed', states:

(1) A person shall not be required or authorized by virtue of this Act—

(a) to furnish any information or answer any question ...

...

which relates to the deliberations of Ministers or any committee consisting of Members of Parliament where the committee is formed for the purpose of advising the Ministers in respect of their deliberations.

So if they had gone down the ministerial path, you also would have been out of the game.

Mr TAYLOR — Except we can look at the actions of the department leading up to the minister's decision.

Mr BARBER — It also says in that section that a certificate issued by the Attorney-General certifying that information is part of one of those decisions is conclusive.

Mr TAYLOR — Yes.

Mr BARBER — Have you had instances where the Attorney-General has issued conclusive certificates?

Mr TAYLOR — No. I have been deputy ombudsman for more than five years, and I am not aware that that has in fact ever occurred in the history of the Ombudsman's office.

Mr BARBER — Thank you.

Mr KAVANAGH — I thank the witnesses for coming today. I do not have any questions, Chair.

Mrs PEULICH — If I may, I will ask four follow-up questions and then one that goes to the issue of process. I think what Mr Barber was trying to get to was also the issue of process and the limitations of constraints that may have shaped the nature of the report and perhaps even hampered us in getting the sort of progress that we were hoping to hear from you today. In your earlier briefing of me there was an indication that office of the Ombudsman would be monitoring the limitation — active monitoring. It has now been four months; I would have hoped for some progress to be reported.

But in relation to follow-up, first of all, you made the criticism of the council that they did not take the matter to the Supreme Court; they did not challenge it. Could you identify specifically the point of law that could have been the subject of that Supreme Court challenge?

Mr TAYLOR — It is specified in the report. If you bear with me one moment, I will just draw your attention to the particular section.

Mrs PEULICH — I am aware of the section; it is just a specific technical point.

Mr TAYLOR — Yes, and we do provide advice on that. As I mentioned earlier, this is one of the largest reports the office has ever published, and in relation to the particular bit of legal advice, at page 194, paragraph 1073 talks about:

... the legal advice obtained by the City of Casey fails to recognise that the operative VCAT decision was the interpretation of the meaning of 'tipping area' in relation to the section 173 agreement, the development plan and the state environment protection policy ...

We then drew the conclusion that there was no doubt that this critical issue — the interpretation of the defined term 'tipping area' — was a question of law and therefore could have been appealed.

Mrs PEULICH — In your earlier comments about being limited to the review of the administrative processes in relation to VCAT, in particular focusing on the technical and support elements, you would then agree that you were not able to comment on the VCAT members' perhaps failure to acknowledge expertise, or to comment on their level of expertise and their failure to draw on further experience to assist in their decision making or perhaps utilise the full extent of their powers to call in the assistance of experts. Were the parameters of your inquiry, therefore, sufficient to get to the bottom of this issue so that you could progress a more speedy resolution of all of those outstanding matters, which are still in abeyance?

Mr TAYLOR — The only point that we commented on that would go to the VCAT members' performance was the very practical one — it took five years to get a written judgement. Apart from that, it was not our role, nor our right, to comment on the decision as it was. The legal advice is a different matter. That was advice provided to council.

Mrs PEULICH — Just a further follow-up, if I may, in praise of the CFA, and I must also agree that their response was commendable, and I think the whole community is grateful for the work they undertook, but in relation the lead-up to the calling of the emergency, I understand that the CFA was reluctant to participate in the calling of the emergency. Can you confirm that that was indeed the case?

Mr SULLIVAN — I think there was a lot of conjecture during that period as to whether or not we were in an emergency. Certainly the EPA, being the body responsible for having the technical information and providing the data in relation to the methane readings, was the primary one and which the CFA were following at that stage. The CFA was certainly involved in discussions but was looking at the EPA to provide that technical advice as to whether or not we had reached the emergency stage.

Mr TAYLOR — So far as we are aware, this was the first time this sort of natural disaster had occurred.

Mrs PEULICH — Just a further two follow-up questions to that very point. Is it correct that soon after the emergency was called a comprehensive risk assessment was commissioned — I think a URS? Am I reliably informed that the conclusion of that risk assessment was that the level of risk was acceptable?

Mr SULLIVAN — That is my understanding of the report, yes, and the report, I understand, was looking at data. The report was in October, and there were two sets of data I think that were looked at, and that report was commissioned by the EPA to look at conducting a quantitative risk assessment. This had never been done before, and I think it took the EPA some month or so to source the experts to be able to provide that advice and, based on that quantitative risk assessment, they did find that the risk was within an acceptable range.

Mrs PEULICH — A further question, if I may in terms of follow-up. The Ombudsman's report records that the EPA's decision to recommend that an emergency be called was based on diverse technical advice. That line is in paragraph 1279. Would you say that the advice of the international expert, Mr Jim Shaughnessy, was given most weight by the EPA, and are you aware what steps were taken by the EPA to analyse critically the international experience relied upon by Mr Shaughnessy?

Mr SULLIVAN — Certainly Mr Shaughnessy was a key figure in the EPA forming the advice that they did, but in the information that I looked at they also sought advice from a number of international experts. I

think there were four in total listed in the report from the USA, Italy — I cannot recall the other one — but they certainly looked at a range of advice, and they were fairly consistent in the information that we saw, indicating that there was a serious problem here. The EPA later arranged for Mr Shaughnessy to come and visit the site and he made some comments which we report in the report in respect to his describing the situation as being one of the worst he had ever seen.

Mrs PEULICH — Your earlier comments about the implementation and it being now too soon, even though obviously in terms of the community it was a year before the tabling of a report, and I understand the amount of work that your office had to do and the complex nature of the inquiry, it has been now four months since then. If four months and a further year before that is too soon, what would be an appropriate time frame for getting to a stage where some of those complex issues can be resolved, or do you see that as something that you can shape and influence?

Mr TAYLOR — We have a process. If it is straightforward, usually we set a timetable, and in this particular case when six months has passed from the tabling of report we will pursue all of the recommendations with the agencies. As I said earlier, we will ultimately report to Parliament on the implementation of those and other recommendations.

Mrs PEULICH — Given the shortcomings that were identified rightly by Mr Barber, will it ever be possible for you to get to where we need to be, given also that there were certain areas that you were constrained from inquiring into?

Mr TAYLOR — Leaving aside the VCAT decision, I do not think you would find a more definitive report in relation to a natural disaster anywhere. We covered every aspect. It simply would not be appropriate for the Ombudsman to comment on the decision itself, because that is outside our jurisdiction. I do not think there was any other stone unturned.

Mrs PEULICH — But you would agree that VCAT's decision was critical and that if that decision was not taken none of this would have transpired?

Mr TAYLOR — There are obvious issues with the VCAT decision which we identify in terms of the need — I think a compelling need — to appeal the decision, but that did not happen.

Mr TEE — Can I start where Mrs Peulich left off — that is, in relation to VCAT and their role? As I follow the debate, it appears that there is a number of aspects to it. I suppose the first aspect is whether or not the Ombudsman ought to play a role in effectively reviewing the VCAT decision, so whether or not the Ombudsman ought to make comment about the VCAT decision. As I understand the debate, really as part of our separation of powers, part of our system, that is not appropriate. As you have indicated, there was a right of appeal and that was, in your view, wrongly not exercised. I do not take it from your evidence and the report that you would want to see a change where you would be in essence usurping the current appeal mechanism and interposing the Ombudsman in that process. Is that a fair summary of your position?

Mr TAYLOR — It is, and it is a fair summary of the law. After all, the Ombudsman investigates administrative actions. We are not a de facto court. The act is quite specific. We require and the act requires complainants to exhaust their normal rights of review before they come to the Ombudsman. There are exceptions, but generally complainants are required to go to the agency and deal with the agency. After all, the agency has the capacity to address the issue; we do not. We make recommendations. It would be inappropriate for the Ombudsman to get caught up in what is the judicial system, remembering that ombudsmen were introduced in Australia in the 1970s because the judicial system was becoming complicated and expensive and the average citizen could not seek a redress through the normal mechanisms.

The Ombudsman is a free, simple process for dealing with citizens' complaints on a daily basis. Last year we dealt with 20 000 complaints and inquiries, and at that time we had 50 staff. So you can see that the important role for us is dealing with day-to-day issues for citizens. These sorts of significant cases present a real challenge for us because of resources, but they also present an opportunity to tackle the big-picture issues that can improve public administration broadly. I can give you many examples of Ombudsman reports in the last five years that have led to change across the Victorian public sector.

Mr TEE — Again following up, your report does deal in some detail with the process in relation to the VCAT decision. To the extent that there is a criticism from yourselves, am I right in summarising that the criticism is in terms of the quality and range of evidence that was given to VCAT, that it might have been different or better? Without commenting on that, your concern is in terms of the quality and range of the evidence that was put in terms of both the council and the expert witnesses. Again, is that a fair summary of your overview of the VCAT position?

Mr TAYLOR — Yes. I think that listening to the tape gave a valuable insight into the way the proceedings were conducted. To identify that a witness had failed to provide fulsome evidence on a key issue was quite an insight into the proceedings, but that is as far as we went.

Mr TEE — The other issue I wanted to follow up in relation to the questions that Mrs Peulich asked goes to her I suppose disappointment at the progress in terms of your reporting. I think at the start you indicated that there would be a further report. Can I just get you to confirm that that is the case and when that is likely to be?

Mr TAYLOR — Next week the Ombudsman will table in Parliament a report summarising the recommendations of his key reports to Parliament between June 2006 and June 2008. Following that, there will be a further report picking up on similar reports, and perhaps even this one, in due course. It is a first for the office, and I can assure you that to prepare a report for Parliament is a huge task.

Mrs PEULICH — Just a minor nuance of meaning: it was not disappointment at your inability to report; my disappointment was at our inability to establish what was the progress of the implementation of those recommendations.

Mr TAYLOR — Understood. Our normal process would be that in a couple of months we will follow up on those, as we do with all cases.

Mr TEE — Again, in terms of that, Mrs Peulich's disappointment will be relieved or released come next week, when the reports or something is filed. My question really is: in terms of the timing of any follow-up reports, that is entirely a matter for the Ombudsman? There is no constraint on you in terms of the act or anything; it is a matter for you as to when and how you make any follow-up report?

Mr TAYLOR — There are two issues that are relevant to that. The Ombudsman Act does provide that if an agency does not take reasonable steps to respond to his recommendations within a reasonable period of time, the Ombudsman can report to Governor in Council. Secondly, there is a general provision that the Ombudsman can report to Parliament on any matter at any time. It is that second provision that we will be exercising next week and in the future as well.

Mr TEE — Thank you.

Mr TAYLOR — If I might just finish, the outcomes of this report will be reported to Parliament in due course, but I can assure you that we will follow up the recommendations as a normal part of our practices.

Mr SULLIVAN — Can I also add that the EPA has accepted all the Ombudsman's recommendations and, in many cases, has already fulfilled some of those recommendations, given that some are historical in respect of things that they have since done. So I think there has been some degree of action in relation to those matters and they will be followed up, as Mr Taylor indicated.

Mr TEE — Thank you. Now there are a number of issues that I want to go to. The first one is you indicated that this was the largest report, and I suspect the largest body of work, that you have been involved in. Are you able to give the committee a sense of the process and the thoroughness in terms of the time that was taken, the number of people in rough terms that you spoke to and the steps that you took to get to what is a very thorough and detailed review of the events?

Mrs PEULICH — And if you could add to that the cost as well.

Mr TAYLOR — Absolutely. I took a call on a Saturday afternoon from our general counsel saying he had been approached by the Attorney-General's department seeking an indication of whether we would consider conducting an investigation. It is always the Ombudsman's independent right to decide what we will do.

On the Monday morning we had further discussions and the condition that we imposed on conducting an own-motion investigation was that it be fully funded, reminding the committee that at that time we had 50 staff and a workload then of about 18 000 complaints.

Within a week we had a small team of four investigators led by Glenn Sullivan. We took over a conference room, as again we are a small organisation with small accommodation, and we brought in some outside expertise, having got a commitment that we would be funded. We asked for a specific amount. I asked for \$700 000, making an estimate of how many people would be involved and how long an investigation of this type might take. I should point out, Chair, I have worked for six ombudsmen across three jurisdictions.

It actually cost \$784 000; we bore the additional cost. We brought in outside expertise when we needed it, and within a week we had an investigation's plan and commenced making inquiries, which largely meant taking possession of records from the various agencies. Within a month we were interviewing individuals and over the following six months — —

Mr SULLIVAN — Yes, seven.

Mr TAYLOR — Glenn and his team interviewed over 70 witnesses, both here and interstate. We sought expert advice from interstate; we brought in an expert planner for three months to assist us with a planning component; and we used an experienced member of the Bar for advice from time to time. We also brought in and seconded other officers as we needed them. So it was a very intensive time leading to a draft report. Sorry for the lesson!

Mr TEE — No.

Mr TAYLOR — But the act requires that if we are critical or imply we are critical of any individual, we must give them an opportunity to respond, and that response must be fairly represented in the report. So again you have a process of going to individuals first, and our practice is to go to individuals whether they are a government official or anyone else, and there were quite a few people who were not government officials, including the developer, to give them an opportunity to respond.

Then after that we develop a further draft report where we give the agencies involved an opportunity to respond to the initial criticisms and recommendations. Having done all that, this report is prepared and provided to Parliament. We took just over a year to complete that exercise.

Mr TEE — Thank you. I just want to pick up a couple of points then in terms of the content of the report. You have already indicated that the EPA has accepted the recommendations and indeed I think your evidence is that a number of those have already been implemented. But I note that on page 16 of your report at paragraph 53 you say:

While the Frankston City Council has accepted my conclusions, the City of Casey has denied any accountability on its part.

In view of the seriousness of the issues and the lessons to be learnt, would that cause you some concern in terms of history not repeating itself?

Mr TAYLOR — Casey have accepted all the recommendations. There are some aspects where, of course, they see things in a different light. This particular paragraph relates to a lack of accountability in terms of Casey's management of the tip and its involvement with the tip management. We have taken quite a strong view based on the available evidence as to the culpability of Casey. Of course no-one likes to admit that they are wrong, but they have accepted all our recommendations. There are aspects in the report that really are very critical of Casey council.

One little example is an exchange of emails between the EPA and the CEO of the City of Casey where the EPA offered to provide an EPA officer to work out of Casey council during this fairly critical time and the CEO — and it is reported in the report — said, 'I could not guarantee the safety of your officer'. What a silly response to a genuine offer to work together on what was a problem that was not going to go away.

Mrs PEULICH — There was a lot of heat in the community, though.

Mr TAYLOR — There was, and there was a lot of tension and a lot of blaming — and we have not touched on that yet — but a lot of finger-pointing as to who is responsible for the ultimate failure to manage the environment.

Mr TEE — I suppose, following on from that, there was a lot of heat and a lot of tension and a fair bit of politics, too. I think that in your executive summary at page 11, paragraph 25, you allude I suspect to the criticism that there was in essence an overreaction in terms of the recommendation to evacuate.

I am wondering if you could give us a summary of your views in terms of whether that was the right decision to make and obviously there is always the benefit of hindsight, but if that was the right decision to be made at the time?

Mr TAYLOR — This was a serious environmental disaster. The level of methane in a number of private homes was significantly and dangerously high. All the experts say that. All the monitoring that was placed in those homes says that. That problem continues in a minor way. The methane gas is still being transmitted from the tip. There is still work being done to mitigate that. I do not think the decision to evacuate those homes was anything other than a very sensible and prudent decision in the interests of protecting the individuals.

As we say, there are many people who live there today who have had a great deal of disruption and fear in their lives. In fact we decided that we should recommend that individuals be compensated for the risks, their fear and concerns, and that perhaps their loss of property value be taken into account, too. How that happens is not a matter for us.

Mr TEE — And there is litigation in relation to that.

Mr TAYLOR — There is currently litigation. True.

Mr TEE — We are wanting to pick up partly on the ongoing monitoring. At page 236 of your report you talk about

the assistance provided by the Victorian Government to affected residents in the form of the emergency grants and the \$3 million funding for in-house monitoring and remediation works ...

You say that was ‘both timely and reasonable in the circumstances’.

Can I get a sense as to the use for which those emergency grants have been allocated in terms of the ongoing monitoring but also the ongoing situation out there today?

Mr TAYLOR — Firstly, I will just give you a brief overview and then I will ask Glenn to address the specific question.

During our investigation we consulted with all relevant residents. We visited all the affected homes. We had meetings with the community, and we have not had one criticism of the assistance provided to individuals. It was seen as a positive. In fact our investigation has been seen as a positive, and we have had a number of written and oral communications from residents, saying, ‘Thank you for identifying the issues. Thank you for bringing it out publicly’.

Mrs PEULICH — So you received none that expressed concern about the level of assistance that they received?

Mr TAYLOR — No.

Mr SULLIVAN — No.

Mrs PEULICH — You should have contacted me. I had heaps.

Mr TAYLOR — Well, I can only say as an independent person involved —

Mr TEE — And who visited everyone.

Mr TAYLOR — We advertised as to our involvement.

Mr SULLIVAN — We also did a letterbox drop to all the affected individuals, inviting them to come forward and talk to us. We met with residents from the community associations in the local area to ensure that we were aware of some of the local concerns.

Mrs PEULICH — But many of them were reported in the papers, and quoted.

Mr TAYLOR — I can only say that no-one came forward and complained to us. The only specific contact when this report came out was one of the residents ringing up and saying, 'It is a great report. I want to buy the Ombudsman a beer'. True story!

Mrs PEULICH — So you letterbox-dropped the area?

Mr TAYLOR — Yes.

Mr SULLIVAN — Yes.

Mr TEE — And visited.

Mrs PEULICH — How about those who had actually moved out of the area?

Mr SULLIVAN — We only did the immediate Brookland Greens area, which I think included 500 houses at that time. That was done in October 2008, straight after the emergency.

Mrs PEULICH — But some of them would have evacuated?

Mr TAYLOR — Perhaps, but again we did advertise in the local media.

Mr SULLIVAN — We also made available information on our website about how people could contact us if they had concerns in relation to the assistance or any problems they were having at that stage.

Mrs PEULICH — Did you follow through with those who had publicly come out to express concern about particular issues?

Mr TAYLOR — Yes, and visited them. We interviewed them, some of them several times.

Mr SULLIVAN — Some are mentioned in the report, particularly the residents of Powerscout Retreat.

Mr TEE — Very thorough.

The CHAIR — Thank you. We have some further follow-up questions from Mr Barber and Mrs Peulich.

Mr BARBER — In paragraph 95 of your report you talk about the City of Casey having a conflict of interest between being the owner and past manager. The council would have been the past owner at the time of the issuing of the planning permit?

Mr SULLIVAN — It would have been the Shire of Cranbourne at the issuing of the planning permit.

Mr BARBER — All right — successor. You are also referring to the VCAT hearings, so you are saying that it was a past owner of the site but then it was defending its refusal of the permit, if you like, in VCAT?

Mr TAYLOR — Yes.

Mr BARBER — You say that it did not appropriately manage this conflict of interest. The City of Casey is quoted as saying the legislative scheme 'makes such a conflict of interest inevitable'. Did you make a recommendation in relation to this matter in your report?

Mr TAYLOR — I think we did. Conflict of interest is a real issue in local government. You would be aware that we reported to Parliament in March 2008 on the issue of conflict of interest. The issue here was the same people being involved in two separate processes.

Mr BARBER — That happens all the time with local council. It is the responsible authority for its entire district. If it wants to give itself a permit for a satellite dish on its own town hall, it still ends up giving itself a permit.

Mr SULLIVAN — I understand that. I think it is a bit different with the landfill where there are environmental issues and concerns.

Mr BARBER — This was an extreme example. I agree.

Mr SULLIVAN — Yes, but I think there needs to be some recognition. You were talking about something that has the potential, and which has occurred in this particular case, to affect a number of local residents.

Mr BARBER — At any time there could be a person who is concerned about the local council issuing itself a planning permit. This is a big matter.

Mr TAYLOR — And it happens. It is not an isolated case, I can assure you.

Mr BARBER — I am a former councillor and I was in an instance where we wanted to do a development on our own town hall, but we had to give ourselves a planning permit, which actually required heritage advice first.

You have raised the issue here. You say the council did not appropriately manage it, which implies to me that you think it could manage the conflict of interest within some sort of procedure. It is suggesting that in fact the legislation, presumably meaning the Planning and Environment Act, makes it the responsible authority, therefore there is nobody else. What is your suggestion to solve that?

Mr TAYLOR — That is true, but I think the response is simplistic. Yes, there are complexities, particularly in local government, but the solution is to have properly documented procedures. Officer X should not be the same person who grants the permit and then administers the actions.

Mr BARBER — So you are not suggesting that any legislative change is needed in this area?

Mr TAYLOR — No. Just good practice.

Mr BARBER — Councils simply create some sort of internal firewall that says, 'That guy on that desk makes a decision, and we ought to be careful that he never worked on this file or had any particular connection with it'. Your view is that you can manage it within the council administration?

Mr TAYLOR — Exactly. Let me give you a further example: what if the company that put up the aerial or the satellite on top of your town hall was also a contractor that was an organisation managed and run by the council but a private enterprise competing for business? If you did not manage that properly, you would have all sorts of conflicts.

Mr BARBER — There would be alternatives. You could put something in the P and E act that says, 'Where the council is the owner of the property, the minister becomes the responsible authority'.

Mr TAYLOR — You can deal with it; there is certainly no doubt.

Mr BARBER — But you are not suggesting any legislative change?

Mr TAYLOR — No.

Mr BARBER — There is no recommendation in relation to this?

Mr TAYLOR — No, not in terms of legislative change. No.

Mrs PEULICH — Would you say, taking your entire report into consideration, that the EPA had sufficient powers to fulfil their role, which is ultimately to arrest an environmental risk? Did they have sufficient power? Are you making any recommendations for additional power?

Mr TAYLOR — No.

Mrs PEULICH — They obviously chose not to exercise that power, but was it adequate at the time?

Mr TAYLOR — I think if you look at the report, you see that we criticise the EPA on a broad range of issues about their failing to exercise their statutory function. They failed to protect the environment; they failed to take adequate enforcement action; they delayed enforcement processes; and they had poor management of their investigations and enforcement processes. But the legislation was more than adequate.

Mrs PEULICH — You suggested earlier that perhaps the local council had an upper hand in its relationship with the EPA, but you also alluded to a previous adverse decision that the EPA was nervous about, and we also saw what happened at the VCAT hearing — the EPA decided on its own course of action.

Given those three different pieces of evidence, would you say that the EPA is in the pocket of local government or is exercising its own function independently and appropriately? Do you think that would be addressed just by the fact that there have been some structural changes in the EPA?

Mr TAYLOR — One of the useful things about an Ombudsman is that we shine the spotlight on the dark corners of the public sector. For the last three years the Ombudsman has reported on the failure of government agencies to perform their statutory functions. Sometimes it is simply cowardice, and I say that deliberately, because I can give examples where there has been a clear failure to do it because of fear — fear of outcomes.

I am not suggesting that the EPA were cowardly in this case, rather it was a sad litany of failures to act over a lengthy period of time. I have more confidence now, because our investigation has highlighted those problems and the deficiencies in their procedures and the deficiencies in their failure to act. But it was more a failure to act and take responsibility for protecting the environment than simply not having sufficient power.

Mrs PEULICH — We have this issue with you not being able to look at VCAT or anything else, but the support and technical issues. We have this issue in relation to the EPA. We have this issue in relation to the manner in which planning permits are managed by local government, which is taking on responsibilities such as, for example, the establishment of a tip. Many of those issues are outside the hands of council — they are actually in the hands of government. So where does the responsibility ultimately lie?

My concern is that I believe the City of Casey has done whatever it can since the crisis and has spent a lot of money — over \$75 million — all of which will be paid for by ratepayers when many of these failings were in actual fact caused by other agencies outside their jurisdiction and control. Why should ratepayers then be left to pick up the tab, and should the government not be coming to the party?

Mr TAYLOR — I think Mr Tee pointed out that there is a court case pending which might end up addressing some of those issues. It is not for me to comment on whether the government should act or not, other than the one recommendation we made which was that the individuals should be compensated — that is a matter for government.

Mrs PEULICH — I am speechless, because we have had this large inquiry and there are a number of recommendations, many of which cannot be enacted because they are a matter for government. There is this court case which is waiting to see what the outcome of these internal parliamentary proceedings will be to determine and form the nature of those proceedings. One is waiting on the other and vice versa. Unfortunately the residents and the City of Casey, which is administering their funds, are the meat in the sandwich here. What help can they look to? Where can they get that assistance?

Mr TAYLOR — I think the answer lies in this report, and that was the purpose of our conducting the investigation — to actually identify the problems. But it is not for us to implement the solutions; that lies with the responsible agencies and, ultimately, government.

Mr TEE — Following on that, will you be continuing to report on progress?

Mr TAYLOR — Yes.

Mr TEE — And thus far, as far as your evidence has been, suitable progress has been made in terms of implementation of your recommendations?

Mr TAYLOR — Correct.

Mr TEE — That is a fair assessment?

Mr TAYLOR — Yes.

Mr KAVANAGH — On the EPA failing to fulfil its obligations and its seeming willingness to be dominated by the local council, does that seem to be a one-off event or has that been systemic?

Mr TAYLOR — I think it is historical. It is certainly something that we identified, but in the past. I do not think that situation exists today.

The CHAIR — Mr Taylor and Mr Sullivan, thank you for your attendance this morning and your evidence before the committee. I will have a draft version of the transcript to you in the next couple of days for any corrections you wish to make, and we will follow up on that one matter with respect to the section of the Local Government Act.

Mr TAYLOR — We will get in touch with the secretary on that later today.

The CHAIR — Thank you very much, the committee appreciates your evidence this morning.

Mr TAYLOR — Thank you for the opportunity.

Witnesses withdrew.

APPENDIX 2 – OMBUDSMAN'S RESPONSE TO QUESTIONS TAKEN ON NOTICE

Response from Victorian Ombudsman to Question Taken on Notice at the 19 February 2010 Public Hearing

Mr Willis,

At the hearing on Friday 19/2/10, Mr Gordon Rich-Phillips asked a question about the Ombudsman's conclusions in relation to Paragraph 649 of the report regarding the tender process for the gas extraction agreement at the landfill.

The report states:

...'the City of Casey was most likely in breach of the Local Government Act and at odds with the Victorian Government Purchasing Board guidelines'.

Mr Rich-Phillips wanted to know the relevant section of the Local Government Act 1989 (the Act) the Ombudsman considered may have been breached.

The relevant section of the Act is Section 186, which requires councils to tender for purchases above a prescribed amount. In particular, Section 186 (4) is relevant in respect of councils not having to accept the lowest tender or any tender.

Section 186 of the Act states:

- (1) Before a Council enters into a contract for the purchase of goods or services, or for the carrying out of works, to the value of \$100 000 (or such higher amount as may be fixed by Order in Council) or more, it must—
 - (a) give public notice of the purpose of the contract and invite tenders from any person wishing to undertake the contract; or
 - (b) give public notice of the purpose of the contract or the project to which the contract relates and invite expressions of interest from any person interested in undertaking the contract or all, or any part of, the project.
- (2) If a Council invites expressions of interest—
 - (a) it must register those expressions of interest; and
 - (b) when it is ready to enter into the contract, it must invite tenders from some or all of those who registered their interest in undertaking the contract (or the part of the project to which the contract relates).

- (3) The public notice, tenders and expressions of interest must be in the prescribed form (if any) and must contain any details that are prescribed.
- (4) Nothing in this section requires a Council to accept the lowest tender or to accept any tender.
- (5) This section does not apply if—
 - (a) the Council resolves that the contract must be entered into because of an emergency; or
 - (b) the contract is entered into with a Council acting as the agent for a group of Councils and the Council has otherwise complied with this Act; or
 - (c) the contract is entered into in accordance with arrangements approved by the Minister for the purposes of this subsection; or
 - (d) the contract is a type of contract that has been exempted from this section by the regulations.
- (5A) This section does not apply in respect of a contract if—
 - (a) the contract is a novated contract; and
 - (b) the original contract was entered into in accordance with this section; and
 - (c) the Council has undertaken a due diligence in respect of the new party to the contract.
- (6) Whenever practicable, a Council must give effective and substantial preference to contracts for the purchase of goods, machinery or material manufactured or produced in Australia or New Zealand.

I hope this information is of assistance. Please contact me if you have any further queries.

Glenn Sullivan
Director, Investigations
Ombudsman Victoria