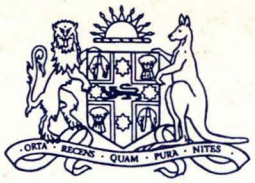

Performance Audit Report

Building Services Corporation

Inquiry into Outstanding Grievances

THE AUDIT OFFICE
OF NEW SOUTH WALES

AUDITING WITH EXCELLENCE

Performance Audit Report

Building Services Corporation

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Executive Summary

Executive Summary

A performance audit of the Inquiry into Outstanding Grievances with the Building Services Corporation was undertaken by The Audit Office. The audit was in response to a motion passed by the Legislative Council on 30 May 1996, requesting the Auditor-General "to immediately investigate and audit all matters and payments and methods of payments relating to the inquiry into outstanding grievances with the BSC ..... [and] report to Parliament on these and any other related matters in the inquiry into outstanding grievances with BSC [Building Services Corporation] relating to the claims and disallowance of claims and any other financial matters by 27 June 1996."

The Inquiry into Outstanding Grievances (the Inquiry) was announced by the Minister for Fair Trading on the 31 May 1995. Under the Terms of Reference the Inquiry was to examine the extent to which, in the cases referred to it, consumers suffered loss or damages as a direct result of the failure of the BSC to discharge their duties under the legislation; and to make recommendations to the Minister about appropriate redress, including monetary compensation. The Inquiry's Report was to be delivered to the Minister on or before 31 December 1995.

The selection of the cases referred to the Inquiry was undertaken by a Scheduling Panel that consisted of three individuals all from outside of BSC. In the absence of a comprehensive data base at the BSC that would have identified all the cases where complaints were received and still outstanding, the Panel established a set of criteria for the selection of cases to be referred to the Inquiry.

For a case to be selected, the complainant had to have an unresolved complaint or grievance that had been raised with the BSC or Government in the two year period prior to 31 May 1995, or that has been referred to the Dodd Inquiry (which had a reporting date of 28 February 1993).

To identify such cases, the Scheduling Panel accessed ten sources of information. BSC's records were too poor to provide a reliable list of outstanding cases as defined, which itself is a matter of concern. The Panel might thus not have identified all eligible cases, though its search appears thorough given BSC's limitations.

Based on the criteria established, it is understood that the Scheduling Panel examined over eight hundred cases and referred 99 cases to the Inquiry.

In its final report the Panel stated that "since its inception in 1987 to 31 December 1994 the BSC has registered 46,580 consumer complaints and received 7,714 insurance claims". In the same report the Panel said that its review "was confined to those sources thought most likely to reveal 'outstanding consumer grievances'. Accordingly it is possible that a number of 'outstanding consumer grievance' which would satisfy the criteria...have not been identified."

Given the nature of the Inquiry and given the Government and the Minister's intention to rectify the misconduct of the past, consideration could have been given to publicising more widely the nature and the extent of Inquiry.

There seems to have been, at least on the part of some complainants, some confusion as to what the Inquiry was or was not to compensate for.

According to the criteria established by the Inquiry, "wherever possible, [the Inquiry] sought to put the complainants in the same position as they would have been in had the BLB/BSC's statutory duty been properly discharged". In essence, the Inquiry took into account monetary losses and expenditures resulting from the BSC failure, but did not compensate for stress or other emotional claims.

Because of the nature of the complaints and the circumstances in which they arose, it was always likely that stress and other emotional complaints were to be an issue with the complainants. Under the circumstance, it would have been beneficial if complainants had been advised, when the Inquiry invited them to make a submission, of the precise nature of compensation likely to be considered by the Inquiry.

The Inquiry also had no mandate to provide a remedy for the faults caused by others when these faults were outside of BSC's purview. This was not immediately obvious from the Inquiry's initial correspondence and also added to the "expectation gap" between some claimants' needs and the Inquiry's capacities.

Based on interviews conducted by The Audit Office, at least some of the complainants indicated that, had they been informed of the limitations or interest adopted by the Inquiry, they would not have participated in the Inquiry.

On the other hand The Audit Office notes that there are a number of letters expressing satisfaction and appreciation to the Inquiry and the way their cases were dealt with.

The compensation recommendations made by the Inquiry and adopted by the Minister appeared generous with respect to eligible financial losses suffered by the complainants.

The lack of compensation for non-financial losses (eg for stress) appears to be the result of the Inquiry's view that it was difficult to recommend compensation that was soundly based and equitable. The Inquiry also reflected Parliament's view to compensation for the victims of HomeFund, which excluded non-financial losses.

Although the Inquiry's approach is reasonable from this angle, it might not always have been fair. The legal advice obtained by Audit indicates a broader approach than the Inquiry used to compensating for stress etc was validly open to the Inquiry, although for many cases any difference in compensation paid might not be significant. Having regard to this view, the apparent generosity of the settlement offer for financial loss, which The Audit Office supports, offers some counter to the absence of non-financial loss compensation for most claimants.

The absence of any Inquiry action for the losses caused to claimants by others (eg builders, local government) has severe repercussions for some complainants. But it is difficult to see how the Inquiry could have acted otherwise (except to have moderated expectations at the outset).

Because of the circumstances (the severity of some of the losses), there is a particular onus on the Department of Fair Trading to assist these complainants actively through its consumer support and litigation programs.

This does not address adequately the dissatisfaction of outstanding complaints: mostly they fall within these two areas (uncompensated stress and faults caused by others). But it is reasonable for the Inquiry to avoid compensation for stress and it is reasonable that the Inquiry not recommend remedies for losses not caused by the State.

The Audit Office is not in the position to verify the size of the compensation offered to individuals in every instance. Whilst the files examined identify the failures by the BSC for which compensations have been granted, they do not always provide a clear audit trail as to how those particular amounts were determined. The Audit Office has been advised that in many instances the amounts were based on records held by individual complainants that have been subsequently returned to them. It is also noted that in many instances the Inquiry requested further substantiation of claims before compensation was, or still is, to be paid.

Where, however, sufficient documentation was available, The Audit Office is of the opinion that the Inquiry consistently applied its criteria in awarding payments. This was also the view of the independent building adviser engaged by The Audit Office.

Following a close review of a number of cases, some selected randomly some because they were contentious, The Audit Office saw no evidence that any complainant was materially overcompensated, or undercompensated, in terms of the Inquiry's criteria.

The Audit Office would have preferred a clearer audit trail on the files to identify how the amount of the recommended compensation was derived. The Audit Office is aware of the fact that, with the exception of a Secretary to the Inquiry, the Inquiry had no substantive clerical support staff.

It is recommended that in any future discretionary schemes, where payments are awarded, appropriate support staff be allocated and a clear audit trail as to the method of arriving at the amounts be established.

The Audit Office is satisfied that there were no monetary limits imposed on or perceived by the Inquiry either in respect of individual cases or in total. This was consistent with a legal advice by the Crown Solicitor to the BSC where it is stated that "If the BSC is negligent or breaches a statutory duty in its

administration of the BSC Act, its liability for loss or damages caused to a person by such negligence or breach in common law and not from statute.....Accordingly, I am of the view that the amount of damages ....is not limited".

To ensure that the Inquiry's recommendations were dealt with fairly and expeditiously, the Inquiry recommended the appointment of an independent legal adviser. Having regard to the circumstances, (ie the Inquiry was to complete its task by 31 December 1995, and it did not wish the files to go back to the BSC), The Audit Office concurs with the recommendation as an effective way to finalise the actions arising out of the Inquiry.

There is also the danger that the acceptance and the banking of the cheques by the 31 May 1996, the date stipulated in the letters, may be interpreted by the Government as a satisfactory conclusion of the past events. Interviews conducted and correspondence received by The Audit Office do not necessarily support that argument in every case.

On the other hand, practitioners spoken to by The Audit Office indicated that, in mediation and in legal jurisdictions such as the Family Court, a five percent dissatisfaction rate would not be unusual. By that measure, the performance of the Inquiry might be judged well.

Finally, although outside the Legislative Council's terms of reference, The Audit Office concurs with the Inquiry's findings and supports that action be taken to deal with many of the problems identified in the Inquiry's Report. By any reckoning, those findings demand urgent and substantial action.

Departmental Response

The Department of Fair Trading provided the following response:

REPLY TO AUDITOR-GENERAL ON THE DRAFT PERFORMANCE AUDIT REPORT RE: INQUIRY INTO OUTSTANDING GRIEVANCES

I refer to the draft report forwarded to me for comment and have set out below those matters that impact upon my Department. For ease of reference I have identified the pages in the report to which the comments refer.

- *(p2) Limitations identified in BSC records management system are being addressed. This is part of the continuing process of integration that is currently being undertaken by the Department.*

- *(p4) "Assistance to complainants" - The Department will provide all possible assistance to complainants in line with its statutory capabilities and the Minister's directions. Support to complainants is available through the advisory services of the Department located at the various Fair Trading Centres.*

  I need to clarify that the Department does not have the capacity to recover amounts paid out by the Inquiry from builders, however, recovery of amounts paid out under the Department's Insurance schemes is being actively pursued. A working group with officers from those divisions with responsibility for the administration of insurance, complaints handling, licensing, and customer service has been created to oversight case management of those matters that require special attention as a consequence of the publicity generated by the Inquiry and its findings.

- *(p30) The group referred to above will also address the problem identified in your report of previously unidentified matters not being dealt with by the Inquiry. This mechanism will provide a forum for review of these matters.*

- *(p61) The Department will vigorously pursue any claims of alleged criminal or corrupt activity by either builders or any other person associated with the processing of an Insurance claim which are formally referred by the Inquiry.*

  The Department is in the process of formulating a new Code of Conduct for the Department as well as associated internal systems for reporting suspected fraud and possible corrupt conduct. Other actions associated with such a program will be implemented as integration of all Departmental functions, activities and systems proceeds.

- *(p63) The Department has already made informal contact with the ICAC corruption prevention function regarding their assistance in other administrative areas/processes. The Department will formally avail itself of these specialist resources as it proceeds through the re-engineering and rearrangement of its functions and operations in the process of integration.*

- *(p63) As noted above, debt recovery proceedings against builders are being instituted whenever possible. Upon referral of the relevant information from the Inquiry the actions of builders, the subject of such referral, will be reviewed to determine what disciplinary action can be taken under the Building Services Corporation Act. If such proceedings are instituted potential penalties extend to the imposition of a monetary penalty or cancellation of a builders licence.*

Yours sincerely

(signed)

Dr Elizabeth Coombs
Director-General
24 June 1996

Background

Background

The Building Services Corporation (BSC) operates under the *Building Services Corporation Act 1989,* (the Act) and is a continuation of and the same legal entity as the Corporation which was constituted by the *Building Services Corporation Act 1987.*

The Corporation subsumed the functions of the Builders Licensing Board constituted under the *Builders Licensing Act 1971* and the Plumbers, Gasfitters and Drainers Board constituted under the *Gasfitters and Drainers Act 1979.*

Corporate objectives as defined by the legislation are:

- to promote and protect the interests of owners and purchasers of dwellings and users of water supplies, sewerage systems, gas, electricity, refrigeration and air conditioning; and

- to set, access and maintain standards of competence of persons doing residential building work or specialist work.

Prior Reviews

The regulation of the residential building industry in New South Wales and the operations of the Building Services Corporation have been subjected to considerable scrutiny.

In July 1990 the Royal Commission into Productivity in the Building Industry in New South Wales (RCBI) was set up. The Commission was to investigate:

- the nature, extent and effects of practices and conduct which may significantly affect efficiency and productivity within the industry;
- the nature, extent and effects of illegal activities that occur in or in relation to the building industry in New South Wales including:
  a) intimidation and violence;
  b) secret commissions;
  c) extortion; and
  d) other corrupt conduct.
- whether any measures should be made to increase productivity or efficiency and deter illegal activities in the industry.

The Royal Commission lodged its report in May 1992.

As a consequence of complaints received, combined with evidence of maladministration, Commissioner Gyles found that an external review of the structure and functions of the Corporation was warranted.

Commissioner Gyles was particularly concerned that, given its primary role as a consumer protection body, the Corporation disproportionately represented the interests of the supply side of the industry and had not adequately addressed the needs of the consumers. Concern was also voiced about the surplus funds accumulated by the BSC, and the high level of funding for education and research activities, little of which was applied to the provision of consumer education.

Arising out of the Royal Commissioner's recommendations, Dr Peter Dodd was appointed to inquire specifically into the way the residential building industry in New South Wales was regulated and administered. The (Dodd) Inquiry was given the task of investigating and providing recommendations to the Government on consumer protection in the home building and related industries. Dr Dodd reported to the Government in February 1993; the report making recommendations for extensive change to the operations of the BSC but none as to the concerns of individual aggrieved consumers.

One of the principal findings of the Dodd Inquiry was that the "one stop shop" approach adopted by the BSC was fundamentally flawed and that the BSC had a position of conflict by having too many roles - licensing, dispute resolution, discipline, consumer protection, insurance provision and funding of education and training. Dodd's principal recommendation was that the key functions of industry regulation, consumer advice, dispute resolution and insurance be separated.

Subsequent to the Dodd Inquiry, a task force was established, led by the Office of Public Management, to assess the report's recommendations and to develop an implementation plan. The task force concluded that although the Dodd Inquiry's report provided a strong foundation for reform, further research and consultation was required. The then Premier and Minister for Housing accepted this position and decided that the reform process would be best managed from within the BSC. The Corporation then commenced reviewing many of its activities.

Inquiry Into All Outstanding Grievances By Consumers with the Building Services Corporation

On 12 March 1995 the then Shadow Minister for Consumer Affairs foreshadowed by media release that "....in Government Labor will immediately institute an inquiry into all unresolved consumer complaints lodged with the Building Services Corporation."

Following the General Election in March 1995, functions formerly undertaken by the BSC have been placed progressively with the Department of Fair Trading. The Department also has responsibility for administering the Act.

The Minister for Fair Trading announced in the Legislative Assembly on 31 May 1995 that there would be an independent inquiry into long standing grievances against the BSC. The inquiry was to examine whether the consumers received their full entitlement under the legislation, whether the Corporation and former Builders Licensing Board properly discharged their statutory duties to the consumers and whether the consumers have suffered loss or damage as a direct result of the failure of the Corporation or Board to properly discharge their duties.

Constitution of the Inquiry

The Inquiry's Terms of Reference were developed by the Minister's Office in consultation with the Crown Solicitor's Office and The Cabinet Office.

Files examined by The Audit Office indicate that it was not intended that a commission of inquiry be established pursuant to the Royal Commissions Act 1923 or the Special Commissions of Inquiry Act 1983. Furthermore it was considered inappropriate to start a management review pursuant to the Public Sector Management Act because the proposed terms of reference went well beyond the "functions and activities" of the BSC. The Crown Solicitor's Office advised that, given these circumstances:

> *the only options available appear to be one of two types of less formal inquiry. The first is an inquiry authorised by the Minister. The second is an inquiry authorised by the Governor pursuant to a recommendation made to him pursuant to an Executive Council Minute. I strongly recommend that this second type of inquiry be adopted in this instance.*

Powers of the Inquiry

In the Crown Solicitor's Office advice it was stated inter alia:

> *... Those persons appointed to conduct the inquiry would have powers no more and no less than those available to private citizens in asking questions about a particular matter. The inquiry could not require persons coming before it to add weight to information provided by them by verification on oath or by affirmation..... The inquiry could, however require written information to be given in the form of a statutory declaration.....The inquiry could not compel the attendance of persons to supply information or documents. It would be dependent upon the goodwill and co-operation of the Corporation, those persons making the complaints and others to ensure that all relevant documentation was available ...*

The Inquiry was formalised on 23 August 1995 when the Executive Council approved an inquiry into, and report on Outstanding Grievances of Consumers with, the Building Services Corporation and its predecessor the Builders Licensing Board. Notification of this was gazetted on 25 August 1995 together with the Inquiry's Terms of Reference.

Terms of Reference

The gazetted Terms of Reference required

> *The Commissioners to inquire into the following matters:*
>
> *1. To examine the outstanding grievances of the consumers listed in the following schedule ("the consumers") arising from:*
>
> - *the investigation of complaints by the consumers received by the Building Services Corporation("the Corporation") and its predecessor the former Builders' Licensing Board ("the Board"); and*
>
> - *the payment, part payment or non payment of insurance benefits as a result of determinations made by the Corporation or the Board;*
>
> *pursuant to the Building Services Corporation Act 1989 and the Builders Licensing Act 1971 ("the legislation").*

2. *To examine, without limiting the generality of the foregoing:*

   - *whether the consumers received their full entitlement under the legislation;*

   - *whether the Corporation and the Board properly discharged their statutory duties to the consumers; and*

   - *whether the consumers have suffered loss or damage as a direct result of the failure of the Corporation or the Board to properly discharge their duties to the consumers under the legislation.*

3. *To make recommendations to the Minister For Consumer Affairs, the Honourable F Lo Po', about appropriate redress, including monetary compensation, where the inquiry is of the opinion that the Board of the Corporation has failed to discharge its duty to a consumer under the legislation and the consumer has suffered loss or damage as a result.*

AND IT IS DIRECTED that you provide a report of the results of your inquiry by 31 December 1995 to the Minister for Consumer Affairs."

The Inquiry's final report was forwarded to the Minister on 29 December 1995.

The Report was tabled in the Legislative Assembly on 18 April 1996 and in the Legislative Council on 30 May 1996.

Legislative Council's Motion

On 30 May 1996 the Legislative Council supported a motion (Appendix A) which inter alia :

1) requested that the Auditor-General immediately investigate and audit all matters and payments and methods of payment relating to the inquiry into outstanding grievances with the BSC; and

   requested that the Auditor-General report to the Parliament on these and any other related matters in the inquiry into outstanding grievances with the BSC relating to the claims and disallowance of claims and any other financial matters by 27 June 1996.

The Audit Process

The Audit Process

Call for Documents

Upon receiving advice of the Legislative Council resolution, The Audit Office contacted both the Minister's Office and the Department of Fair Trading to obtain all documents relating to:

- the establishment and operation of all phases of the Inquiry
- the actions proposed by the Inquiry
- implementaion of actions recommended by the Inquiry
- the determination and making of offers of compensation to individual complainants
- the status of actions in relation to the payment of compensation to complainants and the banking of cheques drawn
- overall reforms undertaken and/or proposed.

Background information was also obtained concerning:

- the operation of the BLB/BSC
- relevant legislation, particularly concerning the operation of the insurance scheme and various funds administered by the BSC
- other recent major reviews (such as the Gyles Royal Commission and the Dodd Inquiry)

Building Advice

The Audit Office commissioned an independent building adviser, the Building Research Centre (a divison of Unisearch Ltd at the University of New South Wales) to provide technical advice upon the validity of the assessment process used by the Inquiry and the nature of compensation proposals made. Their advice is included as Attachment 1 to this Report.

Legal Advice

The Audit Office commissioned independent lawyers, Minter Ellison, to provide legal advice upon a range of matters such as:

- the establishment and operation of the Inquiry
- the assessment process used by the Inquiry
- the determination of liability and association damages by the Inquiry
- the basis and nature of offers of compensation
- the terms of compensation offers
- the terms of settlement proposed.

Their advice is included as Attachment 2 to this Report.

Discussion with MLC

The Audit Office met with Mr J. Jobling, MLC, who had moved the motion leading to the resolution by the Legislative Council that the Auditor-General should undertake this audit. Mr Jobling provided a range of documents to Audit.

Discussions with Key Officials

The Audit Office held discussions with a number of relevant persons, including the following key officials:

- Dr E Coombs, Director-General, Department of Fair Trading
- Ms R Henderson, Chief of Staff for the Minister for Fair Trading and Minister for Women
- Dr P Crawford, Chairman of the Inquiry and Ms M Rayner, Inquiry Member
- Mr T Lynch, Chairman of the Scheduling Panel and person responsible for implementation of Inquiry recommendations
- Mr P King, Secretary to the Inquiry

Meetings with Complainants

The Audit Office had been contacted by and met with a number of complainants, with each meeting running for a considerable time. Further documents were also obtained through this process.

Correspondence Received

The Audit Office received direct correspondence from a number of complainants (some different to those who also sought a personal meeting), including several referred through Parliamentarians. Correspondence was also received from the Shadow Minister for Consumer Affairs.

Reporting Process

The legislation governing performance audits sets out a specific reporting process which must be followed before a report can be tabled by the Auditor-General.

In accordance with that process, a Draft report was forwarded to the Head of the Department of Fair Trading, now responsible for the operation of the BSC, and to the Minister for Fair Trading and Minister for Women, as the responsible Minister under the Act.

The Auditor-General is precluded under the legislation from tabling the report for at least 28 days from the date of forwarding the Draft report.

In this case, in order to satisfy the request made by the Legislative Council to report to Parliament by 27 June 1996, this Draft report has been discussed with the Head of the Department, whose formal response has been included. The report has also been referred to the Minister for action.

Cost of Audit

The cost of the audit is as follows:

	$
Direct Salaries Costs	61,787
Overheads Charged on Staff Time	15,447
Value of Unpaid Overtime (at standard-time rates only)	34,713
Costs of Legal and Building Advisers	23,400
Printing Draft Report	1,300
Printing Final Report	4,600
Other Miscellaneous Items	300
TOTAL COST	**$141,547**

Community Reaction: Factors Affecting Satisfaction with the Inquiry

Community Reaction: Factors Affecting Satisfaction with the Inquiry

Public Expectations

After perhaps many years of fighting, to finally have an Inquiry launched by a Government Minister was clearly welcomed by many in the community, and a very great relief for some. As a result it is apparent that at least some complainants held very high expectations of the Inquiry. How well those expectations are met will determine people's final opinion of whether they consider the Inquiry to have been a success or failure.

In terms of individual claims, some people saw the Inquiry as their "last opportunity for justice". Having battled for perhaps a considerable number of years in any number of forums, perhaps including the courts, some complainants were clearly hoping that they would finally receive what they considered to be just, and their right: namely full satisfaction and restitution. In many cases complainants expected that this would include compensation for a range of non-building costs: such as stress and suffering, loss of earnings and so on.

There were further expectations from some quarters that the Inquiry would go beyond reaching settlements on individual cases: important as this was. Some people hoped the Inquiry would expose a long and persistent history of practices by the BSC which they regarded as a massive failure of statutory duty. Some people allege corruption on the part of particular persons, whilst others go even further to allege that a corrupt culture had become entrenched, even systemic, at the BSC. For some people, addressing matters such as these has become closely associated with, even more important than, settling their own financial claim.

The Expectation Gap, and its Impact

Into this environment of expectations the Inquiry proceeded. As outlined elsewhere in this Report, the Inquiry is a limited instrument. It has a limited timeframe to conduct its work. It has a specific terms of reference. It is not a judicial body, and cannot act as one. It has no special legal or investigative powers. It was not intended to provide relief for the faults of others in the private sector.

However, any gap between complainants' expectations and the Inquiry's ability to deliver is viewed by those complainants as failure on the part of the Inquiry. Those with the greatest expectation gap are the most displeased, and so go further to criticise the Inquiry as "a whitewash".

Community Satisfaction

In terms of community satisfaction, the overall result is mixed. This might be expected for an exercise such as this Inquiry.

Given the nature of the situation, the overall level of satisfaction achieved by the Inquiry might be considered reasonable. Relevant benchmarks are arguable. However, in mediation and in legal jurisdictions such as the Family Court, some practitioners indicated that a 5% dissatisfaction rate would not be unusual. By that measure, the performance of the Inquiry did well.

Some complainants are clearly quite happy with the outcome, and with the process. A small number of letters of compliment and thanks have been sighted indicating this. Most complainants banked the cheque they were offered. Although this does not necessarily imply they are happy with the outcome, it does at least indicate that they may be prepared to put the matter at an end. A small number of complainants have rejected the offer and sought to negotiate further. A number of letters have been sighted which indicate substantial dissatisfaction with the Inquiry, and some people have taken their concerns to the media and/or to Members of Parliament.

Causes of Dissatisfaction

Given the importance placed on this Inquiry by both the Government and the public, regardless of what measures of satisfaction are attempted it is useful to consider what issues gave cause for dissatisfaction on the part of at least some complainants.

The single greatest cause of dissatisfaction with the Inquiry (ie. the greatest expectation gap) appears to be with the approach to determining compensation for non-financial losses.

The second greatest cause of dissatisfaction appears to arise from particular aspects of the implementation process employed for the Inquiry.

The third area of concern relates to the extent to which full and effective corrective action has been taken, at least in the eyes of complainants, to deal with the overall situation including with the faults caused by other than BSC.

These issues are addressed in the following chapters of the Report.

Identification of Outstanding Grievances

Inquiry Process

Phases of Inquiry

The Inquiry process was divided into two phases. The first involved the scheduling of outstanding cases to determine which warranted consideration by the Inquiry in the second phase.

In addition, there was the implementation phase which was conducted separate to the Inquiry.

The first stage was undertaken by a Panel of three, two of whom held legal qualifications and one architectural. They were external to the BSC and were known as the Scheduling Panel. These appointments were endorsed by the Minister.

The Panel's principal task was to make the preliminary assessment on matters to be scheduled for referral to the Inquiry. Further, the Panel was required to determine its own guidelines for identifying those matters which would be recommended for referral.

The Panel's task was considerable. Since its inception in 1987 through to 31 December 1994, the BSC had registered 46,580 consumer complaints and received 7,714 insurance claims. The Panel considered that it was not feasible for it to review comprehensively this volume of material. In the absence of a data base that would have facilitated an easy identification of outstanding grievances, the Panel's review was confined to those sources that, in the opinion of the Panel, were most likely to reveal "outstanding consumer grievances".

Sources of Outstanding Grievances

Accordingly, matters recommended for scheduling were identified by the Panel from an examination of:

1) a submission from Phillips Fox, solicitors representing a number of complainants.
2) the list of matters submitted by Building Action Review Group (BARG) to the Minister in June 1995.
3) the BSC submission to the Royal Commission into the Building Industry in respect of BARG complaints.
4) the matters described by the BSC as "current cases" in its 1993 paper "Long Standing Disputes and/or Insurance Grievances".
5) the BSC registers of ministerial and parliamentary correspondence and briefings between 1 July 1992 and 28 July 1995.
6) the BSC files of correspondence with the Ombudsman.

7) the telephone contacts with, and written submissions to, the Dodd Inquiry.

8) the BSC records of its media coverage.

9) the BSC's record of its correspondence with ICAC.

In addition, the Panel made requests to the management of the BSC's Technical, Legal, Insurance, Special Inquiries and Policy sections that they identify to the Panel all matters in which they felt that the consumer might expect to be considered by the Inquiry. Twenty-seven such matters were identified.

The procedure adopted by the Panel was to provide the BSC with a list of consumers names and require the BSC to furnish all the complaint and insurance files relating to that consumer. The Panel did not meet with a consumer or seek submissions about any of the matters reviewed by it.

Initially, the Panel reviewed a sample of 10% of the consumer hotline contacts with the Dodd Inquiry. However, at the request of the Minister, the Panel subsequently reviewed all cases that related to consumer dissatisfaction.

The Dodd Inquiry

The Dodd Inquiry files, and in the case of respondents to the Dodd Inquiry, their recorded comments and/or submissions to that inquiry, were examined by one member of the Panel who made initial assessments as to "scheduling".

Subsequently the whole Panel reviewed those initial assessments against the criteria discussed below.

Criteria Adopted

The criteria developed by the Panel to identify outstanding cases reflected the principle that a matter was regarded as "outstanding" if there was material on the relevant files indicating either:

- contact between the consumer and the BSC subsequent to 31 May 1993 ie. two years prior to the announcement of the inquiry; or

- the consumer had responded to the advertisement of the Dodd Inquiry for views about the BSC.

If neither the BSC nor the Dodd Inquiry had been so contacted the matter was regarded as not outstanding.

All matters classified as "outstanding" were reviewed to determine whether there was any suggestion of dissatisfaction with BSC conduct. If there was any such suggestion, the matter was examined to see whether the consumer had either:

- obtained full rectification (which term includes completion) from the original builder; or

- been paid an amount of insurance sufficient to obtain full rectification from another builder ("sufficient insurance").

If the consumer did not obtain either full rectification or sufficient insurance, the case was examined to see whether that was due to or could have been contributed to by the BSC's conduct. If that was the case the matter was recommended for scheduling.

Application of Criteria

If there was no record of contact with the BSC on or after 31 May 1993 or with the Dodd inquiry, matters were not recommended for scheduling because having regard to the Terms of Reference they were not considered to be "outstanding". An FOI request, of itself, was not regarded as contact.

Files identified as outstanding were examined for any indication of consumer dissatisfaction with BSC conduct. If there was no such indication the matter was not recommended for scheduling because, having regard to the Terms of Reference, there was no "grievance".

Where a potential grievance was found, the following process was then applied.

If the dissatisfaction was that there had been no, or inadequate, disciplinary action against the builder, the matter was not recommended for scheduling because in the terms of reference there was neither a statutory duty nor any loss or damage to a particular consumer.

If it appeared that a consumer's dissatisfaction was about delay in processing either a complaint against the builder or an insurance claim, the files were examined to ascertain whether there had been either full rectification or sufficient insurance provided.

If there was full rectification or sufficient insurance provided, the matter was not recommended for scheduling because having regard to the Terms of Reference there was no loss or damage to the consumer. The Panel did not consider that claims for inconvenience, irritation, stress or emotional upset etc of themselves provided a sufficient basis for recommending scheduling, if there had been full rectification or a payment of sufficient insurance compensation.

The Panel was of the opinion that, whereas it could assume that having regard to the intrinsic nature of complaint and insurance matters any financial loss would be addressed in correspondence with the BSC, it could not assume that all or even most consumers would in the context of correspondence with the BSC raise compensation claims for personal matters. The Panel also felt that there was a real risk of unequal treatment, to the extent that:

- such personal, subjective reactions were in the circumstances impossible to assess as to veracity, degree and persistence, and
- it was not possible for the Panel to ascertain the extent to which such personal reactions were caused by BSC, rather than the builder or other factors in the consumers life.

This conclusion was reinforced by the terms of the HomeFund Commission Act 1993, enacted with bipartisan support, which provides for compensation for financial loss only. The Panel noted the similarity between its task, the purpose of the Inquiry and that of the HomeFund Commissioner.

If there was not full rectification or sufficient insurance then the Panel examined:

- what, if anything, was said by the owner to be the fault of the BSC, or
- whether in any event that result could be said to be the fault of the BSC.

The Panel thus considered whether it could be reasonably argued that there was BSC fault independent of how the owner alleged it. "BSC fault" was considered by the Panel as being action (or inaction) by the BSC which contributed to or caused the owner to obtain less than full rectification, or sufficient insurance.

The Panel did not regard payment of the maximum amount of insurance as conclusively negating BSC fault. The Panel examined the files to see whether any BSC delay had contributed to loss or damage suffered by the consumer. For example, was the delay such that the difference between available maximum insurance amount and the costs of rectification could have increased appreciably during the period of delay.

In cases where insurance payments approved were not sufficient to obtain full rectification under the successive insurance schemes operating between 8 January 1976 and 20 March 1990, the files were examined to see whether the BSC had classified claimed defects (as between "general defects" and "major structural defects") differently from the owner, and whether this reduced the maximum amount of insurance available. It was a feature of these insurance schemes that this classification was of major significance in determining the amount of insurance available.

Unless the Panel considered that there was no reasonable basis for arguing that BSC fault had resulted in either incomplete rectification or less than sufficient insurance, the matter was recommended for scheduling as arguable "loss or damage".

In cases where an insurance payment was declined by the BSC, the Panel examined the file to ascertain whether there was any arguable basis for disagreeing with BSC's reason. If so, the matter was recommended for scheduling.

All successive BSC insurance schemes have had fixed time limits for the making of claims but permitted these to be extended in "special circumstances". If the insurance was declined as being out of time, the Panel examined the files as to whether:

- the BSC invited the owner to make representations as to "special circumstances" and
- then considered whether there might be "special circumstances".

Unless both were done the Panel recommended the matter be scheduled because having regard to the terms of reference the failure to consider the possibility of "special circumstances" was arguably a failure to discharge statutory duty.

It should be noted that the Panel did not regard the existence of any appeal pending before the Commercial Tribunal of itself as a reason not to recommend a matter for scheduling. This was because the Commercial Tribunal can deal with claims only in terms of the various insurance schemes whereas the scope of the Inquiry is more extensive and may deal with both insurance and non insurance grievances.

If upon examination of a file it appeared that there had been no unreasonable delay and that:

- the complaint against builder was still in progress, or
- any insurance claim had yet to be determined

the Panel treated it as current and therefor not "outstanding" and did not recommend scheduling.

In respect of each matter not recommended for scheduling the Panel reviewed all relevant identified parliamentary and ministerial correspondence. This was to ensure that no relevant considerations were overlooked.

Panel's Recommendation

On 11 August 1995 the Panel, following a perusal of some 650 files and an examination of 247 of those matters, recommended 62 matters to the Minister for scheduling. The 62 cases included 10 that related to the 10% sample of the Dodd Inquiry. To comply with the Minister's request, the 10 cases were held over until the whole of the Dodd Inquiry cases were reviewed.

Following a review of 466 Dodd Inquiry contact sheets, a further report recommending the scheduling of 25 matters, including 23 identified from an examination of the Dodd consumer hotline contacts, was forwarded by the Panel to the Minister on 17 October 1995. These were gazetted on 3 November 1995.

The Panel's final report was issued on 28 November 1995 and recommended another 22 matters which were gazetted on 8 December 1995. This made a total of 99 matters scheduled for examination by the Inquiry.

It should also be mentioned that the Panel made a number of observations and recommendations relating to the BSC which are similar to those made by the Inquiry.

Limitations of the Process

The Scheduling Panel recognised that there were limitations with the selection process employed, and stated that:

> *Accordingly it is possible that a number of outstanding consumer grievances which would satisfy the criteria ... have not been identified.*

When the Inquiry was originally being constituted, consideration was given to arranging extensive advertising in the leading daily newspapers inviting all those with relevant complaints to make contact with the Inquiry.

This course was not ultimately pursued. Given the nature of the Inquiry, and given the Government and the Minister's intention to rectify the misconduct of the past, publicising the Inquiry more widely and inviting submissions may have been helpful in avoiding any concern on the part of consumers that the Inquiry was a limited exercise.

It was noted that when the results of the Inquiry were discussed in the media, a considerable amount of public comment was received. The Minister has issued an invitation for details to be forwarded to her by the media of any complainants which may not have been assessed.

Assessment of Outstanding Grievances

Inquiry Meetings with Complainants

Following the decision of the Scheduling Panel, a total of ninety-nine complainants were eventually selected for the Inquiry.

Contents of Letter to Complainant

To arrange a meeting, complainants were sent a standard letter informing them of the establishment of an independent inquiry by the Minister for Fair Trading to inquire into outstanding consumer grievances with the Building Services Corporation (BSC) and its predecessor, the Building Licensing Board (BLB). The letter also informed the complainants of the Terms of Reference and that the Inquiry would not be holding formal hearings, because it was not a judicial review. It would focus on the facts and issues which concerned the complainants. A tentative date and time was given to the complainants to talk to the Inquiry member or members. A copy of the typical letter is provided at Appendix B.

The complainants were informed that members of the Inquiry had read their original complaints and requested more information if they wished to make it available to the Inquiry.

The letter informed the complainants that the Inquiry member(s) would discuss the matter with them in private. BSC files would be made available for reference if any issues arose from it. BSC was asked by the Inquiry to summarise its views about the complaints and make its response available for the interview. The BSC would not be in attendance, but the complainants and, if they wished, a family member or a friend or an adviser or even a lawyer could attend the informal hearing.

The complainants were informed that the Inquiry members had been appointed by the Minister and would be acting expeditiously and with informality, and would be reporting to the Minister directly.

If the complainants needed an interpreter, the Inquiry provided one free of charge. The complainants were asked to confirm the date and time for the hearing or arrange an alternate appointment.

General Comments about Letter to Complainant

The letter did not specify the range or type of material that would be considered by the Inquiry apart from the original complaints and BSC files and BSC's summary of its views about the complaints. The Inquiry only requested additional information which the complainant would like to make available to the Inquiry. The Inquiry did not ask for particular types of information such as a chronology detailing the complainants' dealings with the BSC/BLB and any expenses that might have incurred in those dealings which the complainants would have wished to be considered by the Inquiry.

It would have been beneficial if the complainants had been advised in more precise terms as to what the Inquiry was or was not to consider; and how the compensation claim might be considered.

Consideration could also have been given to requesting complainants to itemise for the Inquiry their expenditure incurred.

At the Hearing

Members of the Inquiry met with the complainants to discuss grievances they may have with the BSC and its predecessor, the BLB.

For each case, the Inquiry and complainants were provided with a chronology of events compiled by BSC. At the hearing the complainants had the opportunity to view a copy of their BSC files.

A standard form was used by the Inquiry for the recording of hearing dates, the Inquiry Panel members who were present and details of the complainants. It also provided for the recording of whether the complainants were present or represented by someone else and whether the complainants were accompanied by someone. If an interpreter was present, the language used was also recorded.

The Inquiry also used a standard form to record the matters under review, issues to be decided and recommendations made.

The Inquiry Panel was provided with a Secretary to the Inquiry but received no other clerical support. During the hearing, Inquiry members recorded their own case notes and subsequently typed their own findings.

Inquiry Findings and Determinations

The Inquiry's Final Report went further than the Terms of Reference required. It made observations, comments and recommendations arising out of its review of the individual cases that related to BSC/BSC. Those observations and comments reflect badly on the BSC/BLB and are dealt with later in this Report.

In the main the Inquiry noted that BSC was unable to provide it with detailed briefings on each claimant's case in order to justify the actions it had taken. Many key documents were missing from the files provided by BSC, such as summaries of telephone conversations dealing with major structural, licence and insurance matters. In other instances key reports had been omitted from BSC files provided to the Inquiry. Whilst the BSC did provide the Inquiry with individual chronologies of events, they were in many cases incomplete and it was left up to the Inquiry in conjunction with the complainants to complete the picture.

The Inquiry compiled much of the missing information and documents from interviews attended by the complainant, where complainants also provided their own additional information.

Once the Inquiry had established sufficient facts to allow it to recommend a determination of a complainant's case, it applied the assessment criteria to arrive at its findings. Compensation was then recommended based on these findings.

Assessment and Determination of Complaints

Assessment Process

The following extracts from the Inquiry's Final Report dated 29 December 1995 provides the general outline of the approach and assessment criteria used by the Inquiry to determine the amount of compensation:

- *The Inquiry takes the view that a public authority such as the BLB/BSC is subject to a common law duty of care in the functions it performs, or should it fail to perform them. (4.2)*

- *It should be noted that the Inquiry had access to BLB/BSC files and files put together for the Dodd Inquiry, as well miscellaneous other reports. (1.20)*

- *The Inquiry asked the BSC to provide a briefing on the chronology of development of the legislative framework, the*

reasons for the changes introduced and a brief comment on resulting changes in approach by the BSC. (1.21)

- *Consumers were encouraged prior to their appointment to send in a written submission or a chronology detailing their dealings with the BLB/BSC and listing any expenses they might have incurred in those dealings. (1.15)*

- *Following interviews with citizens and other parties, case notes were prepared which demonstrate both the actions taken (or not taken) by the BLB/BSC and the direct harm or losses incurred by individual citizens as a result of any breach of statutory duty by the agency, in accordance with our Terms of Reference. (5.1)*

- *The Inquiry was informed of the general principles governing under Tort or Contract law. We looked for a result which would provide reasonable compensation without imposing a liability exceeding that which could be fairly contemplated or accepted by the party at fault. We sought to apply common sense principles to some of the larger claims. We were conscious of the need to be satisfied that the compensation must be connected with the breach or failure, and not something that would have occurred in any case, or was too remote from the act or omission complained of. (5.6)*

- *If it was possible, and the complainants had simply been denied their full entitlements under the legislation we sought to establish that entitlement and see that it was awarded. (5.7)*

- *We were very conscious that though we had invited the BSC to justify the actions it had taken, it did not accept that invitation and we were obliged to rely on the documentation it provided to elicit that understanding. We were sensitive to the fact that the recommendations should relate to the BSC and not the builders or contractors who had not been "heard". (5.8)*

- *... the Inquiry to take into account the reasonable cost of repairs to defective building work which should have been prevented or rectified at the time by acts of the BSC; demolition expenses where appropriate; where repairs were impracticable for any reason, some estimate of the loss of value of the building or works. (5.10)*

- *We considered that it was reasonable to indemnify citizens for the costs of urgent rectification work, and in some cases for legal and expert fees incurred because of a refusal or failure by the BLB/BSC, for instance where arbitration or litigation was either advised or forced upon the citizen, or where the BSC wrongly defended or intervened against the citizens' interests in such proceedings. (5.11)*

- *... in several cases we commissioned appropriate expert assessments where its lack made it impossible for us to make any recommendation. (5.11)*

- *Whenever practicable, we sought to put the complainants in the same position as they would have been in had the BLB/BSC's statutory duty been properly discharged. (5.9)*

- *... we have in no case made any recommendation of any award to compensate citizens for pain, suffering, distress or grief. (5.14)*

- *In some cases the Inquiry was not able to finalise the quantum of any recommended award, because there was a lack of appropriate evidence. In some cases we deferred the final recommendation until certain other steps, or evidence, or quotations had been obtained. We sought instead to establish a process, and the principles on which a final resolution should be reached with the citizen. (5.15)*

After their original assessment meeting with the Inquiry, complainants were thanked in writing and invited to raise any further matters and/or provide any further relevant information, as soon as possible, so that the Inquiry could make its recommended determination for their case. Many complainants did.

Recommendation for Compensation

The Inquiry forwarded recommendations to the Minister in respect of ninety-one of the ninety-nine cases referred to it. Eight cases were not assessed, either because the complainants did not respond to the invitation to attend the Inquiry, or because settlement had been reached with the BSC.

Of the cases where the Inquiry made recommendations, the Inquiry referred seven cases back to BSC Insurance, as it was of the opinion that the matter could best be progressed in that forum. In 72 cases the Inquiry determined monetary awards. In 11 cases the Inquiry determined that BSC had not caused any direct loss or damage. One determination is still being finalised.

Where monetary compensation was determined, and the Inquiry had all the relevant information from the combination of BSC's files, chronologies, information and submissions supplied by claimants, it recommended specific amounts to be offered to the complainants.

Limits on Compensation

There has been considerable comment in the Parliament that the Inquiry went beyond proper authority in making recommendations for compensation. This is based on the view that there are statutory limits on payments made from the BSC insurance scheme. However, the Inquiry was not established in terms of the insurance scheme. The Inquiry's commission was much broader.

In establishing the Inquiry, legal advice was obtained from the Crown Solicitor's concerning any limits on the ability of the Inquiry to make settlement offers. The Crown Solicitor advised that:

> *If the BSC is negligent or breaches a statutory duty in its administration of the BSC Act, its liability for loss or damages caused to a person by such negligence or breach arises in common law and not from statute ... Accordingly, I am of the view that the amount of damages ... is not limited.*

There have also been views expressed by some people to the effect that the Inquiry was limited in the overall amount of compensation it could offer. That is, some form of overall budget.

The Audit Office is satisfied that no overall limit or limit on any individual case operated during the Inquiry.

Implementation of Inquiry Recommendations

The process by which the Inquiry's recommendations were implemented is set out in detail in the following chapters of this Report.

In some cases implementation was a very simple matter and was able to proceed immediately. In these cases, the Inquiry was, in-the-main, able to arrive quickly at its recommendation because of the relative straightforwardness and completeness of the documentation reviewed. The following case study demonstrates that situation.

Case Study 005

The Inquiry recommends that the BSC compensate the complainant for the projected cost of the rectifications. The amount recommended is quantified by the complainants at $49,600. ($2,000 was previously paid by the builder to the complainants and Inquiry awarded the balance of $47,600.)

Further Substantiation Required

In cases where the Inquiry was not in possession of all the facts or it required further documentation or verification or other supplementary work to be carried out, the Inquiry's recommendation would require those further actions to be carried out before a specific offer was made to the complainant. This is discussed further in the next chapter, but can be illustrated by the following case.

Case Study 067

The Inquiry requested two quotations for rectification work identified by a consulting structural engineer. The recommended offer, was to be subject to those reports.

Enhancing the Offer

Some instances were noted where the complainants felt that the compensation offered was not sufficient to cover costs incurred and they were able to argue for a reconsideration of their cases. In some instances, they received an increased offer, where adequate substantiation could be made. Although the issue is discussed further in the following chapter, the following case illustrates the point.

Case Study 018

The Inquiry initially assessed the cost of rectification to be $4,000 and wrote to the complainant informing them of this. The complainant argued that the amount awarded was insufficient to carry our the necessary rectification; the Inquiry having regard to two quotations attached to the complainant's letter increased the amount of the recommended offer to $9,823.

Cases Referred to BSC Insurance Scheme

In certain cases the Inquiry recommended that cases be referred back to the BSC to allow assessment under the BSC's comprehensive insurance scheme. Complainants had to submit insurance claims for work already done as well as work yet to be done. The following cases illustrate this practice.

Case Study 067

In this case the Inquiry recommended that because of the delays and because the owner was not told of his insurance claim entitlement at the relevant time, this complaint be treated as one concerning major structural defects and be met under current insurance arrangements.

Case Study 074

The complainants had not received appropriate advice from the BSC about the category of defects in which their complaints fell, nor the time limits on the insurance claim. In particular the BSC advised that the claim was out of time. This was found to be incorrect.

The Inquiry recommended that the BSC process the insurance claim.

No Compensation

In the cases where the Inquiry found that no act or omission of the BLB/BSC caused any direct loss or damage to the complainants no compensation was awarded. The following are some of the cases where no compensation was offered.

Case Study 080

The complainant requested a refund of $4,000 paid as a commencement fee to a builder for a cancelled project. The complainant was not successful because the builder was able to justify expenditure of more than $6,000 (although excessive) in preparing plans and submission to council.

In this case the Inquiry found that BSC had not caused any direct loss or damage to the complainant.

Case Study 012

The Inquiry commissioned an engineer to evaluate the defects in the complainant's home. Their report stated that there were no major structural defects with the building. Some remedial work was done by the builder at the time of contact between the BSC and the complainants.

The Inquiry found that BSC had not caused any direct loss or damage to the complainant.

Case Study 024

In a case where the complainant was in dispute with a tiler, the Inquiry found it difficult to assess the extent to which the BSC had caused the complainant any direct loss or damage. The Inquiry noted that the complainant should have had the job specified in writing with the tiler so that there could be no argument in the layout of tiles and the standard of the job that was expected.

Further Investigation

The Audit Office observed one case in which the Inquiry was not prepared to make a compensation assessment and determination. Instead, further investigation was recommended.

Case Study 072

The Inquiry was unprepared to make a recommendation for settlement because of the complainant's continuing dispute with their builder and the matter is before the Building Disputes Tribunal.

The Inquiry recommended that the Minister appoint someone to carry out an independent and thorough investigation of this case.

Comments about the Assessment Process

The Audit Office sought to reach a view on whether the Inquiry had approached the assessment of cases systematically, and applied its assessment method and criteria uniformly. A sample of cases were reviewed by The Audit Office to this end. The building advisers engaged by The Audit Office also selected a random sample of cases for review. A selection of other cases were also subsequently referred to them for advice, and also to the independent legal adviser which The Audit Office had engaged. Whilst all cases were scanned during the course of the audit, only a sample of cases were reviewed for this purpose.

Allowing for the fact that each case has its own history and circumstances, the assessment methodology seemed to have been applied consistently, with an in-built flexibility, which allowed the Inquiry to adjust for the assessment of the particular unique problem.

Compensating for Technical Matters

In terms of dealing with the technical building matters at issue in each case, it appears that the Inquiry has adopted a reasonable approach. From cases examined, The Audit Office was advised that the Inquiry's determinations regarding building works generally seemed fair, if not generous, to the consumer.

The report provided to The Audit Office by the Building Research Centre (refer Attachment 1) concluded that:

1. *With regard to the stated criteria for the assessment and determination of settlements, it is considered that these were appropriate for such an Inquiry.*
2. *In all cases reviewed, the Inquiry was thorough in its identification of the salient issues, even though in several instances these were founded to be obscure.*
3. *The identified basis for settlement is considered to be sound in all five instances reviewed. However it's noted that in two of the five cases, the remedy adopted, which became the basis of the settlement, was conservative in the favour of the citizen.*
4. *Wherever sufficient information was available, costs were based on documented claims. Where it was impossible to assess rectification costs, as detailed estimates were not available to the Inquiry, settlements were in all instances subject to subsequent approval, the determination being based on an agreed scope of works.*
5. *In each of the cases reviewed settlement amounts reflected the stated assessment and settlement criteria of the Inquiry. If anything there appears to have been a bias towards the consumer, erring in favour of the aggrieved.*

Compensating for Indirect Items

From the cases examined, The Audit Office is satisfied that the Inquiry approached the consideration of indirect items in a systematic manner. However, in applying its criteria and making a final recommendation, there is evidence of similar types of indirect costs being allowed in some few cases but not in others. The Inquiry's Final Report illustrates this matter:

> *We did not recommend, in other than two very gross and obvious cases, that the BSC should meet rental expenses for alternative accommodation required by building rectification or demolition work .....*
>
> and at another point in the report
>
> *In those cases of very significant failure in the BLB/BSC's duty to the consumer the Inquiry was, however, more inclined to recommend compensation arrangements which fully recognised all costs incurred by the consumer and were more likely to put them back into some kind of an appropriate position.*

It could be argued that this simply reflects the differing circumstances and facts of each case. Allowing certain costs in one situation but not another requires a judgement to be made. The Inquiry considered each matter on its merits. Without exhaustive re-examination of cases (including having all documentation and the benefit of complainants personal testimony), a valid conclusion cannot be drawn on this issue.

Claims for Stress and Hardship

The Inquiry did not include claims for stress and hardship in its determinations. In terms of this matter, in its Final Report the Inquiry states that:

> *In several cases citizens made very significant claims for compensation based not only on the moneys they had been required to find, or had lost (economic and pecuniary loss) but for non-pecuniary loss, for non-physical injuries and injuries and illnesses caused or contributed to by defective building works and by their unsatisfactory dealings with government agencies, and for what was in effect "nervous shock", inconvenience, distress and frustration, and aggravated or exemplary damages.*
>
> *We understood the reasons for these claims, but we have in no case made any recommendation of any award to compensate citizens for pain, suffering, distress or grief. The Inquiry did find some instances where the citizen's lives had been made wretched, their health and happiness and the stability of their home lives affected. Some citizens were forthright in expressing those effects: others were stoic and restrained, and it was not possible to determine which should be recognised in economic terms.*

Given the nature of the complaints and the circumstances in which they arose, it was always likely that stress and other emotional complaints were to be an issue with the complainants. Some complainants regarded the Inquiry's Terms of Reference as implying that such matters would be considered, as they saw them as a legitimate component of "loss or damage as a direct result of the failure of the BSC".

Advice provided to The Audit Office by Minter Ellison (refer Attachment 2) indicates that the Inquiry's Terms of Reference did not prevent it from examining whether indirect loss or damage was suffered.

The same approach to excluding stress and hardship claims was established in the HomeFund Commission Act. Whilst some complainants are very dissatisfied with not being compensated for all aspects of loss as they see it, on balance it is not unreasonable for the Inquiry to avoid compensation for stress. It is also reasonable for the Inquiry not to recommend compensation for losses not caused by the BSC.

Given the nature of this Inquiry and the circumstances of complainants, it would have been beneficial if complainants had been advised by the Inquiry at the outset of the nature of compensation likely to be considered.

Based on interviews conducted by The Audit Office, at least some of the complainants indicated that they would not have participated at the Inquiry if they had known in advance that claims for stress and hardship would not be considered.

Documentation

From the study of documents, The Audit Office observed a typical case file would normally contain the standard letter sent to the complainants; a note which detailed those present at the Inquiry; standard form completed by Inquiry members' on the hearing which was subsequently typed; case findings; letter of offer of compensation, and correspondence between complainants and BSC and the Inquiry. Occasionally, the file may contain quotations, technical reports, cost estimates of defective building work to substantiate the claim, notations on telephone conversations following the release of letter of offer and correspondence with Members of Parliament.

There were many instances where quotations, cost estimates supplied by the complainants and other itemised expenditure were used by the Inquiry to determine the amount of compensation.

However, The Audit Office did experience difficulties in a considerable number of cases in locating documents showing a break-down of the amount offered to the complainants. The Audit Office was advised that in many cases complainants had provided key documents at their meeting with the Inquiry, or subsequently, which enabled specific amounts to be substantiated.

The Audit Office was advised it had been a general practice either to return such documents, or to destroy them, once the Inquiry had satisfied its need for information in reaching a determination and recommending a compensation offer. This practice has made it difficult to establish retrospectively an audit trail of the details underpinning the amount of compensation offered in quite a number of cases.

Implementation of Inquiry's Recommendations for Compensation

Implementation of Inquiry Recommendations for Compensation

Establishing an Implementation Mechanism

The Inquiry was not given responsibility for carrying out its recommendations. The Terms of Reference for the Inquiry required it to make recommendations to the Minister "about appropriate redress, including monetary compensation" for those consumers which the Minister had referred to it. A separate mechanism was established for implementation.

Prior to completing all of its work and submitting a final report, the Inquiry sought to have a means of implementation put in place. The Inquiry proposed an implementation approach to the Minister in a letter of 5 December 1995, as follows:

> *We consider that it is imperative to move towards an early settlement, given the difficult situation of many of the citizens and legitimacy of their grievances, of some of those cases.*
>
> *With that in mind we have prepared brief case notes which demonstrate both the actions and the harm or losses incurred by individual citizens. We propose to put them forward to be acted upon forthwith. We recommend that you (the Minister) appoint an independent legal adviser who might act as your agent in ensuring that these cases are dealt with fairly and expeditiously .....*
>
> *..... Such an independent adviser would then create a bridge to the Department of Fair Trading, its CEO and senior legal officer, to ensure that appropriate administrative procedures are put in place to deal with insurance matters, settlement processes, recovery and damages claims against builders and so on.*
>
> *The Inquiry would expect to be notified by Wednesday, 13 December, by the independent adviser, that the settlement processes were under way in the terms recommended, and to be advised immediately, before that time, if there is any major impediment.*

In the above letter the Inquiry noted that the person who had served as Chairman of the Scheduling Panel which preceeded the Inquiry (in selecting cases to be referred to the Inquiry) was available and could take on the role suggested, should the Minister wish. The adviser was engaged by the Minister for this purpose.[1]

Transmitting Inquiry Case Findings for Action

On 11 December 1995 the Inquiry began submitting Interim Reports to the Minister, transmitting its findings and recommendations on individual cases. Cases were referred to the Minister in four tranches. Three batches were provided during December 1995. A final group of cases was provided by the Inquiry to the Minister on 11 March 1996.

Each Interim Report by the Inquiry to the Minister includes a statement that, in respect of the cases forwarded to the Minister for action, the Inquiry has concluded that:

> compensation as detailed in each, either by:
>
> (a) remedial action by the BSC, or
> (b) the payment of monetary compensation up to the amounts indicated
>
> should be made. We so recommend.
>
> We have taken the step of providing these summaries so that affected consumers may have their grievances addressed and resolved sooner rather than later.

The findings and recommendations for each case contained in the Inquiry's four Interim Reports were accepted by the Minister who, for each report, formally directed the Director-General of the Department of Fair Trading to "implement them immediately". The Minister's letters include a statement that:

> ..... *the implementation of the recommendations for redress should be implemented independently of the Building Services Corporation through arrangements entered into with Mr T Lynch.*

[1] The adviser, in appearance, took over the mantle of the Inquiry which may have caused some confusion in the minds of certain complainants. He issues correspondence using the Inquiry's letterhead, and official Departmental correspondence to the Inquiry is directed to his private office.

Processing the Inquiry's Determinations

For each case assessed by the Inquiry, the adviser was required to submit a letter of offer, including the amount of compensation to be offered (if any), to the Department for checking and the drawing of a cheque. The offer had to be fully in accord with the directions and/or recommendations of the Inquiry as approved by the Minister.

As indicated earlier in this report, the Inquiry's recommendations ranged from letters of apology to proposals for compensation, some involving specific actions such as rectification or demolition/reconstruction works to be carried out. The adviser had no discretion to vary the basis of compensation recommended.

Where the Inquiry's recommendations required no further action to facilitate implementation, action was taken immediately to issue an offer. However, in a number of cases the Inquiry had not been able to finalise the quantum of any recommended award during its period of operation. This was usually due to a lack of appropriate evidence available at the time to determine specific amounts.

In such cases the Inquiry would recommend the approach to be taken to address the complainant's situation (eg. rectification works). This would provide the general basis upon which an offer of payment should be made. To implement the Inquiry's recommendation in such cases, action would then need be taken to calculate an appropriate sum of money to be offered.

This usually involved actions such as obtaining expert reports on technical matters and/or obtaining estimates for necessary works. Sometimes advice on cost escalation had to be obtained to bring older claims up to present day values.

Where complainants had made detailed, itemised submissions requesting specific amounts from the Inquiry and had already obtained sufficient relevant material to substantiate a quantum, they were asked to provide such substantiation to the adviser if they had not already done so.

In other situations, the adviser would request the Department of Fair Trading to obtain the advice required, with the costs to be borne by the Department. The typical terms of such requests would be:

> *..... Is it possible for you (the Department) to have the reasonable, even generous costs, of that work quantified?*
>
> *If such an assessment can be made I would appreciate your doing so and advising me accordingly. I will need to understand the basis for quantification.*

The Department of Fair Trading would then undertake to provide the relevant information. External agents were engaged to provide a report. The Department would assess what, if any, additional margin might be added to provide a "generous" estimate. All of this information would be provided to the adviser to enable him to prepare a proposed offer.

For each case, when the adviser was satisfied sufficient information was available to implement the Inquiry's recommendations he would set out the details of the offer to be made to the complainant. This would be formally referred to the Department of Fair Trading, usually in the following terms:

> *Please read the offer letter carefully if you (the Department) have concerns that the offers do not accord with the Minister's decision to implement the Inquiry's recommendations or if there are arithmetical miscalculations etc. please advise accordingly.*
>
> *If you have no such concerns please forward a cheque drawn in favour of the addressee according to the tenor of the letter so that an offer may be dispatched ....*
>
> *For the purposes of assessing the position you are provided with the Inquiry Case Findings on the matter. They are provided to you only for the purpose of this letter. Please return them immediately they are no longer required for that purpose. They are not to be copied.*

The offers would then be examined by the Department, and any queries raised with the adviser. When satisfied, departmental officers would send a submission to the Director-General recommending the preparation of cheques. Cheques would then be issued with the letter of offer to the parties concerned.[2]

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[2] On 28 March 1996, for accountability reasons, the Minister confirmed in writing to the Department of Fair Trading that its action to implement the recommendations of the Inquiry was required. The Director-General of the Department confirmed in writing to the Inquiry that all case findings had been returned; that no copies of case findings had been retained by the Department; and that all original and copies of technical reports had been forwarded to the adviser.

Letters of Offer

The letters of offer were issued under the letterhead of the Inquiry. They were not signed by either the adviser or the Department, but rather were signed under the hand of the Secretary to the Inquiry.

Each letter varies somewhat depending on the case involved. However, the framework adopted covered items such as:

- that the Inquiry has reported to the Minister on the case
- whether the BLB/BSC failed to discharge its proper statutory duties in the case
- whether the complainant/s in the case suffered resultant loss for which they should be compensated
- various specific failures of the BLB/BSC in the case
- offer of compensation being made in the case
- explanation of the deed of release applying to the offer
- agreement of the complainant to keep the both the existence of, and terms of, the settlement confidential
- instructions on how to accept the offer (just bank the cheque)
- instructions on how to query or reject the offer.

No time limit for acceptance was specified on the letters of offer. As discussed below, where cheques were not presented in a timely fashion, a subsequent letter sought to impose a settlement deadline.

Offers of compensation were generally not broken down into specific elements, but stated as a single overall amount.

Complainants were advised that non acceptance of the offer could be achieved by returning the cheque, and that their legal rights would be unaffected.

Acceptance of the offer did affect legal rights. The schedule included with the letter of offer is attached at Appendix C. The schedule sets out a comprehensive deed of release mitigating any further action in respect of the matter by the complainant against the State or any of its agents. It is a full and final settlement, which the complainant agrees to keep fully confidential.

Implementation Agent

The letters of offer introduced the adviser to complainants, in the following terms:

> *For the purposes of ensuring fair implementation of the recommendations of the Inquiry Mrs Lo Po' has appointed Mr Terrence Lynch, a lawyer independent of the Building Services Corporation and the Department of Fair Trading. He will be happy to discuss with you any concerns.*
>
> *If you do not wish to accept the offer, or are uncertain what to do, do not bank the cheque. If you are uncertain you should either:*
>
> > *#. (numbered instruction) consult your own lawyer or other adviser about what you should do, or*
> >
> > *#. ring the Inquiry on ## (telephone number) and ask for arrangements to be made for you to speak or meet with Mr Lynch.*

Follow-Up Action

Following the issue of the letters of offer, the majority of complainants accepted the offers made and banked their cheques. Some queried or rejected the offer, and either indicated they would pursue other avenues of action or sought to produce further information and material in support of increasing the amount offered.

Increased offers were made in a number of cases where sufficient substantiation was able to be provided and it was considered that the amended offer gave appropriate effect to the original recommendations of the Inquiry. The Audit Office is advised that such amendments were discussed with the members of Inquiry by the adviser.

Where letters of offer and accompanying cheques had been issued but the cheques not presented as at 24 April 1996, a follow-up letter was issued by the adviser shortly thereafter. The following extract illustrates the purpose and approach of the letter.

> *Accordingly, I am writing to advise you that if you wish to accept the offer made in the above letter, you should ensure that the above cheque has been banked by 5.00pm Friday 31st May 1996. The offer made in the above letter lapses if not accepted by that time.*
>
> *Cheques not deposited by then will thereafter be cancelled.*
>
> *If you wish to accept the offer made you must do so, by banking the above cheque, by 5.00pm Friday 31st May 1996. If you do not do so by then, it will be too late.*

As at 31 May 1996 the situation regarding presented and unpresented cheques stands as follows:

	Number	Value ($)
Presented Cheques	55	4,304,416
Unpresented Cheques	7	403,000

One offer is still being prepared by the adviser.

Audit Commentary

The role of implementing the Inquiry's recommendations and the Minister's decision is a vital, but difficult one. It is the final stage of a process which is highly charged, and upon which very high expectations may have been placed by many people. The desired outcome and impact of the whole exercise, and the community's perception of it, may be greatly affected by the implementation phase.

Independence of the Implementation Process

The adviser served as both Chairman of the Scheduling Panel which preceeded the Inquiry, and as the person with chief responsibility for the practical implementation of the Inquiry's recommendations. There is nothing improper with this arrangement, and in some respects it would have generated efficiency, given his familiarity with the overall situation.

However, some complainants were unsure, and/or concerned about the adviser's role. In some cases this concern was expressed very strongly.

The adviser's role as "a lawyer independent of the Building Services Corporation and the Department of Fair Trading" was interpreted by some complainants as equating his role to one of an independent legal advocate available to them at no cost. As such, some complainants appear to have perceived that the 'independent lawyer' would represent and assist them in negotiating an increased settlement.

When it became apparent that the adviser was not there to argue the merits of their case for them, some complainants were annoyed and felt this arrangement was not appropriate. To balance their concerns, complainants were told that they could utilise their own adviser if they wished.

Legal advice provided to The Audit Office (refer Attachment 2), states that:

> *...in 'overseeing' the implementation of the recommendations, he was not really acting as a lawyer in legal practice providing legal advice to clients, but as a representative of the State. Fundamentally therefore his duty was to seek to protect the interests of the State rather than those of the consumers.*

The adviser sought to allow clear facts and figures to be established so as to avoid criticisms of personal subjectivity being involved. The adviser has an independent function, and no evidence of any conduct other than that of an independent outside lawyer was observed by The Audit Office.

Whilst the adviser's appointment was not made by the Department, his remuneration is processed through the Department. The Audit Office is satisfied that this represents a reasonable administrative arrangement which has not impaired independence. The perceptions of some complainants have been affected by this arrangement. Certain aspects of the implementation process were also not seen by complainants to be clearly independent of the Department, as claimed in the letter of offer.

In some aspects of process the adviser is perceived to be in fact *dependent* upon the Department. For example, the adviser's proposed offers to complainants are both processed and reviewed by the Department before being implemented. Further, where experts are required to be engaged to provide estimates or reports, these are arranged by the Department. And in some cases, the same agents are engaged a number of times for different cases. Given the unsatisfactory history of the BSC which the Inquiry reported, these practices tend to be viewed by some complainants with great concern. This is understandable.

In some cases, further clarification to assist the adviser in calculating the precise sum of compensation to be offered was provided by the Department. This advice may only have been supplementary or incidental, and in any other context such action might be entirely reasonable and appropriate. However, in this situation it may have been advisable to err on the side of incontrovertible independence of process.

Enhancing the Offer

After their original assessment meeting with the Inquiry, complainants were thanked in writing and invited to raise any further matters and/or provide any further relevant information as soon as possible, so that the Inquiry could make its determination for their case. Many complainants did, to assist their claim to the maximum extent possible.

After the Minister had approved the Inquiry's recommendations and letters of offer had been issued, some complainants who were dissatisfied with the original offer were able to secure an enhancement if they presented a properly substantiated argument (full details and supporting material would be required).

Case Study 056

The complainant in this case was initially offered $119,850 for the demolition and replacement of a grossly defective house. The complainant later contacted the Inquiry requesting consideration of a supplemental schedule containing a detailed costing of the proposed work. In response to the revised costing, the Inquiry amended the offer to $155,000.

Substantiation

In seeking substantiation details from complainants (where specific amounts had been claimed), it is apparent that the Inquiry has not sought to adopt a lowest quote approach, and has deliberately attempted to err in favour of the complainant. In implementing the Inquiry's recommendations there is also evidence of offers being made for amounts higher than that originally proposed or estimated by the Inquiry: but only if adequate substantiation exists.

Case Study 017

The complainants only itemised out of pocket expenses of $5,058 that the Inquiry recommended to reimburse. They provided the Inquiry with a list of defects that prompted the Inquiry member to request a technical & professional evaluation report by structural engineers. Based on the report the offer was increased by the amount of compensation for remedial building work recommended by consulting engineers.

Given the long and often appalling history of many of these cases, the mere existence of a substantiation process is viewed by some complainants as bureaucratic and unfriendly, adding to their already high levels of frustration and anger. Some are at the point of despair, and any further need for proof is, to them, just too much. Some complainants feel that, at times, substantiation may have been sought for what they regard as relatively minor amounts, further adding to the emotion of the case.

Deed of Release

The settlement schedule attached to the letters of offer has drawn strong criticism from a considerable number of complainants and also from a number of external commentators. One complainant voiced concern to the extent that it amounted to bribery.

Implementing a full and final settlement and protecting the Crown from further financial liabilitity is quite legitimate. However, the means by which this is done is important if the good work of setting up and carrying out the Inquiry is not to be undermined in the final process of implementation.

Such a deed of release is valid, and is fairly common in the resolution of disputes. But some complainants did not regard the offer as an "agreed negotiation", which in the commercial field would make such a deed of release appropriate. Some also saw the Inquiry as having a broader role, which made such a schedule inappropriate.

Some complainants have seen this schedule as a means of legally drawing the curtain across a large number of unsavoury incidents, rather than seeking to uncover and pursue improper practice in whatever form it took. These views are expressed by people with strong emotions concerning what has happened to them and their experience with the BSC. It reflects an expectation on their part that the Inquiry would go further and seek to prosecute bad builders and discipline those who let them down. In that sense, such complainants view the deed of release as protecting some of the forces with whom they are most at odds.

Expiry of the Offer

A number of complainants expressed surprise and dismay at the final letter they recently received, requiring them to bank their cheque by a fixed date or the offer would expire. Whilst this is also quite normal practice, some complainants saw this as completely out of character with the "help the consumers" intention of the whole exercise.

Access to Adviser

Some concerns were expressed from complainants that access to the adviser was difficult at times, which further frustrated their situation. Given the number of cases to be processed, some problems in this regard were to be expected. However, recognising the nature of the situation, greater attention to adopting a smoother process to deal with this aspect may have been helpful.

Late in the implementation process the Inquiry changed its base of operations. Some complainants still desiring contact with the adviser to advance their case were unaware of this and were further frustrated by telephones and faxes which did not answer.

While these concerns are real, the Inquiry was not aimed at bringing a final resolution to all of the faults, frauds or incompetencies suffered by a home owner. Its brief was limited to providing a remedy for the faults caused by the BSC. And it is reasonable, in its making an offer that erred on the generous side, as the Inquiry saw it, with respect to BSC faults, that there be a deed of release with respect to the BSC and to the State generally. (It did not limit in any way the home owners' capacity to seek remedies for the faults occasioned by the private sector.) It is also reasonable to ensure that the matter was finalised at some time, that a time limit be imposed.

There is often, however, no need for the imposition in the public sector of the confidentiality provisions commonly used in private sector deeds of release. Moreover, such provisions are often inimical to the accountability requirements in the public sector.

Implementation of Inquiry's Recommendations for General Reforms

Implementation of Inquiry's Recommendations for General Reforms

Scope of Inquiry Recommendations

As mentioned earlier in this Report, there were expectations from some quarters that the Inquiry would go beyond reaching settlements on individual cases. Some people hoped the Inquiry would expose a long and persistent history of practices by the BSC which they regarded as a massive failure of statutory duty. Some people allege corruption on the part of particular persons, whilst others go even further to allege that a corrupt culture had become entrenched, even systemic, at the BSC. For some people, addressing matters such as these had become even more important than their own specific claim.

It could be argued that the Terms of Reference for the Inquiry did not require it to go beyond making compensation recommendations for the cases referred to it. However, the Inquiry did not consider itself limited in this way and proceeded to produce a Final Report which addressed a range of concerns that the Inquiry desired to express, and made a range of recommendations for reforms. In a covering letter to the Minister the Inquiry Chairman writes:

> This report deals with the more general findings of this Inquiry. In the light of its findings the Inquiry considered it proper to provide you and the government not only with commentary about past failures but also with recommendations aimed at achieving higher levels of consumer protection in residential building in the future.

Final Report

The Inquiry presented its Final Report to the Minister on 29 December 1995. The report was tabled in the Legislative Assembly by Minister Lo Po' on 18 April 1996, and in the Legislative Council by Minister Dyer on 30 May 1996.

The Inquiry's Final Report provides a damning dossier on the history and practices of the BSC (and its predecessor organisation). Some of the serious problems reported arise from fundamental conflicts of functions for the BSC. Others flow from entrenched practices and a culture which appears to have transcended a number of attempts over time to reform it.

Scope of Findings

The community would rightly be concerned with the seriousness of the findings. However, regardless of these substantial and serious findings, some complainants still feel that the Inquiry did not go far enough.

In this regard it must be remembered that the Inquiry was not a judicial body in any sense, and had no special legal or investigative powers. Given this, the Inquiry had to make a judgement as to how far it could, and should, go in addressing its Terms of Reference.

It would appear that the Inquiry had no mandate or powers to expand its considerations into any form of investigation and to make any determinations of impropriety, corruption or illegality, nor to make any recommendations concerning disciplinary or legal action against any person or body.

Concerns have been expressed by some parties about the adequacy of natural justice relating to some of the statements in the Inquiry's Final Report. To have gone any further would almost certainly have raised serious questions of legality. The Audit Office was advised that two matters were referred to the NSW Police Service by the Inquiry for criminal investigation. An instance of possible fraud by a builder was also referred by the Inquiry to the Department of Fair Trading.

Corruption Matters

The nature of the Inquiry's task and its powers have not permitted it to undertake the steps required to investigate possible corruption, or to sufficiently establish the basis for notifying specific matters to the Independent Commission Against Corruption. However, the Inquiry has raised some issues which the Department should consider as part of its ongoing corruption prevention and detection program in the first instance. Appropriate further action, if any, could then be properly considered.

Systemic Weaknesses

The Inquiry's Final Report provides commentary on a range of what it regards as systemic weaknesses in arrangements existing at the time. It observes that:

> The Inquiry believes that a new and systematic approach must be developed if adequate levels of consumer protection are to be achieved in residential building.

Direction for Change

The Final Report then proceeds to make ten significant recommedations for directions for change, setting out a platform for reform covering such matters as:

- standards for builders
- achieving effective industry self-regulation of licensing and certification
- adequate scope for building insurance
- improved residential building contracts
- mandatory points of building certification
- establishment of a consumer protection bureau
- creation of a less formalised disputes forum
- consolidation of various legal forums
- a transition plan to be overseen by the Department.

Reform Agenda

By the time the Inquiry presented its Final Report, the Government was already developing and implementing a broad reform agenda across several Ministerial portfolios dealing with many of the specific matters raised by the Inquiry.

The Audit Office was advised that the Inquiry's recommendations were considered in light of this contemporary action, and absorbed into the overall considerations being explored.

At this time, several specific actions have occurred, such as the integration of the BSC within the Department of Fair Trading. This has led to a complete review of the mechansims to be employed within the Department for consumer protection generally, and building complaints in particular. A completely new approach is currently evolving, centering around mediation and early intervention. The efficacy of these new methods will require some time to pass before any assessment could be made.

The Audit Office was also advised of a package of further reforms currently being developed, covering aspects such as:

- privatisation of building services insurance, including professional insurance of builders and homeowner warranty
- licensing of builders
- building inspection processes and standards
- compliance policies and procedures
- dispute resolution mechanisms
- debt recovery processes
- access to customer service operations.

A range of legislative proposals, discussion papers and other actions were advised to be currently in train which, it was claimed, will give full effect to the substantial concerns and comments set out in the Inquiry's Final Report. The Audit Office has not examined these matters at this time.

Further Action

By any reckoning, the appalling findings set out in the Inquiry's Final Report clearly demand urgent and substantial action. The BSC's incompetence and the limits of the Government's capacity to intervene satisfactorily in the cases examined by the Inquiry are scathingly illustrated.

Major reforms to policies, systems and practices are required. In developing new approaches and mechanisms to deal with building complaints, the Department of Fair Trading should consider seeking advice and assistance from the corruption prevention function of the Independent Commission Against Corruption.

The Department of Fair Trading should consider the possibility of instituting proceedings for recovery action against builders and others who have abused their powers against the reasonable interests of consumers. This will require the assistance of the Inquiry, since the Department does not have possession of the case files prepared by the Inquiry. For this reason, case files will need to be retained for some time.

Appendices

Appendix A

Resolution of the NSW Legislative Council, 30 May 1996

That this House:

1. Views with concern the failure of the inquiry into outstanding grievances with the Building Services Corporation (BSC) to produce and use consistent methodology in assessing victims' claims.
2. Condemns the failure of the Hon. Faye Lo Po' to release the methodology used in the inquiry.
3. Condemns the Hon. Faye Lo Po' for failing to explain how a budget of $4 million is structured.
4. Condemns the unfair tactic adopted by the BSC and the Department of Fair Trading in insisting that victims bank any cheques offered by 31 May 1996 in full satisfaction of any claim and agree to forgo any further, or future, rights to claims of further legal action.
5. Requests the Auditor-General to immediately investigate and audit all matters and payments and methods of payment relating to the inquiry into outstanding grievances with the BSC.
6. Calls upon the Government and Minister for Fair Trading to rescind the 31 May 1996 deadline for banking cheques issues and:
   (a) allow the complainants to bank such cheques received in part payment of proper compensation for damage and loss; and
   (b) enable such complaints to retain their full legal rights on banking such cheques.
7. Calls upon the Government, Minister for Fair Trading and the Department to produce all such papers as may be requested by the Auditor-General to assist in this audit.
8. Requests the Auditor-General to report to the Parliament on these and any other related matters in the inquiry into outstanding grievances with the BSC relating to the claims and disallowance of claims and any other financial matters by 27 June 1996.

Appendix B

Letter of Invitation to Attend the Inquiry

Inquiry into BSC Consumer Grievances

Dear ...

An independent inquiry has been established by the Hon Minister for Consumer Affairs to inquire into outstanding consumer grievances with the Building Services Commission. You are one of the people whose complaints an independent committee had decided should be further investigated.

The inquiry has been established to examine the outstanding grievances arising from the investigation of complaints received by the Building Services Corporation and its predecessor, the former Builders'Licensing Board.

Our Terms of Reference require us;

1. To examine the outstanding grievances of the consumers listed in the following schedule ("the consumers") arising from:

    - the investigation of complaints by the consumers received by the Building Services Corporation ("the Corporation") and its predecessor the former Builder's Licensing Board ("the Board"); and
    - the payment, part payment or non payment of insurance benefits as a result of determinations made by the Corporation or the Board;

pursuant to the Building Services Corporation Act of 1989 and the Building Licensing Act 1971 ('the legislation").

2. To examine, without limiting the generality of the foregoing:

    - whether the consumers received their full entitlement under the legislation;
    - whether the Corporation and the Board properly discharged their statutory duties to the consumers; and

- whether the consumers have suffered loss or damage as a direct result of the failure of the Corporation or the Board to properly discharge their duties to the consumers under the legislation.

3. To make recommendations to the Minister for Consumer Affairs, the Honourable F Lo Po', about appropriate redress, including monetary compensation, where the inquiry is of the opinion that the Board or the Corporation has failed to discharged its duty to a consumer under the legislation and the consumer has suffered loss or damage as a result.

4. The report of the inquiry be delivered to the Minister on or before 31 December 1995.

The Minister will make her determination about appropriate redress after receiving our recommendations where we are of the opinion that the Board or the Corporation has failed to discharged its duty to a consumer under the legislation, and that the consumer has suffered loss or damage as a result.

We will make our recommendations to the Minister by the 31 December 1995.

We will not be holding formal hearings, because this is not a judicial review, but we do want to talk to you about your complaint.

We have made tentative arrangements for Dr Peter Crawford, Ms Moira Rayner and Mr Warwick Neilley, inquiry member, to talk to you about the complaint at Level 30, State Office Block, 74-90 Phillip Street, Sydney on ... 1995 at ...

If those arrangements do not suit you please ring Paul King on 02 228 3833 relevant to the complaint, to make another time.

We have read your original complaint but there might be more information you want to make available to the Panel we should receive this as soon as possible.

We have set aside a reasonable time to talk with you, and other people, on that day. The discussions will be held in private, and though they are informal we hope that they will focus on the facts and issues which concern you. We want to be sure all the issues are properly dealt with. We will have read the BSC file, which will be available for reference if any issues arise from it. We have asked the BSC to summarise its views about the complaint and the way it was handled, and we will have its

response available to us by the time you meet with us. The BSC will not be in attendance, only you, and if you wish a family member or a friend or an adviser or even your lawyer if you wish, though this is not a hearing, you don't need to bring anyone.

The members of the Panel have been appointed by the Minister and will report directly to her. We will be acting with informality, and, we expect, expeditiously, because we are not an formal inquiry.

Please telephone to confirm that you are willing to discuss your complaint on the day we have set aside. Mr King will telephone you to confirm that appointment.

If you need an interpreter, we will provide one free of charge. Please telephone Paul King immediately so that we can make these arrangements.

Yours sincerely

Paul King
Secretary to the Inquiry

Appendix C

Sample of Inquiry Letters of Offer to Complainants

Inquiry into BSC Consumer Grievances

Dear ...

Re: Grievances with the Building Services Corporation (BSC)

I refer to your discussion with the Inquiry members on ...

I am pleased to be able to tell you that the Inquiry has provided to the Minister for Consumer Affairs, the Hon Faye Lo Po', an interim report dealing with some of the cases including yours.

The Inquiry has reported to Mrs Lo Po' that the Building Services Corporation:

1. failed to discharge its duties under its legislation, and
2. as a result you suffered loss for which you should be compensated.

Specifically the Inquiry found that the Builder's Licensing Board and later the BSC:

3. unduly delayed in investigating your complaint made
4. was inadequate in its administration of the processes and requirements for engaging a rectifying contractor
5. wrongly rejected engineering advice as to the causes, extent and remedial works necessary
6. authorised remedial work only to limited extent, which was inadequate in the circumstances and that:
7. you have unnecessarily incurred expenses for engineering and other experts in maintaining your claim which ought not have been necessary, and
8. the house needs to be demolished.

In respect of your case Mrs Lo Po' on behalf of the Government, has on the conditions set out in the attached schedule, accepted the report and recommendation and an offer of monetary compensation is hereby made.

Additionally, it is proposed that you be reimbursed your reasonable out of pocket expenses for building consultants and experts etc incurred in supporting your claim. These expenses will be reimbursed to you upon supply to the Inquiry of substantiating receipts etc.

The intent of the conditions in the schedule is that if you bank the cheque:

9. you settle once and for all, all of;

    a) your grievances whatever its or their legal basis arising out of any conduct of the Builders Licensing Board and or the Building Services Corporation, and of anyone responsible to or for either of them, and

    b) your entitlements under the Builders Licensing Act 1971 and under the Building Services Corporation Act 1989,

as at the date of banking the cheque

10. You agree not to discuss with anyone both

    a) the fact that you grievances have been settled, and

    b) the terms of the settlement.

If you wish to accept that amount you may do so by banking the attached cheque drawn in your favour for $...

If you do not wish to accept the offer, or are uncertain what to do, do not bank the cheque. If you are uncertain you should either:

11. consult your own lawyer or other adviser about what you should do, or

12. ring the Inquiry and ask for arrangements to be made for you to speak to or met with Mr Terrence Lynch.

For the purposes of ensuring fair implementation of the recommendations of the Inquiry Mrs Lo Po' has appointed Mr Lynch, a lawyer independent of the Building Services Corporation and the Department of Fair Trading. He will be happy to discuss you concerns with you.

If you do not wish to accept the offer do not bank the cheque, return it tot he Inquiry: your existing rights will be unaffected.

The Inquiry has asked that I convey to you its appreciation of your assistance and co-operation in meeting with them.

The Minister, Mrs Lo Po', has asked that I convey her sympathy for what occurred in your past dealings with the Building Services Corporation.

Yours faithfully

Paul King
Secretary to the Inquiry

THE SCHEDULE

This offer is made on conditions. They are:

1. Acceptance of the offer is in full and final settlement of any and all complaints, insurance claims and/or insurance entitlements you have or might have under the Building Licensing Act 1971 or the Building Services Corporation Act 1989 as at the date of your banking the attached cheque.

2. By banking the cheque you release and discharge:

   a) the Crown right of New South Wales;

   b) the Government of New South Wales;

   c) the State of New South Wales

   d) the Builders Licensing Board and/or the Building Services Corporation

   e) the officers, staff and agents of the above

   from

   f) all actions, suits, causes of actions, claims, proceedings and demands both at law and in equity and

   g) any other liability or responsibility whatsoever.

   past, present, future or contingent for or respect of any conduct to the date of acceptance of the offer, in connection with, arising out of, associated with, or in consequence of the making of or the entitlement to make;

   h) any complaint made or which could have been made;

   i) any insurance claim made or which could have been made;

   under the Builders Licensing Act 1971 and/or Building Services Corporation Act 1989 but for these conditions.

3. You agree to keep this settlement and the terms of it confidential and not discuss it with anyone else.

Attachments

Attachment 1

Report to The Audit Office from the Building Research Centre

BUILDING
RESEARCH
CENTRE

A Division of Unisearch Ltd
ACN 000 263 025
The University of New South Wales

25th June, 1996

Stephen Horne
Director Performance Audit
The Audit Office
Level 1
453 Kent Street
SYDNEY NSW 2000

Dear Sir,

I write to report on the results of the technical audit that you asked us to undertake on the decisions of the ***Inquiry into the BSC Consumer Grievances***.

The brief asked us to review, on technical grounds, decisions made by the Inquiry. We were asked to review the assessment criteria used and the decisions in a number of individual cases.

Five cases were selected at random by us for detailed investigation. You subsequently forwarded four additional cases to us. Settlements awarded in these ranged between $10,000 and $500,000. Between one and a half and seven hours were spent with an average of four and a half hours in evaluating each case. This gives some indication of the complexity and the detail that needed to be considered. To date, we have made detailed reviews of nine cases, and provided you with our assessments.

The overall findings are summarised as follows:

1. With regard to the stated criteria for the assessment and determination of settlements, it is considered that these were appropriate for such an Inquiry.
2. In all cases reviewed, the Inquiry was thorough in its identification of the salient issues, even though in several instances these were found to be obscure.
3. The identified bases for settlement are considered to be sound in all nine instances reviewed. However it is noted that in two of the nine cases, the technical remedy adopted, which became the basis of the settlement, was conservative in the favour of the citizen.
4. Wherever sufficient information was available, costs were based on documented claims. Where it was impossible to assess rectification costs, as detailed estimates were not available to the Inquiry, settlements were in all instances subject to subsequent approval, the determination being based on an agreed scope of works or agreed principles of settlement and further negotiation where required.
5. In each of the cases reviewed settlement amounts reflected the stated assessment and settlement criteria of the Inquiry. If anything there appears to have been a bias towards the consumer, erring in favour of the aggrieved.

I trust this brief summary report is sufficient for the purposes of your audit.

Yours sincerely,

Marton Marosszeky
Associate Professor and Director

THE UNIVERSITY OF NEW SOUTH WALES

Location:
Building 9
22-32 King Street
Randwick NSW

Correspondence to:
Building Research Centre
The University of New South Wales
Sydney 2052 Australia

Telephone (02) **398 2233**
Facsimile (02) **398 3114**

AUDIT.DOC

Attachment 2

Report to The Audit Office from Minter Ellison, Lawyers

MINTER ELLISON
LAWYERS

CONTACT Jon Gunn (02) 210 4325

OUR REFERENCE JCG:RAH:10446613
YOUR REFERENCE

MINTER ELLISON BUILDING
44 MARTIN PLACE SYDNEY NSW

TELEPHONE (02) 210 4444
INTERNATIONAL +61 2 210 4444
FACSIMILE (02) 235 2711

POSTAL ADDRESS
GPO BOX 521
SYDNEY NSW 2001
AUSTRALIA

DX 117 SYDNEY

24 June 1996

Mr Tom Jambrich
Assistant Auditor General
Audit Office of New South Wales
Level 1
453 Kent Street
SYDNEY NSW 2000

Dear Mr Jambrich

PERFORMANCE AUDIT INTO INQUIRY INTO OUTSTANDING GRIEVANCES WITH THE BUILDING SERVICES CORPORATION

A. Our approach

You have asked us to review the Inquiry's Final Report and associated materials and advise generally about legal issues which may be relevant to your audit. We identify and discuss below a number of legal issues which have emerged from our analysis of the material supplied by you. There may be other legal issues involved in other material which we have not seen. If they exist we would be happy to deal with them.

B. Summary of our advice

1. The Inquiry - its nature and scope

1.1 The Inquiry operated under Executive arrangements. Its Terms of Reference authorised it to:

(a) examine outstanding grievances of certain specified consumers arising from the investigation of complaints by the consumers to the BSC/BLB and its decisions about insurance benefits; and

(b) recommend appropriate redress to the Minister for Fair Trading.

1.2 Although not contemplated in the Terms of Reference, further outstanding grievances were later referred to the Inquiry following selection by a 'Scheduling Panel'. The referrals appear to have been made through the Minister, who can probably have been

taken to have, on behalf of the Executive, authorised the Inquiry to examine these later grievances.

1.3 The Inquiry was not authorised to perform (nor did it) a quasi-judicial function - that is, it did not determine the rights and obligations of consumers or others. Rather, its function was essentially advisory.

1.4 The Terms of Reference gave the Inquiry no formal role during the implementation process. However:

(a) its letterhead was used during this process; and

(b) understandably, the Inquiry was used by Mr Lynch (the lawyer independent of the Building Services Division of the Department, who was appointed by the Department to oversee the implementation process) to clarify the recommendations and issues arising from discussions with consumers in relation to the offers.

2. The examination and recommendation process

2.1 We have not identified any procedures which were publicly promised to consumers, but which were not followed. The Inquiry was not required by its Terms of Reference to apply legal principles in examining the grievances or in arriving at its recommendations. Rather, the Terms of Reference required the Inquiry to examine the grievances and make recommendations about redress, and this it has done. We are not aware of any material promises or representations which might have been made outside the direct communications to the individual consumers.

2.2 The Inquiry did not exclude consideration of claims for non-pecuniary loss. Rather, it found these impossible to assess. It is impossible to say how a court would have assessed such claims; although difficulty of assessment would not have prevented a court doing the best it could to arrive at a monetary equivalent, the NSW Supreme Court seems reluctant to allow claims for mental anguish suffered as a consequence of negligence by governmental authorities.

3. Settlement offers

3.1 The settlement offers and payments appear to have been legally authorised.

3.2 The settlement offers and their stipulations (for example, the release of claims and time limit on acceptance) sought to protect the interests of this State, and this is reasonable, and indeed prudent, from a legal viewpoint.

3.3 There is nothing exceptional in the failure to provide a break-up in the offers. The settlement offers encouraged consumers to consult their own lawyers or contact Mr Lynch to discuss any concerns.

3.4 Theoretically, aggrieved consumers may be able to obtain review of the Inquiry's offer through the following mechanisms:

(a) review of the accepted settlement offers under the *Contracts Review Act 1980 (NSW)* , although even if an application were successful, this would be unlikely to lead to a full review on the merits of any grievance;

(b) review by the Ombudsman, depending on whether the Inquiry comprised people appointed to an *'office'* by the Governor or *'in the service of the Crown'*;

(c) administrative law review by the NSW Supreme Court, depending on whether a procedure which was promised to the consumers was not followed; and

(d) suing in negligence, on the basis that liability was effectively admitted in the *'open'* part of the settlement offer, and that it did not expressly exclude liability in negligence (liability in negligence is probably excluded, but it is possible that a court would entertain an argument to the contrary).

In practice, however, the possibility of obtaining a review will turn on the evidence in each case.

C. Elaboration of summary

1. The Inquiry

1.1 The legal nature of the Inquiry

Question 13(a) asked by Mr Jobling MLC in the Legislative Council on 14 May suggested that the Inquiry might have had no separate legal existence. To the extent that this question leads to an argument that the Inquiry had no authority to do what it did, this does not appear to be correct.

The Inquiry comprised three individuals (none of whom, we understand, were at the time of their appointment employees of the State) who were appointed by the Executive.

The Inquiry itself had no separate legal personality in the sense of being some form of separate legal entity. At its simplest level, it was no more than a set of procedures to be carried out, supported by budgetary allocation. The individuals appointed to carry out the procedures of the Inquiry were, as far as we are to determine from the rather brief letters of appointment of these individuals, independent consultants.

It was really the State which was carrying out the Inquiry, through the three individuals. Therefore although the Inquiry itself was not a separate legal entity, the State and the three individuals were.

1.2 The scope of the Inquiry

The Inquiry was authorised on 23 August 1995 by the Governor following a recommendation made to him under an Executive Council Minute.

The Inquiry's Terms of Reference as set out in that Minute were:

'1. To examine the outstanding grievances of the consumers listed in the following schedule ("the consumers") arising from:

- *the investigation of complaints by the consumers received by the Building Services Corporation ("the Corporation") and its predecessor the former Builders' Licensing Board ("the Board"); and*
- *the payment, part payment or non payment of insurance benefits as a result of determinations made by the Corporation or the Board;*

pursuant to the Building Services Corporation Act of 1989 and the Building Licensing Act 1971 ("the legislation").

2. To examine, without limiting the generality of the foregoing:

- *whether the consumers received their full entitlement under the legislation;*
- *whether the Corporation and the Board properly discharged their statutory duties to the consumers; and*
- *whether the consumers have suffered loss or damage as a direct result of the failure of the Corporation or the Board to properly discharge their duties to the consumers under the legislation.*

To make recommendations to the Minister for Consumer Affairs, the Honourable Faye Lo Po', about appropriate redress, including monetary compensation, where the inquiry is of the opinion ['determines' appeared in the draft attached to the Crown Solicitor's advice of 2 June 1995] *that the Board or Corporation has failed to discharge its duty to a consumer under the legislation and the consumer has suffered loss or damage as a result.*

The report of the Inquiry be delivered to the Minister on or before 31 December 1995'.

In summary therefore, the Terms of Reference required the Inquiry to:

(a) 'examine' certain consumer grievances; and

(b) 'make recommendations' to the Minister about appropriate redress where the Inquiry was of the opinion that the BSC/BLB failed to discharge its duty and the consumer suffered loss or damage as a result.

The Schedule listing the consumers whose grievances were to be considered had been prepared by a 'Scheduling Panel' in what we understand was the Inquiry's first phase, although one not mentioned in the Terms of Reference.

Further grievances were later referred to the Inquiry, following the advice of the Scheduling Panel, which was addressed to the Minister. This was not contemplated by the Terms of Reference. We do not know how the referrals were then passed on to the Inquiry, but presumably this occurred through the Minister. If so, the Minister can probably be taken to have authorised the Inquiry to examine these later cases on behalf of the Executive.

1.3 A quasi-judicial function?

The Inquiry saw itself as seeking to '***determine*** what compensation, if any, ought to be offered to injured citizens' (paragraph 5.5 of the Final Report), to try to '... ***finalise*** the quantum of any award ...' (paragraph 5.15), to '***establish***' entitlements, and to 'see that it was ***awarded***' (paragraph 5.7). Taken out of context, this might suggest that the Inquiry was (or thought it was) performing a quasi-judicial function, ie finally determining the rights of the consumers.

However, the Inquiry was not authorised by its Terms of Reference to make a determination, but rather, to inquire into the grievances and recommend appropriate settlement action to the Minister. As is reflected in general language of section 5 of the Final Report, the Inquiry was performing what was essentially an advisory function, albeit containing an investigative component. Further, that the word 'determines', which appeared in the Crown Solicitor's draft was replaced with 'is of the opinion', suggests that the Executive Council itself did not regard the Inquiry as having a quasi-judicial role.

1.4 The threshold requirement before a recommendation could be made

It was effectively only where the Inquiry considered, in its own opinion, that the BSC/BLB had actually failed to discharge its duty that the Inquiry could, under its Terms of Reference, recommend appropriate redress. The Terms of Reference were silent on the tests (eg according to legal principles on the one hand or fairness on the other) or standards of proof (eg beyond reasonable doubt, or, on the balance of probabilities) which the Inquiry should apply in reaching its opinion, in the case of each grievance, whether the:

(a) BSC/BLB failed to discharge its duty; and

(b) the consumer suffered loss or damage as a result, and if so, to what extent.

It seems clear from the Final Report that the Inquiry did not see those tests as including a consideration of whether (as is commonly the case when government or its agencies are considering whether to settle claims) a grievance was more likely than not (or reasonably likely) to succeed before a court; rather the Inquiry itself was effectively required by its Terms of Reference to go further and to be satisfied (at least in the context of reaching its subjective opinion) about both liability and quantum, before recommending some level of redress. This might be thought of as a fairly high threshold in order to attract a recommendation about redress for those claims which might otherwise have been litigated (given the Inquiry's view that many consumers were in no practical position to pursue their claims in the courts), although it amounted to a lower threshold for those claims which for any reason were unlikely or unable to proceed in the courts.

1.5 What was the Inquiry's role during the implementation phase?

The Inquiry's three reports to the Minister included its case notes and recommendations, and the Minister 'directed that they be acted upon forthwith' : paragraph 5.3 of the Final Report. That direction, addressed to the Director-General of the Department of Fair Trading, stated that *'the implementation of the recommendations for redress should be implemented independently of the Building Services Division* [of the Department] *through arrangements entered into with Mr T Lynch'*. Mr Lynch was a barrister in private practice, who had been a member of the 'Scheduling Panel' in the Inquiry's First Phase. He had been appointed by the Minister as *'an independent lawyer to oversee the implementation process'*. This was on the Inquiry's suggestion in its letter of 5 December 1995, in which it recommended the appointment of *'an independent legal adviser who might act as your* [ie. the Minister's] *agent in ensuring that these cases are dealt with fairly and expeditiously and dealing with the citizens'*.

We understand that the position was as follows:

(a) The letters of offer followed a similar structure, were on Inquiry rather than Departmental letterhead, and were signed by Mr King, the Secretary to the Inquiry.

(b) Follow up letters were sent to those consumers who had not accepted settlement offers on 29 April 1996, also on Inquiry letterhead, but this time signed by Mr Lynch. Those letters stipulated that the offers remained open only until 30 May 1996.

(c) Mr Lynch's role in overseeing the implementation was more than to simply forward offers with cheques. He discussed matters with Dr Crawford, the Chair of the Inquiry where clarification was needed. Where funds additional to those recommended were paid, Mr Lynch nonetheless calculated or assessed the amounts in accordance with the Inquiry's recommendation, but only made payment offers with the Department's approval. All amounts offered have been approved, to some extent retrospectively, by the Minister.

(d) During the implementation phase the Inquiry members had a limited clarifying function advising Mr Lynch, which did not seem to contradict the spirit of the Terms of Reference.

Mr Lynch was seen by some consumers as an independent lawyer appointed to advise **them**; this was not the Minister's expressed intention, which was that he be independent of the (now defunct) BSC and the Department. However, the confusion about Mr Lynch's role is not surprising. Although not an employee of the BSC or the Department, he was engaged by the Department. Further in 'overseeing' the implementation of the recommendations, he was not really acting as a lawyer in legal practice providing legal advice to clients, but (as the Inquiry proposed in its recommendation of 5 December 1995) a representative of the State. Fundamentally therefore his duty was to seek to protect the interests of the State rather than those of the consumers.

There is, however, a residual possibility that a consumer may argue that he or she based the decision to accept the offer on the understanding that Mr Lynch was independent in

the sense of representing the consumer's interests, and that the offer had been reviewed by him prior to it being made from the point of view of what might be fair and reasonable for the consumer.

2. The Inquiry's examination and recommendation processes

Section 5 of the Final Report describes the process followed by Inquiry in 'seeking to resolve grievances'.

2.1 Measure of potential loss

The Inquiry states that it sought (presumably to the extent which it could do so through its recommendations) to 'put the complainants in the same position as they would have been had the BLB/BSC's statutory duty been properly discharged': paragraph 5.9.

Interestingly, this is equivalent to the measure of damages in cases of breach of **contract**, rather than for the potential breaches of:

(a) statutory duty, for which the measure of damages is what is of a kind that the statute was intended to prevent, ie. within the contemplation of the statute; and

(b) the duty of care owed in negligence for which the measure of damages is what is required to compensate for loss occurring as a reasonably foreseeable consequence of the breach.

In reality the three approaches often have the same result, although the compensatory principle is potentially more generous. Because the Inquiry was not required to reach its recommendations in accordance with legal principles, nothing turns on this.

2.2 Compensation for indirect loss or damage

Perhaps acting within the constraints of the last dot point of its Terms of Reference, (which refers to examination of 'whether the consumers have suffered loss or damage as a **direct** result of the failure of the Corporation or the Board ...') the Inquiry focussed in its examination on the **direct** loss or damage to the consumer (paragraphs 5.1 and 5.7), and only recommended compensation for certain indirect loss or damage such as legal and other expert's fees, or loss of income, in isolated cases: paragraphs 5.10, 5.11 and 5.12.

As the Terms of Reference required the Inquiry to 'make recommendations ... where ... of the opinion that ... the consumer has suffered loss or damage as **a** result', it was not prevented from examining whether **indirect** loss or damage was suffered; indeed, as the above shows, in at least a few cases where it considered it appropriate it did recommend compensation for such loss or damage.

2.3 Compensation for non-pecuniary loss

In no case did the Inquiry recommend '*any award to compensate citizens for pain, suffering, distress or grief*'. However, the Inquiry did not, as a matter of policy, exclude non-pecuniary loss from consideration. Rather, it reported that its failure to recommend compensation for such claims was because it was '*not possible to determine which*

[claims] *should be recognised and which rejected, nor any basis for assessing how this should be recognised in economic terms*': paragraph 5.14.

Paragraph 5.14 stated that in those cases of '*very significant failure in the BLB BSC's duty to the consumer the Inquiry, was, however, more inclined to recommend compensation arrangements which fully recognised all costs incurred by the consumer and were more likely to put them back into some kind of appropriate position*'. There is at least an implied suggestion in this that in the worst cases of BLB/BSC failure, the Inquiry was reasonably generous in relation to its recommendations about compensation for monetary expense than in less serious cases.

Amongst the material with which we have been supplied is a document headed '*Compensation*', which sets out in some length the legal principles applicable to the assessment of damages. We do not know to what extent the Inquiry had access to this document, although we understand that it was provided to you by the Inquiry with its letter of 14 June 1996. At page 6 of that document is a heading '*Non-pecuniary loss*'. This states:

> '*Some attempt must be made to assess a reasonable sum for non-pecuniary loss having regard to the general standards prevailing in the community* [There is then a footnote referring to *O'Brien* v. *Dunsdon* (1965) ALJR 78].
>
> *Consideration under this head traditionally includes:*
>
> - *Pain and suffering.*
> - *Loss of amenity and enjoyment of life.*
> - *Disfigurement.*
> - *Nervous shock'.*

It may be that the Inquiry had regard to the possibility that other events occurring independently may have brought about the '*loss of amenity and distress*' complained of. The second paragraph of the '*Compensation*' document draws attention to this factor.

It seems that the Inquiry did **not** as a matter of policy exclude non-pecuniary loss from its assessment. Rather, as it reported in its Final Report, the Inquiry found them impossible to assess adequately or at all.

Bearing in mind that the Inquiry had not been instructed in its Terms of Reference to carry out its examination and recommendation exercise by the application of legal principles, its stated approach would seem to be reasonable from a legal view point.

It is impossible and not entirely relevant, to know how a Court may have determined the claims for non-pecuniary loss. A Court would have had regard to the following factors:

(a) that assessment is difficult does not require the Court to reject the claim; the Court must do its best with the available evidence in the circumstances; and

(b) damages are only recoverable if the injury itself is reasonably foreseeable as a consequence of the breach; and

(c) the NSW Supreme Court's apparent reluctance as a matter of policy is to allow damages for mental anguish in cases of negligence (especially where there is delay) by governmental bodies.

In *Avenhouse* v *The Council of the Shire of Hornsby*, NSW Supreme Court, 27 June 1995, Spender AJ, unreported, the Court noted:

'It is well known ... that frustrations in dealing with Government Departments, and the delay and the anguish that those dealings can cause, may result in psychiatric illness of varying degrees of severity. But not all injuries should be compensable at law. Were the present claim to be allowed, those who suffer from the arrogance or ineptitude of Government Departments, statutory authorities or other arms of government, might have claims in damages.

There may be many cases where officers of Councils and other statutory bodies will know that those seeking their help and the exercise of their powers are deeply worried as a result of delays in getting things done. Let us assume that in such cases there is a negligent failure to act and the worry and frustration leads to a heart condition or a nervous breakdown. Should damages be recoverable?

In my view, the answer is, as a matter of policy, no: the consequences of imposing in such cases liability in damages are far-reaching, indeterminate and startling. Expressed in terms of established principles, I think that the injuries claimed in the present case are of such a character as not to be reasonably foreseeable, or are too remote as a consequence of the Council's negligence.'

3. The settlement offers

3.1 Were they legally authorised?

We understand that the Minister has approved all offers and payments. We have reviewed the Public Finance and Audit Act and Regulations. There is no provision specifically regulating the offering and payment of money to potential claimants against the State. We understand that there are no applicable Treasury Directions.

3.2 Were the settlement offers reasonable from a legal viewpoint?

From a legal viewpoint it is perfectly reasonable (indeed prudent) in cases involving settlement of potential claims against the State to seek to protect the State's position through time limits for acceptance, the obtaining of releases against claims, and a secrecy stipulation.

We understand however that the time limit ultimately imposed for acceptance (itself of about 4 weeks) and the secrecy stipulations have met with some criticism. This is not surprising in cases involving consumer grievances, especially where the key allegation, that the State and/or its agencies failed to carry out its consumer protection role, was accepted by the Inquiry.

We have not reviewed the amounts offered, which we understand were not broken-up between different heads of damage claimed (and this is borne out in the sample case files which we have reviewed). However, from a legal viewpoint it is not unreasonable to seek to resolve quickly and with a certain degree of arbitrariness, ie. without providing a breakup, claims which, according to the Inquiry, were unlikely to be pursued through the courts, and some of which were the subject of a 'major intervening event' (see paragraph 5.7) and had been outstanding for some time. Further, the settlement offers we have seen encouraged consumers to discuss queries with Mr Lynch.

3.3 Are the admissions of liability in the Inquiry's letters of offer privileged?

In the letters of offer which we have seen, the Inquiry may have effectively admitted liability on behalf of the State, or at least made it hard for the State to defend liability in the future. Even if they have not admitted liability, the Inquiry's findings as set out in the letters of offer are exceptionally useful evidence for the consumer if they are admissible in any subsequent proceedings.

It is arguable that these admissions will not be protected in subsequent proceedings by any 'without prejudice' privilege. To attract privilege for without prejudice admissions, the admissions must be made in the course of negotiations which are a genuine attempt at settlement. The Inquiry's letter of offer, which we understand was in a standard 'shell', is in two parts. The first, in which the admissions are made, sets out, by way of report, findings of the Inquiry relating specifically to the consumer. It is only the second part, which goes on to make the offer, which could be privileged. If is therefore unlikely that any claim by the State for privilege would be successful.

3.4 The nature of the accepted offers - contracts of compromise

The banking of the cheque by a consumer in response to the BSC Inquiry offer was acceptance of the offer in the manner stipulated in it, and gave rise to what on its face was a binding 'contract of compromise'.

The essence of a contract of compromise is that one party abandons its claim for a particular sum in return for the receipt of a newly agreed sum from the other party. The consideration moving from the claimant in such instances is the claimant's promise to give up its original asserted claim.

The terms of the Inquiry's form of offer make it clear that, in accepting the proposed compensation by banking the cheque, the consumer agrees to settle any grievances it has against the BSC, the State and others representing the State.

3.5 Contracts Review Act 1980 (NSW)

Depending on the facts of their individual cases, consumers may be able to obtain relief under the *Contracts Review Act 1980 (NSW)* in the Supreme Court in relation to the settlements if the Court finds the contract to have been unjust in the circumstances and considers it just to do so to avoid the consequences of an unjust result.

If an application is successful, the Court may grant:

- 'principal relief' in:
  - refusing to enforce the contract;
  - declaring the contract void; or
  - varying the contract; and
- 'ancillary relief', which comprises *'such orders as may be just in the circumstances for ... any consequential or related matter, including orders for or with respect to ... (b) the payment of money (whether or not by way of compensation) to a party to the contract ... '.*

Section 9 of the Act sets out the matters to be considered by the Court in determining whether a contract is unjust. The overriding factors are the public interest and all the circumstances of the case. Section 9(2) requires the Court to have regard to a number of factors, including [referring to the paragraph numbers in section 9(2)]:

(a) whether or not there was a material inequality in bargaining power between the parties (ie. here the Inquiry which represented the State on the one hand, and the consumer on the other);

(b) whether or not prior to or at the time the contract was made its provisions were the subject of negotiation;

(c) it was not reasonably practicable for the consumer to negotiate for the alteration any of or to reject any provisions of the contract;

(f) the relative economic circumstances, educational background and literacy of:

(i) the parties to the contract (other than a corporation); and

(ii) any person who represented any of the parties to the contract;

(h) whether or not and when independent legal or other expert advice was obtained by the party seeking relief under this Act;

(i) the extent (if any) to which the provisions of the contract and their legal and practical effect were accurately explained by any person to the party seeking relief under this Act, and whether or not that party understood the provisions and their effect;

(j) whether any undue influence, unfair pressure or unfair tactics were exerted on or used against the party seeking relief under this Act:

(i) by any other party to the contract;

(ii) by any person or appearing or purporting to act for or on behalf of any other party to the contract; or

(iii) by any person to the knowledge (at the time the contract was made) of any other party to the contract or of any person acting or appearing or purporting to act for or on behalf of any other party to the contract;

(k) the conduct of the parties to the proceedings in relation to similar contracts or courses of dealing to which any of them has been a party; and

(l) the commercial or other setting, purpose and effect of the contract.

The Court is able to grant relief in relation to a contract even when that contract has been fully performed (section 14). Without being in a position to review all the potential evidence we are not able to advise whether any consumer would be successful in obtaining relief under the *Contracts Review Act*. Further, if the Court declared that a contract was void, the consumer may well be liable to repay the settlement amount.

3.6 Do the settlements still leave open actions in negligence?

There may be scope for disaffected claimants to bring negligence actions against the State/BSC, notwithstanding that they have accepted the cheques enclosed with the settlement offers.

If a contract intends to exclude liability for negligence, that intention should usually be clearly expressed. In cases where there is no express reference to negligence, the issue is whether an intention to exclude liability should be imputed to the parties on the basis of the words used in the contract.

The Schedule used by the Inquiry is indeed in broad terms and uses phrases such as 'any other liability ... whatsoever'. In the absence of an express reference to negligence, however, the conclusion that liability for negligence is excluded, although unlikely, could not be drawn with complete certainty.

3.7 Review by the NSW Ombudsman

(a) Right to complain to the Ombudsman

Section 12 of the Ombudsman Act entitles any person to complain to the Ombudsman about the conduct of a 'public authority'.

The Ombudsman is precluded under Schedule 1 of the Act, however, from investigating conduct of some public authorities in particular circumstances. The Ombudsman is not entitled to investigate conduct of a Minister of the Crown, but this exclusion does not extend to conduct of a public authority relating to a recommendation made to a Minister of the Crown.

(b) Public authority

'Public authority' is defined extensively in Section 5 of the Act. The definition includes:

'(a) any person appointed to an office by the Governor; ....

(c) any officer or temporary employee of the Public Service;

(d) any person in the service of the Crown or any statutory body representing the Crown; ....

(h) any person acting for or on behalf of, or in the place of, or as deputy or delegate of, any person described in any of the foregoing paragraphs ...'

Although by no means clear, the Inquiry may fall within (a) or (d). Its function was certainly of an acutely public (rather than private) nature, although its members were not employees of the Crown, but rather consultants engaged by the Crown.

Butterworth's Judicial Dictionary defines '*public officer*' in a similar vein. It states:

> *'a public officer may be said to be one who discharges a duty in the performance of which the public are interested; a person is more likely to be such an officer if it is paid out of a fund to provide it by the public but it does not necessarily follow that the fund must belong to the Central Government'.*

3.8 Administrative law review by the Supreme Court

We understand that the Inquiry did not advise consumers about:

(a) how their claims should be structured;

(b) in what form they should be presented;

(c) the criteria against which the claims would be examined and recommendations formulated; and

(d) any supporting material required by the Inquiry.

The decisions of the Inquiry were preliminary in nature in that they were only about what should be offered to the consumers. It could only be the Minister's decisions based on these recommendations which could be said to be final.

The application of procedural fairness requirements to decisions of a preliminary nature is one of the more difficult areas of the law relating to procedural fairness. As Aronson and Franklin, *Review of Administrative Action* (1987) say, it is unrealistic to suggest that natural justice must be observed whenever advice is given or an initial decision is made to set proceedings in motion (p.138). The critical issue is whether or not the conduct concerned affects rights, interests or legitimate expectations. Clearly, in some cases, a person can be prejudiced by an inquiry or an investigation. The most obvious way in which prejudice may be caused is by the making of adverse findings in a report (see in this regard the recent decision of the Federal Court in *Kelson v Forward* (1995) 39 ALD 303 -

report by the Merit Protection and Review Agency into allegations of workplace harassment at the Australian War Memorial).

Most of the case law is concerned with cases where the particular inquiry has a statutory basis. See, eg, *Ainsworth v Criminal Justice Commission* (1991) 175 CLR 564 and *Independent Commission against Corruption v Chaffey* (1993) 30 NSWLR 21. It must also be remembered that, in the absence of a statutory judicial review code such as that found in the *Administrative Decisions (Judicial Review) Act 1977* (Cth), it may be impossible for a report to be quashed by certiorari even where recommendations made in the report breach the rules of natural justice, because no legal effect or consequence attaches to the report: see *Ainsworth*. See also *R v Collins; ex parte ACTU - Solo Enterprises Pty Limited* (1976) 8 ALR 691 - certiorari not available to quash parts of a report of a Royal Commission because the report itself is merely a report to the executive, not in itself legally affecting the rights of the applicant.

The Courts have, however, been able to grant declaratory relief in these circumstances (see *Kelson v Forward*; *Ainsworth; Johns v Australian Securities Commission* (1992) 178 CLR 408; *ATSIC v Ombudsman* (1995) 134 ALR 238).

All of these cases tend to be cases involving reputation in one way or another. In contrast, any action for judicial review in the current circumstances would seem to be based on 'legitimate expectation' as to the assessment to be made by the Inquiry. Although, as mentioned in section 1.2 of this advice the Inquiry saw itself in its report as 'determining' what compensation if any ought to be offered to injured citizens, the Terms of Reference make it clear that the charter it in fact had was to enquire into grievances and recommend appropriate settlement action to the Minister. Having read what we understand to be the standard form correspondence to the consumers, we do not think that they could reasonably have entertained legitimate expectations other than that the Inquiry would consider the matters before it and make its recommendations to the Minister.

There have been cases where the Courts have found that an applicant is entitled to a procedure which has been publicly promised: see *Attorney-General (Hong Kong) v Ng Yuen Shiu* [1983] 2 AC 629 (note, however, that former Magistrate Quin was unsuccessful before the High Court in running an argument along these lines: *Attorney-General (NSW) v Quin* (1989) 170 CLR 1).

Although it could hardly be argued successfully that the consumers were legitimately entitled to have expected that, in effect, the State would assist them to prepare, present and pursue their claims against the State or its agencies, it may be contended that the consumers had nonetheless a 'legitimate expectation' of a fair assessment and recommendation procedure from the Inquiry, especially if the government or the Inquiry had specifically represented that the process would be fair (see paragraph 1.9 on page 10 of the Phillips Fox submissions and the second reading speeches). Also of possible relevance is the following:

(i) as the Inquiry recognised, most consumers find legal process intimating and too expensive (paragraph 3.1.6) and the consumers were, in most of the cases reviewed, 'totally out of their depth in the domain of the civil justice system' (paragraph 3.1.12); and

(ii) where BSC/BLB had advised citizens to enter into arbitration or litigation almost invariably the results were most unsatisfactory (paragraph 3.1.11)

The Inquiry recognised from this that it offered consumers their last and only practical opportunity for redress. However, it did offer a hearing, with the opportunity for others to attend, and the opportunity to make submissions in writing. In the present case there appears to be nothing in the materials provided to us to establish a basis for an argument that there was a procedure which was publicly promised to complainants and which was not followed. To extent that legitimate expectation may be based on procedural issues, we are satisfied that this has been met. To the extent that legitimate expectation is based on the more intangible concepts of fairness in the assessment of compensation we are unable to comment.

3.9 The potential availability of class actions to aggrieved consumers

(a) Supreme Court

There is provision in the Supreme Court Rules for a class action based on concurrent interests. Part 8, Rule 13(1) states:

> *'Where numerous persons have the same interest in any proceedings the proceedings may be commenced, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.'*

The High Court has recently determined that there are only two pre-conditions for the commencement of a class action in the Supreme Court: *Carnie v Esanda Finance Corp Limited* (1995) 182 CLR 398. These preconditions are:

'(i) that there are numerous transactions; and

(ii) that there is some similarity of interest in the determination of a particular matter of law or fact.'

It is apparent from *Carnie* that the test of 'common interest' will be liberally interpreted. There may therefore be scope for representative action on the question of whether the purported contracts of compromise are valid. As a practical matter, however, the potential for a large number of plaintiffs with a corresponding necessity for enquiries about their individual damages might provide a ground to refuse to grant a representative order.

(b) Federal Court

A class action is also available in the Federal Court under Order 6, Rule 13 of the Federal Court Rules. Again, all that is required for a representative action is that the parties have the *'same interest'*. The principles of *Carnie* apply equally in the Federal Court context.

We trust that this advice is useful. Please call us if you have any questions.

Yours faithfully
MINTER ELLISON

Robert Holtsbaum

Performance Audit Reports

Agency or Issue Examined	Title of Performance Audit Report or Publication	Date Tabled in Parliament or Published
Department of Housing	*Public Housing Construction: Selected Management Matters*	5 December 1991
Police Service, Department of Corrective Services, Ambulance Service, Fire Brigades and Others	*Training and Development for the State's Disciplined Services: Stream 1 - Training Facilities*	24 September 1992
Public Servant Housing	*Rental and Management Aspects of Public Servant Housing*	28 September 1992
Police Service	*Air Travel Arrangements*	8 December 1992
Fraud Control	*Fraud Control Strategies*	15 June 1993
HomeFund Program	*The Special Audit of the HomeFund Program*	17 September 1993
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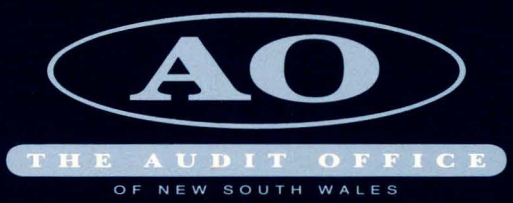

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