Investigation into the Conduct of Council Officers in the Administration of the Shire of Melton

March 2005
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Report of Ombudsman Victoria

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Ombudsman Victoria

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To

The Honourable the President of the Legislative Council

and

The Honourable the Speaker of the Legislative Assembly

I have the honour to present a Report on an investigation into the conduct of council officers in the administration of the Shire of Melton. The Report is tabled pursuant to section 25 of the Ombudsman Act 1973.

G E BROUWER
OMBUDSMAN
1 CONTEXT

1.1 Background to this investigation

In June 2002 Ombudsman Victoria commenced an investigation into the conduct of Council Officers in the administration of the Shire of Melton. Some background to the events leading up to the commencement of this investigation provides context to understanding the course of the investigation.

1.1.1 Restructuring local government - the role of Commissioners

In 1993 the government of the day passed amendments to the Local Government Act 1989 to enable the restructuring of local government. As a result, the total number of councils in Victoria was reduced to almost two-thirds. Only minor changes were made to the boundary of the Shire of Melton.

Commissioners were appointed to administer the new councils until elections were held. Commissioners Alistair Frazer, John Hyett and Brian Morison were appointed to fulfil the functions of Councillors for the Shire of Melton in December 1994. The Melton Commissioners were originally appointed for a one-year period. This was extended for a further two years.

In late 1994 the Commissioners appointed Mr Adrian Pennell to be the Shire’s Chief Executive Officer.

It was originally planned that Council elections would be held at the end of this period, in March 1997. In October 1996 the possibility of deferring the elections and extending the Commissioners’ terms of office began to surface. The prospect of conducting a poll to assess public opinion about this issue was the subject of correspondence between the Council and the Department of Infrastructure and mentioned in Parliament question time.

The Australian Electoral Commission subsequently conducted a poll of enrolled voters in Melton in December 1996. The result of the poll was that, of the 52 percent of enrolled voters who returned votes, 71 percent were in favour of extending the Commissioners’ terms of office.
Significant controversy surrounded the conduct of the poll and actions taken by the Commissioners and Council Officers. This was the subject of debate in both houses of Parliament in the spring sittings of 1998. At this time the ability of the Commissioners to further extend their terms through compulsory polling of voters was eventually clarified with the passage of amendments to the Local Government Act that came into effect on 17 November 1998.

Following further amendments to the Act in 2000 a general election of Councillors was eventually held on 13 October 2001. The Commissioners’ terms expired at the first meeting of the newly elected Council.

1.1.2 Development aspirations

Section 6 of the Local Government Act was repealed by the Local Government (Democratic Reform) Act 2003 but at the relevant time stated that the purposes of a council were:

a) To provide for the peace, order and good government of its municipal district; and

b) To facilitate and encourage appropriate development of its municipal district in the best interests of the community; and

c) To provided equitable and appropriate services and facilities for the community and to ensure that those services and facilities are managed efficiently and effectively; and

d) To manage, improve and develop the resources of its district efficiently and effectively.

From December 1994 until the Council elections in October 2001 the Melton Shire Council was, in effect, the three Commissioners. They told Ombudsman Victoria investigators that they appointed Mr Adrian Pennell as CEO because they considered he would be able to implement their vision for a rapid development of the Shire.

Significant tracts of land in the Shire had been zoned rural but were unviable for agricultural purposes. The rainfall in Melton Shire is considered to be low. Mr Alistair Fraser, the former Chief Commissioner of the Shire, told Ombudsman Victoria investigators that the need for Melton to grow and to address the
high unemployment rate were amongst the key drivers of the Commissioners’ pro-active approach. To achieve these objectives the Shire needed to attract employment-generating industries to the area and develop a better mix of residential properties.

1.1.3 Business incentives offered by Council

Consistent with the approach of the State Government and other municipalities, Melton Shire embarked on an aggressive strategy to attract investment to the area. The Auditor-General reported into these activities in May 2002. A summary of relevant findings is attached to this report as Appendix One.

1.1.4 Previous investigation by the Ombudsman

In 1999-2000 Ombudsman Victoria conducted an investigation into the circumstances surrounding the development of Blackhill Road, Melton (the ‘Blackhill Road Investigation’). In the course of this investigation Ombudsman Victoria received substantial amounts of information from various sources that reflected adversely on the administrative practices of Council Officers employed by the Shire of Melton. Information about specific matters that fell within the Ombudsman’s jurisdiction was largely unsubstantiated or could be dealt with informally by the Council. These matters were therefore not addressed in the Blackhill Road Investigation report. The final report was forwarded to the Chairman of Commissioners for the Shire of Melton, Mr Alistair Fraser, in June 2000. The report stated that there was evidence of serious maladministration in the operations of the Shire. The report identified that the administration of Council matters was predominantly the responsibility of the Chief Executive Officer, Mr Pennell, and recommended that Mr Pennell’s position be reviewed. The report was not released publicly but was eventually tabled in Parliament by Independent MP Russell Savage in October 2000.

Following the tabling of the report in Parliament, and the resultant media coverage, further information was received by this office from both existing and new sources. This information indicated that there were concerns about how recommendations arising from the Blackhill Road Investigation had been implemented. The administrative practices of employees of the Shire of Melton remained the subject of criticism.
The Chief Executive Officer resigned in December 2001. Council elections had been held in October 2001. Following his resignation, this office received specific information about circumstances surrounding his resignation that warranted further investigation.

Following substantial preliminary enquiries, a number of corroborative complaints were consolidated into twelve separate matters. Two additional matters were raised during preliminary enquiries. The Ombudsman determined that an investigation should be conducted into each of these fourteen matters. Consistent with the provisions of section 17 (1) of the Ombudsman Act 1973, the new CEO, Mr Neville Smith, the Mayor, Ms Sophie Ramsey, and the Minister for Local Government, Mr Bob Cameron, were informed about this decision and the matters to be investigated on 27 May 2002.

After the commencement of the formal investigation, Ombudsman Victoria received separate correspondence from three individuals seeking protection under the Whistleblowers Protection Act 2001 for various matters later determined to be public interest disclosures under that Act. Consistent with the provisions of section 50 (2) of the Whistleblowers Protection Act, the Mayor, Ms Sophie Ramsey, and the Minister for Local Government, Mr Bob Cameron, were informed about the matters to be investigated on 30 May 2002 (in relation to two matters) and 26 September 2002.

Subsections 22 (2) and (3) of the Whistleblowers Protection Act prohibits me from disclosing, in any report to the Parliament, particulars likely to lead to the identification of a person who has made a public interest disclosure or against whom a public interest disclosure is made. This report is therefore limited to complaints investigated under the provisions of the Ombudsman Act. Matters solely the subject of whistleblower disclosures were found to be unsubstantiated.

1.2  Matters subject to investigation

1.2.1  Complaints under section 14 of the Ombudsman Act:

1. The failure of employees of the Shire of Melton (Council Officers) to follow due process when appointing senior staff.

2. The failure of Council Officers to follow due process and to obtain normal cost contributions from benefiting land owners in regard to road construction projects.
3. The failure of Council Officers to follow due process and to obtain the appropriate infrastructure cost contributions to Council in regard to subdivisions.


5. The failure by Council Officers to keep full and accurate records of the business of Council in accordance with the provisions of the Public Records Act.

6. The provision of inaccurate planning advice by Council Officers.

7. The failure of Council Officers to follow due process, and to provide reasonable assessments in regard to rezoning proposals.

8. The failure of Council Officers to follow due process in regard to the subdivision of land.

9. Purchases of various items including motor vehicles by Council Officers for Council without following due process.

10. The failure of Council Officers to ensure that the purchase of a motor vehicle by the CEO, and the expenditure on Council credit cards, were fully investigated as directed by Council, and to ensure that appropriate action was taken following the investigation.

11. The failure of Council Officers to give appropriate advice in regard to planning matters, the granting of business incentives, the monitoring of agreements and the waiving of incentive obligations in regard to a particular development.

12. The failure of Council Officers to properly manage a contract for the clean up of land in relation to an enforcement order.

13. The failure of Council Officers to properly manage the assessment and monitoring of business incentives arrangements entered into by the Shire.

14. The failure of Council Officers to give the Council appropriate advice in the lead up to the approval of a termination agreement with the previous CEO.
1.3 Legislative framework

1.3.1 The Ombudsman Act

Ombudsman Victoria derives its jurisdiction from the Ombudsman Act. Under section 2 of the Act, the definition of an authority to which the Act applies includes a municipal council. Section 13 (1) sets out the principal function of the Ombudsman, which is to enquire into or investigate any administrative actions, including actions taken by any member of staff of a municipal council.

Section 13 of the Act prohibits the Ombudsman from investigating any administrative action taken by a number of people, including actions taken by a municipal council or a councillor (or commissioner) of a municipal council acting as such.

The procedures for conducting an investigation are set out in Division 3 of the Ombudsman Act. Section 17 (1) (b) requires that the Ombudsman inform the mayor of a municipal council, in writing, if the Ombudsman decides to conduct an investigation in relation to an administrative action taken by a member of the staff of a municipal Council. Section 17 (5A) states that the Ombudsman may at any time during or after the investigation consult the mayor of the council. The Ombudsman must consult the mayor before forming an opinion adverse to the administrative action concerned or if at any time the mayor asks to be consulted.

Under section 17(6), if the Ombudsman is of the opinion that there is evidence of a breach of duty or misconduct on the part of a staff member of a municipal council, he must send a copy of the report to the responsible minister and the mayor of the council.

1.4 Investigation process

In the course of this investigation Ombudsman Victoria investigators inspected significant volumes of Council files and interviewed the complainants, concerned Shire residents, existing and former Council employees, including the former Chief Executive Officer, Mr Adrian Pennell, the Commissioners and Councillors. Most witnesses were interviewed under oath.
2 RESULTS OF INVESTIGATION INTO COMPLAINTS

For convenience I have consolidated discussion about the results of this investigation into areas with common themes or facts.

2.1 Allegations to do with administrative processes

2.1.1 The appointment of senior staff. (Complaint 1 under the Ombudsman Act)

These allegations related to the appointment of senior staff in a number of positions. Section 94B of the Local Government Act regulates the appointment of senior staff to councils by the Chief Executive Officer. It states:

1) A Chief Executive Officer may only appoint a person to be a senior officer after she or he has invited applications for the position in a notice in a newspaper circulating generally throughout Victoria and has considered all applications received by her or him that comply with the conditions specified in the notice.

The definition of ‘senior officer’ under the Act was amended in 2003 but at the relevant time “senior officer” meant:

A member of council staff who is entitled to total remuneration in any 12 month period of at least $60,000 (or any other amount that might be prescribed from time to time).

The Shire’s Human Resources policy also determined that appointments to senior positions should be subject to public advertisement and formal interview processes.

In early 2001 the Shire of Melton advertised for a General Manager who would report directly to the Chief Executive Officer. In response to this advertisement, Mr Pennell, the then Chief Executive Officer, a Human Relations expert and two of the then Commissioners, Mr Fraser and Mr Hyett, interviewed four people in April 2001. None of the applicants were considered suitable for the position. Mr Pennell subsequently arranged for a person to be appointed to the position. Mr Pennell had previously worked with the appointee and prior to the...
appointment had lunch with the appointee and another person, three or four times in the preceding year. The appointee stated she attended a formal interview and that Mr Pennell was the only interviewer present. She states this interview took place after she had forwarded a written application that addressed the position description. She states she later met on separate occasions with Commissioners Fraser and Hyett. Each meeting with a Commissioner happened in an informal setting. Mr Pennell states that he never appointed any general manager without “running them past the Commissioners”. Neither of the Commissioners could recall formally interviewing the appointee prior to her appointment. Council records indicate that Mr Pennell met with the appointee on 18th May 2001 and offered her a position in writing on the same day.

In the course of this investigation Ombudsman Victoria investigators became aware of other people being appointed to positions without a formal interview or advertising process. For example, a person was offered the position of Economic Development Manager directly by Mr Pennell. The appointee had been working as a part-time consultant at the Shire. He did undergo an interview with one of the General Managers but he did not formally apply for the position.

I find that the former Chief Executive Officer, Mr Pennell, breached the provisions of the Local Government Act in his appointment of persons to senior officer positions, without the individuals having followed procedures set out in public advertisements for the positions.

In a third example of a breach of the Shire’s Human Resources policy, a General Manager promoted a person to the position of Community Infrastructure Manager without the position being advertised. This position was not a ‘senior officer’ position. While this appointment may be questionable in terms of good human resources practices, I do not consider it to be in breach of the Act.

2.1.2 The destruction of Council records in breach of the Public Records Act. (Complaint 4 under the Ombudsman Act)

This allegation related to a number of people who had reported shredding of documents occurring in Mr Pennell’s office shortly before his departure. At no time did anyone observe what the
documents were. Mr Pennell told Ombudsman Victoria investigators that he kept duplicate copies of meeting minutes in his office for his own convenience and shredded or removed them prior to his departure. Other files kept in Mr Pennell’s office related to business incentives and development works.

While the current Chief Executive Officer, Mr Neville Smith, told Ombudsman Victoria investigators that he has found no evidence of missing documents, an inspection of these files revealed that many were incomplete. (See also 2.1.3 below).

I am unable to say whether lack of information on files is the result of poor record keeping or inappropriate action, for example the destruction of records.

2.1.3 The failure to keep full and accurate records. (Complaint 5 under the Ombudsman Act)

Section 13 of the Public Records Act states an officer in charge of a public office (such as the Chief Executive Officer of a municipal council):

\[
a) \text{ Shall cause to be made and kept full and accurate records of the business of the office}
\]

Records of business incentive arrangements

As stated above, an inspection of volumes of Council documents and files to do with business incentives during Mr Pennell’s term of office revealed that they were kept in a haphazard state. Documentation regarding some business incentive arrangements negotiated by Mr Pennell was limited to submissions to Council. Some files did not contain notes of preliminary meetings or did not contain sufficient information to indicate a process by which negotiations proceeded. Others contained duplicates and sometimes triplicates of information.

Mr Pennell told Ombudsman Victoria investigators that in some cases business incentive arrangements were negotiated without any documentation being brought into existence. He said sometimes negotiations had taken place on the side of a road. In one
arrangement, substantial negotiations had been undertaken with another council and had been brought to the Shire of Melton as a ‘package’ ready for submission to Council. Mr Pennell’s personal assistant told Ombudsman Victoria investigators that Mr Pennell did not type or use computers and did not always make file notes of telephone conversations. She conceded that in that regard some of the records were incomplete.

**Personnel records**

A number of personnel files inspected by investigators also fell short of appropriate standards of record keeping. Some file notes made by the former and present Chief Executive Officers that commented adversely on the performance of particular employees of the Shire had not been counter-signed by the employee concerned. There was no evidence that the comment had been brought to the attention of the person concerned.

Mr Pennell told Ombudsman Victoria investigators that he believed he always indicated to an employee when he was considering putting an adverse comment on her or his file and gave the person the opportunity to discuss the issue. He disagreed with the proposition that employees were unaware that he had made file notes on their personnel files commenting adversely on their performance.

Mr Smith told Ombudsman Victoria investigators that he believed he had always given an employee a copy of any file note that reflected adversely on the person’s performance even if it had not been counter-signed by the person.

**Minutes of Council meetings**

During the course of the investigation Ombudsman Victoria investigators became aware of a dispute between some Councillors and employees of the Shire about what had been discussed at a particular Council meeting on 10 December 2001. The tape recording of the Council meeting was unclear. Minutes of the meeting were later disputed by a particular Councillor as being a true and accurate record of the meeting, but were nevertheless endorsed by the Council as a whole.
Other records

In addition to the specific areas that are identified above, Ombudsman Victoria investigators examined numerous planning, development and computer records. They identified numerous deficiencies including irregularities about when documents were purportedly brought into existence and missing documents, such as in-house advice, consultant reports, tender documents and statements of legal advice.

Current record keeping practices

Mr Smith told Ombudsman Victoria investigators that since commencing the position of Chief Executive Officer he has instituted a file management system more appropriate for local government.

I find that record keeping practices at the Shire of Melton have, in some areas, been of a poor standard. I consider past deficiencies in some areas breached the provisions of the Public Records Act. I note record keeping practices have improved under the direction of the current Chief Executive Officer, Mr Smith. I therefore consider that no further action is warranted.

In response to this finding Mr Smith advises that the Council’s Human Resources manager is currently preparing a Council policy to formalise management and procedures in relation to personnel records.

2.1.4 The purchases and disposal of various items including motor vehicles. (Complaint 9 under the Ombudsman Act)

These allegations relate to purchases made by the former Chief Executive Officer, Mr Pennell. In particular the purchases of cars, wine, computer equipment and a satellite phone. In the course of this investigation Ombudsman Victoria investigators established that on more than one occasion Mr Pennell failed to obtain three quotes when purchasing a motor vehicle. He negotiated directly with a car dealer to trade in and up-grade his work vehicle and then instructed the purchasing officer to do the paper work. When questioned by Ombudsman Victoria investigators, Mr Pennell said he had been told to go and buy a car by the Finance Manager and that the Commissioners were understanding of the process. He explained the absence of any written record of this arrangement on the basis that his
understanding came from conversations with the Finance Manager and the Commissioners. Ombudsman Victoria investigators found no evidence that appropriate adjustments had been made to Mr Pennell’s salary packaging arrangements when he upgraded a vehicle to a more expensive one.

In relation to other purchases, Mr Pennell had authority to spend up to $50,000 without first seeking Council approval. He used this authority to purchase, amongst other things, wine. Ombudsman Victoria investigators established he had regularly purchased dozens of bottles of wine using a corporate credit card over at least a three-year period. This wine was stored in various cupboards on Council premises but was not subject to any stock control by Council Officers. When questioned by Ombudsman Victoria investigators, Mr Pennell stated his wine purchases were intended to establish a ‘cellar’ for the Shire to entertain guests. After his departure more than 400 bottles of wine were put up for auction. At the time of writing, all but two dozen bottles had been sold, recouping $5000 for the Shire.

Ombudsman Victoria investigators established that a staff member regularly purchased lunch for Mr Pennell out of petty cash. When questioned about this, Mr Pennell told Ombudsman Victoria investigators that, consistent with their role as Councillors, the Commissioners regularly had lunch provided at Council expense, and that he saw no reason why he should not as well.

While Ombudsman Victoria investigators were told that Mr Pennell sometimes took home unconsumed food and wine following Council functions, they found no evidence to suggest he purchased wine with Council money for his personal use.

Mr Pennell also purchased a number of computers intended to assist him to transcribe hand written notes, or independently access the internet and a satellite phone. Again these purchases were made without following the Council’s purchasing protocols. Once he had purchased an item, witnesses allege that Mr Pennell would require Council Officers to retrospectively ‘do the paper work’ including making appropriate entries in the asset registry. Again, Ombudsman Victoria investigators found no evidence to suggest that Mr Pennell appropriated Council property for his personal use.
I find that the former Chief Executive Officer, Mr Pennell, purchased and disposed of various items without following due process and improperly arranged for petty cash funds to buy his lunch on a regular basis. I also find that Council Officers who were junior to Mr Pennell were required to make adjustments to regular purchasing procedures to accommodate his actions.

2.2 Allegations to do with improper cost waivers

2.2.1 The failure to obtain normal cost contributions from benefiting landowners in road construction projects. (Complaint 2 under the Ombudsman Act)

A number of matters were raised in relation to this allegation. After an examination, all but one of these matters were unsubstantiated.

The exception was in relation to the construction of part of Harkness Road, Melton. This road by all accounts was a heavily used, poor standard, unsealed road with high maintenance costs and a high accident record. Rather than introduce a road scheme whereby benefiting landowners would be required to contribute to the costs of constructing a standard sealed road, Mr Pennell and the Commissioners agreed to a proposal that would trial a new product. The product was an experimental sealant that would be low cost and that could at a later stage be upgraded to a standard sealed road. When asked by Ombudsman Victoria investigators why a road scheme had not been developed and benefiting landowners required to contribute to the costs of construction, Mr Pennell stated that landowners would not have been expected to pay for something that had not been proven to be a reliable product. The Shire’s Civil Contract Manager, responsible for road maintenance in the Shire, told Ombudsman Victoria investigators it was his view that ‘typically landowners paying for the introduction of road schemes don’t get up because you don’t get enough property owners with the spare cash or the spare resources to get enough of a quorum for the project to succeed’.

I find that, to the detriment of the Council, Council Officers, under instruction from former Chief Executive Officer Mr Adrian Pennell, did not obtain cost contributions from benefiting landowners in regard to road construction costs for part of Harkness Road, Melton.
2.2.2 The failure to obtain appropriate infrastructure cost contributions to Council in regard to subdivisions. (Complaint 3 under the Ombudsman Act)

This allegation relates to a major subdivision known as Killarny Lakes. An offer to purchase this particular land was contingent on the land being re-zoned from rural to rural-residential. The proposed purchaser was a developer who wanted to initially subdivide the land into 80 residential blocks. He approached Mr Pennell with a proposed sub-division and to discuss re-zoning prior to finalising the purchase of the land. It appears that once the re-zoning was effectively guaranteed, the purchase was completed and sub-division plans submitted, Mr Pennell directed Shire employees to waive infrastructure fees (estimated at approximately $4000 per lot). As the sub-division eventually created 110 blocks this meant a substantial windfall for the developer. When questioned over this issue by Ombudsman Victoria investigators, Mr Pennell stated that as the land had previously been zoned rural, no charges had been struck for the area, and therefore no levy could be made. He failed to provide a satisfactory explanation about why standard charges could not be extended to the area once the land was re-zoned to rural-residential. When this matter was raised in interviews with Commissioners they expressed no knowledge of the issue and concern that a decision to forgo substantial revenue to the Shire was taken unilaterally by Mr Pennell, without their knowledge. Although other sub-divisions were not fully investigated, Ombudsman Victoria investigators did not find evidence to suggest infrastructure costs were waived in relation to other subdivisions in the Shire during the period 1995-2001.

I find that the former Chief Executive Officer, Mr Pennell, failed to follow due process and failed to obtain infrastructure cost contributions to Council in regard to a particular subdivision.

In response to this finding, Mr Smith advises that in accordance with current State Government policy and its own Infrastructure Contribution Policy, the Melton Council no longer rezones land for residential development without requiring landholders to contribute towards community infrastructure.
2.3 Allegations to do with the granting and monitoring of business incentives. (Complaints 11 and 13 under the Ombudsman Act)

The Auditor-General publicly reported on the subject matter of these allegations in his report *Investment attraction and facilitation in Victoria*. That report was tabled in Parliament on 30 May 2002. A summary of relevant findings is attached to this report as Appendix One. In May 2001 the out-going Commissioners at Melton engaged a consultant to investigate and report about its business incentive arrangements (the ‘Laird Report’). The Laird Report identified that a number of businesses had failed to meet employment targets and that business incentive agreements had been ineffectively managed.

Ombudsman Victoria investigators examined substantial records to do with business incentives. The main method of giving business incentives was to provide land to businesses as an incentive for the creation of employment opportunities. Mr Pennell told Ombudsman Victoria investigators the value of the land was related to the number of jobs to be provided. Mr Pennell and the Commissioners had received legal advice that an appropriate mechanism to ensure employment targets were met was to use section 173 of the Local Government Act. They were advised this could be a means whereby the Council could determine whether land was rateable or not and therefore what ‘rates’ a business should pay, or be exempt from paying. The Council has subsequently received further legal advice that this mechanism may not be legally enforceable against businesses that have failed to reach employment targets. As the Auditor-General pointed out, this was not the only flawed aspect of the business incentive agreements struck by Mr Pennell within the policy framework set by the Commissioners.

In one instance the Council provided a cash incentive in return for a tourism business providing employment for a specified number of people. The developer approached the Council for assistance in building a turning lane. The road works were required as part of the permit conditions to allow patrons to safely enter and exit the property. The Council agreed to subsidise the developer and contribute to the costs in building the turning lane. It transpires the construction costs were underestimated and the anticipated number of
people to be employed in the business was overestimated. This meant the Council contributed more than originally agreed. Ombudsman Victoria investigators have been told the Council has waived the right to seek reimbursement from the developer for failure to meet employment targets, based on legal advice and alterations to the agreement that meant people employed by co-located businesses were included in target figures.

However in the course of this investigation it has been established that the Council no longer has a policy to offer business incentives. While the legacy of some of the structural flaws in the agreements limit options for the Council, I note that since commencing as Chief Executive Officer Mr Smith has instigated a three monthly report to Council on compliance of business facilitation arrangements.

I concur with the findings of the Auditor General in relation to business incentive agreements negotiated by the former Chief Executive Officer, Mr Pennell, and find that the agreements contain structural flaws. I am satisfied that the current monitoring of existing agreements undertaken by Council Officers is addressing issues as they arise.

2.4 Allegations to do with the general competency of Council employees such as:

2.4.1 The inaccurate or unreasonable planning advice by Council Officers. (Complaints 6, 7 and 8 under the Ombudsman Act)

These allegations related to a number of planning decisions made while Mr Pennell was the Chief Executive Officer and the Commissioners determined the policy direction of the Shire.

In the course of the investigation it became apparent that complaints about planning decisions were in many respects inevitable. Planning schemes in place at Melton in the early 1990s were inconsistent with the growth aspirations the Commissioners had for the Shire. The Commissioners wanted to provide opportunities for entrepreneurs and developers that were not available to existing landowners due to their limited resources. It was inevitable that competing interests would come into play. When a developer wanted to develop land out of sequence with existing planning schemes, Mr Pennell told
Ombudsman Victoria investigators that he sought advice about how it could happen instead of being constrained by traditional planning principles. He said that this meant planners at the Shire had to be flexible. During the relevant period there was a shortage of planners. Some planners employed by Melton were head hunted and this created turnover of staff in the planning area. Ombudsman Victoria investigators found that applicants for planning permits were given conflicting planning advice from time to time. In some instances, such as the Killarny Lakes subdivision, planning took place prior to approvals for re-zoning and without regard to appropriate infrastructure planning (See 2.2.2 above). The speed of the developments in the Shire has meant some ongoing legacies in relation to the way the Shire operates. For example, the Shire has incurred significant costs in trying to modify some planning permits in relation to one business. Needless to say, planning decisions made while Mr Pennell was Chief Executive Officer are largely irreversible.

Noting that Mr Pennell is no longer the Chief Executive Officer of Melton Shire and that improvements have been made to the planning process since the Auditor-General’s report, I consider that no further action is warranted.

2.4.2 The failures to appropriately follow up, or properly investigate the purchase of a motor vehicle by the former Chief Executive Officer and expenditure on Council credit cards. (Complaint 10 under the Ombudsman Act)

Following the election of Councillors in October 2001, the Internal Audit Committee of Council requested that there be an internal investigation into the use of credit cards by Council Officers. The report of that investigation stated there had been significant expenditure on credit cards but that receipts were not attached to the relevant documentation. The inference drawn by one Councillor from the internal audit report was ‘that there had been big expenditure without any documentation and things acquired that could have been for home use’.

In the course of this investigation it became clear that the evidence did not support this inference. Ombudsman Victoria investigators established that all relevant expenditure items had originally been supported by receipts. The physical evidence demonstrated staple
holes where receipts had been attached. The statements of relevant witnesses and relevant Fringe Benefit Tax Returns supported this physical evidence.

In response to questioning, the internal auditors told Ombudsman Victoria investigators that they considered their role was just to report accurately to Council. They did not appear to consider it appropriate to demonstrate initiative or provide professional advice about how to improve the way finances were managed at the Council. They said they would not initiate contact with Council unless they had concerns of a criminal nature. I consider their interpretation of their role lacks an appropriate understanding of the importance of internal auditors as an independent check and balance on the way Council finances are managed.

I find that the role of the internal auditors at Melton Shire lacked an appropriate level of independence and rigor commensurate with a transparent and accountable financial management system.

In response to this finding, Mr Smith stated that in his view the Internal Audit Committee has operated effectively during his period as Chief Executive of Melton Shire Council. He agreed to ‘take on board’ the comments in this report and refer them for consideration in the Best Value Review of Internal Audit Services currently being undertaken by the Council.

In response to this finding, the Executive Director of Local Government Victoria and Community Information, Ms Prue Digby, suggested the Council should be reminded of the need for rigorous governance processes, and the existence of the Good Governance Guide published by the Good Governance Advisory Group in March 2004.

2.4.3 The failure to manage a contract for the clean up of land (Complaint 12 under the Ombudsman Act)

This allegation relates to the clean up of private land that was being used as a tip. The owner had been issued with an enforcement order for failing to clean up the land. The Council issued warnings over a two-year period before action was taken. Council Officers advertised for quotes for the clean up of the land, but only received
one response, a fixed price quote for $80,000. Mr Pennell referred this quote to the Local Laws Manager who determined that the quote was reasonable and awarded the contract accordingly. When the Local Laws Manager determined the works had been completed the contractor was paid with additional payment being made for approved additional works.

I find this allegation is unsubstantiated.

2.4.4 The failure of Council Officers to give appropriate advice in the lead up to the termination agreement between the Council and the previous Chief Executive Officer (Complaint 14 under the Ombudsman Act)

This allegation arose in relation to the departure of the former Chief Executive Officer, Mr Pennell, some two months after Councillors were elected. I am satisfied that no Council Officer was involved in providing advice about the termination agreement negotiated between Mr Pennell and the Council. I am satisfied the Council received legal advice in relation to the negotiation and acted on that legal advice.

I found no evidence to support this allegation.
3 CONCLUSIONS

As demonstrated by the preceding discussion, I found no evidence that reflects adversely on former Commissioners Fraser, Hyett, and Morison. I find that the former Chief Executive Officer, Mr Pennell, at times acted improperly and without regard to due process.

His apparent enthusiasm to develop the Shire of Melton lacked sufficient forethought to the long-term impact of many of his decisions, in particular the equitable distribution of infrastructure costs and realistic cost-benefit analysis of business incentive agreements. I note some decisions failed to take into account contingency plans in the event proposals failed to achieve intended goals.

I found no evidence to suggest Mr Pennell benefited to the substantial detriment of the Shire in any of his dealings. While many of the processes in operation during the period Mr Pennell was Chief Executive Officer were deficient, most of these appear to have been addressed.

Mr Pennell was provided with an opportunity to respond to these findings, but did not avail himself of this opportunity. I have not made any specific recommendations in relation to Mr Pennell’s conduct, as he is no longer a Council employee. However, it remains open to the Council to seek its own advice on any other remedies that may be available to it.

While Mr Smith has stated that in his view the Internal Audit Committee has operated effectively during his period as Chief Executive of Melton Shire Council, I remain concerned that internal audit processes still in operation at the Council lack sufficient independence and rigour to provide an appropriate accountable and transparent check and balance on the financial management of the Shire.

Accordingly I recommend as follows:

3.1 Recommendations

- That the Melton Council develop guidelines on infrastructure contributions by developers likely to benefit from a rezoning and / or subdivision.
I note that in accordance with current State Government policy, Melton Council now has an Infrastructure Contribution Policy.

- That the Melton Council review existing business incentive agreements using a suitably qualified professional to determine what actions if any should be taken to mitigate any ongoing economic loss associated with the agreements.

This recommendation has been accepted by the Council.

- That the Melton Council review existing internal audit arrangements to ensure that there are appropriate mechanisms in place to provide independent, accurate and professional assessments of the Council’s financial management activities.

I note that Melton Council is currently undertaking a Best Value Review of Internal Audit Services. I am advised that the State Government’s Good Governance Advisory group has published a ‘Good Governance Guide’ that supports the need for councils to adopt rigorous governance processes.
Appendix One

Summary of relevant findings of the Auditor-General’s report into Investment attraction and facilitation in Victoria

Tabled 30 May 2002

• In the period 1995-2001 Melton Shire provided $7.5 million to 9 businesses with the objective of creating a range of employment opportunities in Melton.

• The Melton Shire monies represented 32% of the total local government assistance to industries throughout Victoria in this period.

• While the pursuit of investment in Melton was public, investment assistance discussions were held in camera. The Chief Executive Officer, Mr Pennell, was directly responsible for negotiating industry assistance packages.

• A case study involved the transfer of Melton Council-owned land (5.66 hectares) to a company for $1 in return for the company generating 180-220 jobs. The company also received an interest-free loan of $3.3 million to build a factory. The Council retained a mortgage over the land for three years to secure its assets in the event the company was not able to meet its early employment targets. This case study demonstrated:

  – Lack of transparency in the process. The Council’s statutory advertisement calling for submissions in response to its intention to transfer the land identified the land and its value of $850,000 but not that the land would be transferred for $1 in return for the company generating 180-220 jobs.

  – Defects in the loan repayment agreement. Only $2000 of the $3.3 million loan would have been paid over the 99-year life of the loan, with the outstanding debt apparently forgiven at the expiration of 99 years.
– Lack of contingency planning. Shortly after three years from the date of settlement, external factors caused the company to go into voluntary liquidation. Five weeks earlier the Council had discharged its three-year mortgage. In appreciation of the company’s financial difficulties, the Council had also waived penalty payments due because job creation numbers had fallen short of targets. Factors causing the company to go into voluntary liquidation were eventually reversed but the Council had effectively waived all debts.

– Inadequate monitoring of employment levels. Company reports of jobs created were not validated nor regularly monitored.

– Inadequate cost-benefit analysis. Information available in 2001 indicated it would take 9.5 years before the economic return to the community was at break-even point.

– Lack of coordination between the Department of Innovation, Industry and Regional Development and the Council. The State Government provided the same company with financial assistance of $902,500 on certain conditions that included achievement of capital investment of $10 million. The money was paid despite the fact that the company only invested $7.5 million, the $10 million audit certificate on which the State Government paid the company included the $3.3 million loaned by the Shire of Melton.