

THE COMMONWEALTH OMBUDSMAN'S POWER TO COMPEL TESTIMONIAL ACTIVITY FOR THE PURPOSE OF AN INVESTIGATION

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For the purpose of reaching a decision about potentially defective administrative action into which he is conducting an investigation, the Ombudsman may wish to compel people to engage in various sorts of testimonial activity—the furnishing of information in writing, the production of documents, the answering of questions orally. This article examines the Ombudsman's powers in that regard, pointing to matters which may give rise to difficulties in the exercise of such powers and suggesting a number of changes to the relevant provisions. Some of the matters discussed are relevant to the information-gathering powers of other Commonwealth agencies, for example, the Taxation Commissioner and the Trade Practices Commission. Not discussed in the article is the question of excuses which can be made to avoid complying with a valid request once made, a subject which deserves its own treatment separately.

In his first Annual Report, covering the year ending 30 June 1978, the Commonwealth Ombudsman said that he had conducted formal investigations of complaints received relatively infrequently, relying instead on discussions and informal inquiries to resolve matters.¹ He added, however: "As the office develops, I expect a greater proportion of complaints will proceed to a formal investigation."² In light of this expectation, it may be timely to examine the Ombudsman's power to compel testimonial activity for the purpose of an investigation.

The principal relevant section is section 9 of the Ombudsman Act.³ Sections 9(1) and (2) purport to authorise the Ombudsman to require people to engage in three different types of testimonial activity—the furnishing of information in writing, the production of documents and the answering of questions before him. I use the words "purport to", not because I wish to imply a doubt about the constitutionality of the relevant provisions, but because it appears that, in the case of one of the types of testimonial activity referred to, no sanction is prescribed for a person's refusal to comply with the Ombudsman's requirement. It seems best to dispose of this matter before going further.

The problem arises out of the offences section of the Act, section 36. Section 36(1)(c) provides:

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¹ *Commonwealth Ombudsman First Annual Report (1977-1978)* 33.

² *Id.* 36.

³ Ombudsman Act 1976 (Cth).

A person shall not refuse . . . without lawful excuse . . . to answer a question or produce a document . . . when required to do so in pursuance of this Act.

It does not, however, refer to the third type of testimonial activity which the Ombudsman can ostensibly compel, the furnishing of information in writing. This omission appears all the stranger when one notes that section 36(2)(b) makes it an offence to furnish information to the Ombudsman knowing that it is false or misleading in a material particular. Perhaps it can be argued that section 36(2)(a) fills the gap. It provides:

A person shall not wilfully obstruct, hinder or resist the Ombudsman . . . in the exercise of his functions under this Act without lawful excuse.

However, there is a difficulty with such an argument. If section 36(2)(a) was intended to deal with, *inter alia*, an unlawful refusal to engage in the testimonial activity of furnishing information in writing, why was it thought necessary to deal specifically elsewhere in section 36 with an unlawful refusal to engage in the other two testimonial activities dealt with in section 9, answering questions before the Ombudsman, and producing documents to him? Surely, if section 36(2)(a) were intended to cover unlawful refusals to furnish information in writing, it would also have been intended to cover unlawful refusals to answer questions before the Ombudsman or produce documents to him, in which case section 36(1)(c) would have been superfluous. The only conclusion seems to be that although section 9 does authorise the Ombudsman to compel people to answer questions before him or produce documents to him, in the sense that their refusal to do so would subject them to sanctions under section 36, it merely purports to authorise the Ombudsman to compel people to furnish information in writing, so that a person's refusal to comply with such a request would place him in no jeopardy under the Act.⁴

⁴ Perhaps it could be argued that a person who refused without lawful excuse to furnish information in writing when required to do so by the Ombudsman had committed the common law misdemeanour of contempt of statute. For a discussion of this crime: The Law Commission (U.K.), *Report on Conspiracy and Criminal Law* (Law Com. No. 76) (1976) Part VI. A successful prosecution for this crime has taken place in New South Wales in the twentieth century: *R. v. Martin* (1904) 4 S.R. (N.S.W.) 720, a case which should be read together with the three *Chanter v. Blackwood* cases: (1904) 1 C.L.R. 39; 121; 456, and with *Sawer*, *Australian Federal Politics and Law 1901-1929* (1956) 35, 64, in order to gain a better understanding of the political skulduggery with which it deals. An objection to this argument might be that there are no federal common law crimes, but this objection would seem likely to fail. Certainly Quick and Garran thought that contempt of a federal statute would be a punishable crime: Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 809-810. Judicial acceptance of the notion of federal common law crimes can be found in *R. v. Kidman* (1915) 20 C.L.R. 425, 436 *per* Griffith C.J., 444 *per* Isaacs J., and in *Connor v. Sankey* [1976] 2 N.S.W.L.R. 570, 597 *per* Street C.J., although in neither of these cases was contempt of a federal statute the particular federal common law crime under discussion. Another, more weighty, objection would be based on the notion,

If this argument is correct, it might be said that there is no point in a detailed analysis of section 9 in so far as it refers to the testimonial activity of furnishing information in writing. However, I disagree. First, section 36 could well be amended to overcome the defect I see in it; secondly, many of the points relevant to an analysis of that part of section 9 dealing with the testimonial activity of furnishing information in writing are also relevant to an analysis of the parts dealing with the other two testimonial activities, so that the points might as well be dealt with in connection with the furnishing of information in writing as in connection with the other two testimonial activities.

Of course, if the argument is incorrect, then it is all the more necessary to analyse in detail that part of section 9 dealing with the furnishing of information in writing. Accordingly, I begin by doing so, treating it as legally potent throughout.

Section 9(1) provides in part as follows:

The Ombudsman may, by notice in writing, require a person whom he believes to be capable of giving information relevant to an investigation under this Act to furnish to him in writing, within a period specified in the notice, such information, . . . being information . . . relevant to the investigation, as . . . [is] . . . specified in the notice.

A number of matters will be considered in connection with the portion of the subsection quoted.

First, the provision refers to the Ombudsman's giving notice "in writing". Would oral notice nevertheless be effective? In other words, would a court classify the requirement that the notice be in writing as either mandatory or directory? It is confidently predicted that the requirement would be treated as a mandatory one, so that failure by the Ombudsman to comply with it would mean that a purported notice given orally would be ineffective. As Edmund-Davies J. (as he then was) said in *Cullimore v. Lyme Regis*:

Where powers . . . are granted with a direction that certain . . . formalities or conditions shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the . . . authority conferred, and it is therefore probable that such was the intention of the legislature.⁵

These words were uttered in the context of a case in which a borough council had been given the power to levy, within six months of the

expressio unius est exclusio alterius. It seems difficult to argue seriously that Parliament, having dealt with three activities together and having explicitly created penalties in respect of refusal to engage in two of them, had intended that the penalty in respect of refusal to engage in the third activity would be supplied by the common law.

⁵ [1962] 1 Q.B. 718, 726, quoting *Maxwell on Interpretation of Statutes* (10th ed. 1953) 376.

completion of certain work, a charge on lands benefitted by that work. The defendant council had purported to levy a charge on the benefitted lands some two years after the completion of the work and it was declared at the plaintiff's instance that the purported levy was invalid. It is submitted that the requirement of writing in the provision under discussion is an even stronger candidate for classification as a mandatory requirement than the time limit in *Cullimore's* case, because the provision in the latter case merely conferred a power to take property, while the former provision confers a power to compel testimonial activity. "Strict compliance with statutory requirements is especially insisted upon when administrative action may interfere with personal liberty."⁶

Some slender judicial authority for the argument that the writing requirement is mandatory can be found in *Snow v. Keating*,⁷ a decision of the Supreme Court of Western Australia. The case involved a prosecution under the Income Tax Assessment Act 1936 (Cth) arising out of Snow's failure to comply with a written notice from the Commissioner of Taxation issued under section 264(1) of that Act. That section, to which further reference will later be made, is broadly similar to sections 9(1) and (2) of the Ombudsman Act, in that it gives the Commissioner power to compel testimonial activity by notice in writing. In the course of his judgment accepting an argument by Snow that there was an invalidating defect in the written notice issued to him, Burt C.J. said, "[t]he power which is given can *only* be exercised by 'notice in writing' . . .".⁸

Incidentally, if it be accepted that the Ombudsman's notice must be in writing to be effective, that presumably answers two other questions which might be asked about section 9(1). The section obliges a person to whom notice is given to furnish to the Ombudsman "within a period specified in the notice" such information relevant to his investigation "as . . . [is] . . . specified in the notice". It could be said that any attempt by the Ombudsman orally to specify or amend either the period within which he required the information to be furnished, or the information he required to be furnished, would be ineffective for the same reason that a bare oral notice to furnish would be ineffective.

The second matter to be considered in connection with the portion of section 9(1) quoted at the outset is the meaning of "person" therein. Specifically, does it include a corporation? There is high authority to suggest that it does not, namely, the judgment of Stephen J. in *Smorgon v. Australia and New Zealand Banking Group Ltd.*⁹ This was a case involving section 264(1) of the Income Tax Assessment Act 1936, referred to *supra*. In part, that section confers on the Commissioner the

⁶ Whitmore and Aronson, *Review of Administrative Action* (1978) 191.

⁷ (1978) 19 A.L.R. 373.

⁸ *Id.* 375 (emphasis added).

⁹ (1976) 134 C.L.R. 475.

power by notice in writing to "require any person . . . (a) to furnish him with . . . information . . . and (b) to attend and give evidence before him . . .". The case dealt in part with a notice which the Commissioner had issued to the Australia and New Zealand Banking Group under section 264(1)(b), requiring it, among other things, to attend and give evidence before him. Stephen J. held that the Commissioner's power to compel a "person" to attend and give evidence before him was one which could only be exercised in respect of a natural person. Stephen J. pointed out that a corporation could not itself give evidence; it could merely authorise a natural person to give evidence on its behalf. He thought it improbable that Parliament had intended that some natural person chosen by the corporation should give evidence on its behalf.

What s. 264(1)(b) is designed to do is to permit the Commissioner to gain access to the knowledge residing in men's minds. A corporation can possess knowledge only because of its existence in the minds of those who direct its affairs and serve its interests. It is surely to them personally, and at first hand, that the Commissioner must direct his questions. . . .¹⁰

It is submitted that these words are equally apt to describe that part of section 9(1) of the Ombudsman Act now under discussion and that the subsection would be interpreted as giving the Ombudsman no power to require a corporation to furnish to him information in writing.¹¹

The third matter to be considered in connection with section 9(1) is this: the only person to whom the Ombudsman can direct a notice under the subsection is one "whom he believes to be capable of giving information relevant to an investigation" under the Act. Is the Ombudsman required to express in the notice his belief in the recipient's ability to give relevant information in order to ensure the notice's validity? It may be argued that this is so. In the "great"¹² case of *Gosset v. Howard*,¹³ dealing with the validity of an arrest warrant issued by the Speaker of the House of Commons, Baron Parke delivering the judgment of the Court of Exchequer Chamber contrasted "the mandate or writ of a Superior Court acting according to the course of the common law"¹⁴

¹⁰ *Id.* 481.

¹¹ The Ombudsman Act and Income Tax Assessment Act provisions may be compared with s. 155(1)(a) of the Trade Practices Act 1974 (Cth) which authorises the Commission to require a person "to furnish . . . by writing signed by that person or, in the case of a body corporate, by a competent officer" certain information.

It should be noted that in *Geosam Investments Pty Ltd v. Australia and New Zealand Banking Group Ltd* (1979) 79 A.T.C. 4, 418 (High Court), Gibbs J., sitting alone, held valid a notice issued under s. 264(1)(b) of the Income Tax Assessment Act requiring a company to furnish information to the Taxation Commissioner. It does not appear, however, from the brief report of the reasons for judgment that it was argued that such a notice could not be directed to a company, by analogy with the reasoning of Stephen J. discussed *supra*.

¹² *Broom's Legal Maxims* (10th ed. 1939) 648.

¹³ (1845) 10 Q.B. 411, 116 E.R. 158.

¹⁴ *Id.* 452.

with "the warrants of magistrates or others acting by special statutory authority and out of the course of the common law"¹⁵ and summarised the law with respect to the validity of the instruments of the latter as follows:

in the case of special authorities given by statute to justices or others acting out of the ordinary course of the common law, the instruments by which they act, whether warrants to arrest, commitments, or orders, or convictions, or inquisitions, ought, according to the course of decisions, to shew their authority on the face of them by direct averment or reasonable intendment.¹⁶

Since the Ombudsman's belief in the ability of the recipient of an instrument under section 9(1) to give relevant information is expressed in the subsection to be a prerequisite to his authority to issue such an instrument, it may be argued that the Ombudsman's belief must be directly averred on the face of the instrument in order that it show its authority and thus be valid. On the other hand, it may be argued that the Ombudsman's merely requiring by instrument the furnishing of information without reciting his belief would nevertheless be legally effective, because the very issuing of the instrument would imply the existence of the required belief and thus the instrument would show its authority on its face by reasonable intendment.

An approach similar to the latter was suggested by the New South Wales Court of Criminal Appeal in *R. v. Martin*.¹⁷ In that case the Governor had been empowered by statute to declare by proclamation that certain drugs fell within the provisions of the statute, provided that one of two things with respect to the drugs appeared to him. The Governor purported to issue such a proclamation in respect of certain drugs but he did not express in the proclamation that either of the two conditions precedent required to appear to him with respect to the drugs did appear to him. The Court held that his failure to express the appearance to him of either of the two conditions nullified his proclamation. According to Jacobs J.A. (as he then was):

The state of mind of the Governor . . . must appear either expressly or by implication as a matter of construction of the proclamation from the proclamation itself.¹⁸

The Governor had not expressed his state of mind and it was impossible to infer it from the proclamation, because either one of two different states of mind would have justified the issuing of the proclamation. However, Jacobs J.A. said:

If, before any drug could be proclaimed one and one only state of mind was apposite . . . , then as a matter of construction of the

¹⁵ *Ibid.*

¹⁶ *Id.* 452-453.

¹⁷ (1967) 67 S.R. (N.S.W.) 404.

¹⁸ *Id.* 407.

proclamation it might be possible to say that there could be implied that the proclamation showed that the necessary state of mind did exist.¹⁹

Earlier in his judgment Jacobs J.A. had expressed the same idea in a less tentative way, saying:

if there is only one possible source of power for the proclamation it may be assumed from the construction of the proclamation that the opinion or satisfaction (as the case may be) of the Crown existed.²⁰

If this reasoning were to be applied to section 9(1) of the Ombudsman Act, then a failure by the Ombudsman to express his belief on the face of a notice that its recipient was capable of giving relevant information would not be fatal to the validity of the notice, since before the notice can be issued one, and only one, state of mind is apposite.

The phrase in section 9(1) which requires the Ombudsman to hold a certain belief before issuing a notice may be thought to be a potential source of another legal problem. Could a notice be impugned on the ground that the Ombudsman, although expressly or impliedly asserting his belief in the ability of the recipient of the notice to give relevant information, did not in truth hold that belief? Apart from the probably insurmountable problems of proof involved, it is submitted that the nature of the power conferred on the Ombudsman by the subsection, particularly the fact that the power is one to require the furnishing of information "relevant to the investigation", means that this problem would probably never arise in practice. An allegation of *mala fides* on the part of the Ombudsman would probably only be made by a recipient of a notice who was capable of furnishing relevant information, because if he were not so capable he would instead probably respond to the notice merely by saying so. It is submitted that a recipient in those circumstances would find it impossible to convince a court that the Ombudsman had issued his notice without the required belief.²¹

The next matter to be considered in connection with section 9(1) arises out of the fact that the Ombudsman is empowered to specify in

¹⁹ *Id.* 409.

²⁰ *Id.* 408-409.

²¹ There appears to be only one circumstance in which the recipient of a notice to furnish information who was not capable of furnishing relevant information could nevertheless wish to allege *mala fides* on the part of the Ombudsman in seeking the information. This is when the Ombudsman has required not only the furnishing of information, but also the production of documents, and the recipient, although he is not capable of furnishing relevant information, is capable of producing relevant documents. In that case the recipient could allege that the Ombudsman's power to require the production of documents is ancillary to his power to require the furnishing of information (*infra* p. 332) and that the Ombudsman, knowing full well that the recipient was incapable of furnishing relevant information, but believing that he was capable of producing relevant documents, sought the information solely as a device to justify his seeking the documents.

his notice a period within which the recipient is required to furnish the specified information. What would be the consequence of the Ombudsman's specifying an unreasonably brief period? It is suggested that if the courts considered that the period specified was unreasonably brief, they would be prepared to hold the notice void. They would achieve this by applying the doctrine of *ultra vires*, saying that the Ombudsman in exercising the discretion conferred on him to specify a period for compliance had either failed to take into account a relevant consideration or had acted unreasonably.

Some indication of the likely judicial approach may be gleaned from *Deputy Commissioner of Taxation v. Ganke*,²² a decision of the New South Wales Court of Criminal Appeal. The case concerned the prosecution of a person who had not furnished information to the Commissioner within the period specified in a notice issued to him under section 264(1)(a) of the Income Tax Assessment Act 1936 (Cth). Section 264(1) of that Act, unlike section 9(1) of the Ombudsman Act, does not refer to a period within which the information must be furnished. The Court held that the subsection should be read as impliedly obliging the Commissioner to specify in his notice a reasonable period within which the information must be furnished. It also held that if an issue arose as to whether the period specified by the Commissioner in his notice was reasonable, the Commissioner's view would not bind the courts. Nagle J., for the Court, said:

the question for consideration by the Court is an objective one and does not depend on the subjective views of the Commissioner. To adopt a contrary view would give rise to such a Draconian situation as to demand the clearest and most explicit words in s. 264, and this I do not find.²³

Earlier in his judgment he had described the situation in which "the Commissioner might demand compliance with the notice by the taxpayer as soon as it was received" as "farcical" and "absurd".²⁴ This sort of language certainly suggests a willingness in the courts to hold a notice from the Ombudsman invalid if it specifies a period for compliance which they consider unreasonably brief.

Incidentally, one other matter arising out of *Ganke's* case which seems to have some significance for the Ombudsman under section 9(1) is that the Court held that section 264(1) impliedly required the Commissioner to specify in his notice the place at which the required information must be furnished. Perhaps a failure by the Ombudsman to include this information in his notice under section 9(1) would invalidate it, although, in this connection, it may be relevant that section 9(2), dealing with the Ombudsman's power to require people to attend before him to

²² [1975] 1 N.S.W.L.R. 252.

²³ *Id.* 258.

²⁴ *Id.* 255.

answer questions, does make explicit reference to his specifying in his notice the place at which the recipient is to attend.

The next matter to be considered in connection with section 9(1) concerns the requirement therein that the information specified in the notice as required to be furnished must be "relevant to the investigation" in which the Ombudsman is engaged. Undoubtedly these words would be interpreted as words of limitation on the Ombudsman's power under section 9(1) and any attempt by him to compel the furnishing of information thought by a court considering the matter to be irrelevant to the investigation would be held ineffective. An analogy can be found in the attitude of Stephen J. in *Smorgon's* case.²⁵ As well as being concerned with a notice issued by the Taxation Commissioner under section 264(1) of the Income Tax Assessment Act to the Australia and New Zealand Banking Group, the case concerned a notice issued to Smorgon himself. Smorgon's notice required him to attend and give evidence concerning the income or assessment of named persons, including himself. The notice was issued under section 264(1)(b), which provides:

The Commissioner may . . . require any person . . . to attend and give evidence . . . concerning his or any other person's income or assessment, and may require him to produce all . . . papers . . . relating thereto.

In the course of his judgment, Stephen J. said:

If, in the course of questioning, answers were to be sought relating to matters unrelated to the income or assessment of the persons named in the schedule to the notice addressed to him [Smorgon] he could not properly be required to answer such questions and his refusal to do so would be no breach of the Act.²⁶

Similar remarks were made in *Federal Commissioner of Taxation v. Smorgon*,²⁷ a subsequent action involving the same parties as *Smorgon's* case, again involving notices under the Income Tax Assessment Act. Stephen J. again presided at the trial of the action. He pointed out that the validity of a notice to produce a document under section 264(1)(b) depended on the opinion of the court considering the matter as to whether the document sought did in fact relate to the income or assessment of the person under investigation:

the validity of his [the Commissioner's] notice . . . will depend . . . upon whether or not the necessary relationship in fact exists. Only if it does will there be power under s 264(1)(b) to require production of documents. . . . A prosecution under s 224 of the Act [for refusal to produce] will fail if the document in question proves to lack that relationship.²⁸

²⁵ (1976) 134 C.L.R. 475 (already referred to *supra* p. 324).

²⁶ *Id.* 492.

²⁷ (1977) 16 A.L.R. 721.

²⁸ *Id.* 730.

This approach was echoed in the judgments of Gibbs A-C.J. and Mason J. on appeal to the Full Court of the High Court from the judgment of Stephen J.²⁹

If it is accepted that this approach would be applied to the Ombudsman as well, so that his opinion that information he required to be furnished was relevant to his investigation would not be conclusive, the question arises as to how the recipient of the notice is to form his own opinion on the relevance of the information sought. Clearly, one thing which might assist him would be a reference to the particular investigation in respect of which the Ombudsman considers the information to be relevant. Is there an obligation on the Ombudsman to make such a reference?

If the decisions dealing with notices from the Taxation Commissioner are any guide, then there is. One of the matters in dispute in *Federal Commissioner of Taxation v. Smorgon*³⁰ involved notices issued to the Australia and New Zealand Banking Group requiring it to produce certain documents. (It should be noted that while Stephen J. had held in *Smorgon's* case³¹ that the Commissioner could not require a corporation to give evidence, he had also held that the Commissioner's powers to require the giving of evidence and the production of documents were independent of one another, and that the Commissioner could require a corporation to produce documents.) One of the notices to the bank did not name any person to whose income or assessment the documents sought were thought by the Commissioner to relate and at the trial Stephen J. held that this omission invalidated the notice. According to him:

an addressee must know whose income or assessment is in question if he is to make any sort of a determination whether the Commissioner's notice is, in relation to any particular document, a lawful exercise of power.³²

Of course, Stephen J. recognised that this information would not always assist the recipient of the notice to decide whether to produce the documents, but it was better than nothing.

The approach of Stephen J. was echoed in the judgments of the Full Court of the High Court on appeal from his judgment, although it appears from the judgment of Gibbs A-C.J. that the Commissioner did not even attempt to argue that Stephen J. had been wrong on this point.³³ It may also be noted that Gibbs A-C.J. approved³⁴ the judgment of

²⁹ *Federal Commissioner of Taxation v. Australia and New Zealand Banking Group Ltd* (1979) 23 A.L.R. 480, 489-493 *per* Gibbs J., 498-499 *per* Mason J. A similar approach in a similar situation was taken by Devlin J. (as he then was) in *Potato Marketing Board v. Merricks* [1958] 2 Q.B. 316, 332.

³⁰ (1977) 16 A.L.R. 721.

³¹ (1976) 134 C.L.R. 475.

³² (1977) 16 A.L.R. 721, 728.

³³ (1979) 23 A.L.R. 480, 490.

³⁴ *Ibid.*

Burt C.J. in *Snow's case*,³⁵ which has already been referred to in connection with the question whether the requirement that the Ombudsman's notice to furnish information be in writing is mandatory or directory. The case involved a prosecution under section 224 of the Income Tax Assessment Act for refusal to attend and give evidence pursuant to a notice issued under section 264(1)(b). The notice which had been issued did not identify the person in respect of whose income or assessment the evidence was required and Burt C.J. held that this omission invalidated the notice.

There now remain only two further matters to discuss in connection with that part of section 9(1) dealing with the furnishing of information to the Ombudsman, both of which are noted because they were mentioned in *Smorgon's case*.³⁶

Among the arguments raised against the validity of two of the notices in dispute in that case were: first, one notice did not refer to any sanction which could follow a failure to comply with it; secondly, another notice did not refer to the statutory provision which authorised its issue. Stephen J. rejected both of these arguments and presumably a court faced with similar arguments concerning a notice issued by the Ombudsman under section 9(1) would do likewise.

So far, all discussion has centred on that portion of section 9(1) which deals with the Ombudsman's power to require the furnishing of information in writing. The subsection, however, also confers on the Ombudsman the power to require the production to him of "documents and other records". Before a discussion of this latter power, it may be as well to quote section 9(1) in its entirety.

The Ombudsman may, by notice in writing, require a person whom he believes to be capable of giving information relevant to an investigation under this Act to furnish to him in writing, within a period specified in the notice, such information, and to produce to him such documents and other records, being information, documents or records relevant to the investigation, as are specified in the notice.

What matters may be raised in connection with this latter power beyond those already raised in connection with the former power? First, it may be noticed that section 9(1) does not specify any particular relationship which must exist between the documents and the recipient of the notice, as does, for instance, section 264(1)(b) of the Income Tax Assessment Act. That paragraph allows the Commissioner to require of a person the production of documents "in his custody or under his control". It is submitted that the absence of these words would make it even easier than it was in *Federal Commissioner of Taxation v. Australia and New Zealand Banking Group Ltd*³⁷ for a court to conclude that the recipient

³⁵ (1978) 19 A.L.R. 373.

³⁶ (1976) 134 C.L.R. 475.

³⁷ (1979) 23 A.L.R. 480.

of the notice need not stand in any particular legal relationship to the documents in order for the notice to be effective. To quote Gibbs A-C.J. in that case:

The section [section 264 of the Income Tax Assessment Act] is not concerned with the legal relationship of the person to whom the notice is given to the documents which he is required to produce, it is concerned with the ability of the person to whom the notice is addressed to produce the documents when required to do so. Therefore, in my opinion, a notice can be given under the section to any person who has physical control of the documents in question, whether he has or has not the legal possession. For example, if an employer gives his books of account to a servant to keep on his behalf, a notice under s 264 can be given to the servant, who has physical control, although the master has the legal possession. However, "control" in s 264 (1) is not limited to physical control, and in the example the notice could be given to the master, who has legal control of the documents, as well as to the servant. Indeed I can see no reason why a notice cannot be given to a person who wrongfully has physical control of the documents, or to a person who has parted with possession but retains a right to legal possession; the question is, has the person to whom the notice is given such custody or control as renders him able to produce the documents?³⁸

These words are, it is submitted, apt to describe the situation under section 9(1) of the Ombudsman Act.

The next and undoubtedly most important matter is this: it can hardly be doubted as a matter of language that the power conferred on the Ombudsman in section 9(1) to require the production of documents to him is an ancillary one, to be exercised only in respect of those people whom the Ombudsman believes capable also of furnishing to him information in writing relevant to his investigation and from whom he seeks such information. (This is not to suggest, however, that a person who could not furnish the relevant information specified, but who could produce the relevant documents specified, would not be required to produce them. It seems clear that he would.)

This ancillary nature of the Ombudsman's power to compel the production of documents to him is unfortunate, since it obviously prevents him from compelling a natural person to produce a document if he believes that that person's only connection with his investigation is the person's ability to produce a relevant document. It also prevents him from compelling a corporation to produce a document.

The consequences of this latter inability, which flows from the Ombudsman's already-discussed inability to require a corporation to furnish to him information in writing, deserve to be investigated. First, it must be pointed out that the Ombudsman's inability to require a

³⁸ *Id.* 486.

corporation to furnish to him information in writing is no real impediment to him, since; to quote Stephen J. in the *Smorgon* case, he can merely require instead the furnishing of the information in writing by "those who direct its affairs and serve its interests".³⁹ Judging from what was said by the High Court in *Federal Commissioner of Taxation v. Australia and New Zealand Banking Group Ltd.*,⁴⁰ he could presumably overcome his inability to require the production of documents by a corporation in the same way. The question arises, however, whether a corporation could frustrate the Ombudsman's attempt to obtain its documents from a natural person who directs its affairs or serves its interests and who is able to produce the required documents by, for instance, removing the documents from the person's custody or by forbidding him to produce them or even by not authorising him to produce them. Certainly, the cases relating to *subpoenas duces tecum* and to production of documents on discovery would suggest that such devices could be effective.⁴¹

However, against these cases one can set comments by the Full Court of the High Court in *Federal Commissioner of Taxation v. Australia and New Zealand Banking Group Ltd.*⁴² In that case it was decided that notices issued to the Australia and New Zealand Banking Group requiring it to produce documents contained in safe deposit boxes it had rented to Smorgon were valid, since the bank was able to produce the documents required. Mason J. in his judgment asked, "[c]an the Smorgons remove the documents from the boxes after a valid notice for production under section 264 has been given to the Bank?"⁴³ His answer was as follows:

I do not think that they can. The Bank's obligation to produce attaches to documents in its custody and control at the time when notice to produce was given to the Bank and by reason of the existence of that obligation the Bank cannot disable itself from performing its statutory obligation [by returning the documents to the Smorgons]. It is not to the point that the Smorgons have contractual rights against the Bank; they are overridden by the statutory obligation.⁴⁴

Murphy J. referred to the same point fleetingly, saying, "[t]he contractual arrangements between it [the Bank] and the Smorgons cannot prevail

³⁹ (1976) 134 C.L.R. 475, 481.

⁴⁰ (1979) 23 A.L.R. 480.

⁴¹ On *subpoenas duces tecum*: *Crowther v. Appleby* (1873) L.R. 9 C.P. 23; *R. v. Stuart* (1885) 2 T.L.R. 144. See also *Radio Corporation of America v. Rauland Corporation* [1956] 1 Q.B. 618, 648-649; *Penn-Texas Corporation v. Murat Anstalt* [1964] 1 Q.B. 40, 59; *Penn-Texas Corporation v. Murat Anstalt (No. 2)* [1964] 2 Q.B. 647, 663. On discovery: *Williams v. Ingram* (1900) 16 T.L.R. 451; *Park Company v. South Hustler's Reserve Company* (1882) 8 V.L.R., M. 37; *cf. B. v. B.* [1978] 3 W.L.R. 624. See also *Lonrho Ltd v. Shell Petroleum Co. Ltd* (H.L.) *The Times* 25 May 1980.

⁴² (1979) 23 A.L.R. 480.

⁴³ *Id.* 502.

⁴⁴ *Ibid.*

against s 264 . . . of the [Income Tax Assessment] Act . . .".⁴⁵ Gibbs A-C.J. also referred to the point and, as would have been expected in light of his comments already quoted on the meaning of "custody and control", said:

The Parliament cannot have intended that a person whose taxation affairs were under consideration could protect his documents from disclosure simply by binding the person to whom they were entrusted to refrain from producing them.⁴⁶

These comments taken together suggest that the High Court would not countenance the frustration by a corporation of a notice from the Ombudsman to a natural person able, at the time of his receipt of the notice, to produce the corporation's documents.

The next matter to be raised in connection with the Ombudsman's power to require the production of documents to him under section 9(1) concerns the degree of specificity required in his identification of the documents sought in order to ensure the validity of that part of the notice requiring their production. This is a matter which received some attention in both of the cases involving Smorgon. One of the notices in the first case in effect required its recipient to produce all documents in its custody which concerned the income or assessment of certain other named persons. Stephen J. held that such a requirement was illegal. He said:

I would not regard a notice which did no more, by way of requiring production of documents, than to repeat the words of the latter part of s. 264(1)(b) as an effective exercise of the Commissioner's power. These words describe the ambit of that power but do not provide a suitable formula for insertion in a notice. Such notice, given in exercise of the power, must instead specify with some degree of particularity . . . what documents are being sought. Failing this there will be no valid requirement.⁴⁷

It is not certain whether Stephen J. would have taken the same view if the notice had required the recipient to produce all those documents in its custody which concerned *its own* income or assessment rather than those of others. He had, however, pointed out earlier:

A particular taxpayer may not himself be aware of the particular basis upon which . . . the Commissioner may be proposing to assess him in the future.⁴⁸

The context in which this statement appears, together with the statement quoted *supra*, rather suggest that Stephen J. would have treated identically a notice requiring the production of all documents relating to the recipient's own income or assessment.

⁴⁵ *Id.* 507.

⁴⁶ *Id.* 487.

⁴⁷ (1976) 134 C.L.R. 475, 491.

⁴⁸ *Ibid.*

On the other hand, Gibbs A-C.J., in the second of the cases involving Smorgon, seems to have taken a different approach. He said:

To be valid a notice to produce documents under s 264(1)(b) must of necessity identify with sufficient clarity the documents which are required to be produced. . . . Where a notice is addressed to a taxpayer who is required to produce documents which relate to his own income or assessment, the very description of the documents (for example, "your books of account") may be enough to show that the notice is within the power conferred by the section⁴⁹

However, whatever may be the true position with respect to a notice to produce documents issued to a taxpayer in respect of his own income or assessment, it is submitted that a notice to produce documents directed to a complainant under the Ombudsman Act or to officers of a Department or prescribed authority the conduct of which is under investigation under that Act should be treated differently from notices directed by the Ombudsman to anyone else. In the latter case the notice should have to specify the documents with the same degree of particularity required in a *subpoena duces tecum*. In the former case there is no reason why a general request should not suffice, in the same way that a litigant is required to make discovery of documents.

So far, the discussion of the Ombudsman's power to compel the production of documents has ignored his ability to compel also the production of "other records". Do these words add anything to his power? Apparently not, judging from the expansive definition given to the notion of documents in cases involving discovery and *subpoenas duces tecum*. For instance, in *Australian National Airlines Commission v. The Commonwealth*, Mason J. of the High Court held, *obiter*, that an audio tape was a document for the purpose of discovery of documents,⁵⁰ while in *Senior v. Holdsworth; ex parte Independent Television News*,⁵¹ the English Court of Appeal held that a movie film was a document for the purpose of the County Court equivalent of the *subpoena duces tecum*. It seems likely that the courts would treat as a "document" any physical medium which carried information. If it is the case that the notion of records is superfluous to the subsection, it should also be mentioned that another notion which is not superfluous is not included, namely, the notion of objects relevant to an investigation which do not carry information. For instance, if it were thought necessary by the Ombudsman to examine some portable piece of machinery for the purpose of an investigation, it does not appear that he would be able to compel its production for his examination, because a piece of machinery could not be described as a "document or other record".⁵²

⁴⁹ (1979) 23 A.L.R. 480, 490.

⁵⁰ (1975) 132 C.L.R. 582, 594.

⁵¹ [1976] Q.B. 23.

⁵² Cf. *Nichols v. U.S.* (1971) 325 F. Supp. 130, a decision concerning the Federal Public Records Law or Information Act (U.S.). It was held that a rifle belonging

The last matter to be considered in connection with the Ombudsman's power to compel the production of documents to him concerns the nature of the notion of production. It has already been mentioned that section 9(1) contains no reference to the place at which information in writing is to be furnished. So far as written information is concerned, the specification of the place at which it is to be furnished seems most unlikely to cause any practical problem. Not so, however, with the specification of a place at which documents are to be furnished. Where documents are concerned, the specification of a place for production other than their usual place of keeping could cause a serious problem for the recipient of the notice, depending on the frequency with which the documents are required to be consulted at their usual place of keeping and the ease with which they can be duplicated.

The prospect of this problem occurring leads to the questions of whether the Ombudsman can require a person to produce documents to him at some place other than their usual place of keeping and whether the Ombudsman can retain the documents, no matter where they can be required to be produced, for as long as he needs them in connection with his investigation.

It may be thought that section 14 of the Ombudsman Act gives some assistance on these questions. Subsection (1) of that section authorises the Ombudsman to "enter any place occupied by a Department or prescribed authority" and "carry on the investigation at that place". Subsection (4) authorises the Ombudsman to "inspect any documents relevant to the investigation kept at premises [a place] entered by him under this section". Subsection (5) provides: "Sub-section (4) shall not be taken to restrict the operation of section 9".

Does section 14(5) suggest that the Ombudsman could, under section 9(1), require the production of documents, usually kept at a place occupied by a Department or a prescribed authority, at some other place? If so, then presumably the Ombudsman's power under section 9(1) to require the production of documents would allow him to require the production of documents kept anywhere by anyone at some place other than their usual place of keeping.

It is submitted that this is not what section 14(5) suggests. The reasoning is as follows. Section 14(4), unlike section 9(1), does not appear to provide for a compulsion on anyone to engage in testimonial activity. It seems instead merely to give the Ombudsman a power to search for relevant documents and inspect them when found. On this interpretation of section 14(4), all that section 14(5) is doing is ensuring that this conferral on the Ombudsman of a power to search for documents at certain places is not to be taken as implying that he cannot

to Lee Harvey Oswald, the coat and shirt worn by President Kennedy at the time of his assassination and various bullets and fragments thereof were not "records" within the meaning of that statute.

instead require the testimonial activity of producing documents kept at those places.

If this interpretation of section 14(5) is correct, then section 14 is of no assistance in answering the questions of whether the Ombudsman can require a person to produce documents at some place other than their usual place of keeping and whether he can retain the documents, no matter where produced.

The case of *Collier Garland Properties Pty Ltd v. O'Hair*⁵³ may, however, provide some assistance on these matters. It dealt with section 171(3) of the Companies Act 1961 (N.S.W.), which authorised company inspectors to require, by notice in writing, "the production of all books and documents in the custody or under the control of" an officer or agent of a company the affairs of which were under investigation. Such a notice had been served in respect of the plaintiff company by the defendant inspector, requiring the production of documents at the company's registered office. When the documents were produced, the defendant took them away with him for the purpose of his investigation. The plaintiff sought equitable relief in respect of the defendant's retention of the documents, which relief was granted by Hardie J. (as he then was) of the New South Wales Supreme Court. He said:

Much of the debate and argument in the case centred around the meaning of the word "produce". It was claimed on behalf of the plaintiff that the word "produce" normally has the meaning of "make available" and that it does not indicate or convey that the documents in question are to be handed over or delivered up to the person to whom production is to be made. It is reasonably clear, in my view, that "produce" has been used in this section in its ordinary sense; in other words, the person to whom the notice is given satisfies his obligation under the section when he produces the books to the inspector. The question as to whether the inspector then has the power to take the books into his custody and to retain them in his possession for a period and at a place reasonably necessary to enable him to carry out and complete his investigation depends, in the main, upon whether or not it is proper and permissible to read into a provision such as that now under consideration the inherent power of courts and judicial tribunals to take into their custody and to retain documents produced pursuant to a subpoena *duces tecum*. The point is by no means free from doubt. On the whole I have come to the conclusion that s. 171(3) empowers the inspectors to inspect and examine the books at the place at which their production has been required and given, and contemplates that when such inspection and examination at that place is completed the books and documents shall remain there and revert to the possession and control of the person to whom the notice was given. This would mean that if the inspectors desired to have the books produced to them at their own office they would have to

⁵³ [1964] N.S.W.R. 775.

give the officer or agent concerned an appropriate notice. He would then bring them to the place named, and the inspectors' right to retain them would come to an end at the conclusion of the day specified in the notice. If the inspectors required them on some later day or at some other place, a fresh notice would have to be given.⁵⁴

Thus Hardie J. would allow the inspectors to require the production of the documents at least at their office (and perhaps at any other reasonable place), so that the recipient of a notice could not complain if he were required to make the documents available at some place other than their usual place of keeping. At the same time, inconvenience to him would be reduced by ensuring that he could have the documents back at the end of the day on which they had been made available unless a fresh notice were given.

Assistance on the matters under discussion may also be gained from the decision of the Full Court of the Federal Court in *Melbourne Home of Ford Pty Ltd v. Trade Practices Commission*.⁵⁵ The applicant in that case sought declarations that certain notices issued by the respondent were void and the judge before whom the matter came submitted a number of questions in respect of the notices to the Full Court. One question was whether a notice given under section 155 of the Trade Practices Act 1974 (Cth) could lawfully require the production of documents "at any place, other than the usual place of business of the person to whom the notice is directed or the usual place of custody of such documents". The Court answered this question in the affirmative, saying:

There is nothing in the Act which suggests that the Commission does not have power to direct that . . . the documents to be produced are not to be . . . produced at the office of the Commission. In proceedings under sec. 155(5) of the Act [for refusal to comply with a notice] questions may arise as to whether, in the particular circumstances of that case, a requirement is reasonable or not. . . .⁵⁶

The applicant directed no argument at all to the question of whether the Commission could retain a document produced to it, for the reason that the Act is explicit on this point. Section 156(2) provides:

The Commission may, for the purposes of this Act, take, and retain for as long as is necessary for those purposes, possession of a document produced in pursuance of a notice under section 155 but the person otherwise entitled to possession of the document is entitled to be supplied, as soon as practicable, with a copy certified by a member of the Commission under his hand to be a true copy. . . .

⁵⁴ *Id.* 780-781.

⁵⁵ (1979) 2 A.T.P.R. 40-107, 18,080.

⁵⁶ *Id.* 18,099.

The reasoning of these two cases, when applied to section 9(1) of the Ombudsman Act, would suggest that the Ombudsman could require production of documents at some place other than their usual place of keeping, provided the place were reasonably chosen, but that the Ombudsman could not retain the documents beyond the end of the day on which they were required to be produced; he would have to return them. Perhaps an amendment to the Act along the lines of section 156(2) of the Trade Practices Act would be appropriate.

Let us now turn to section 9(2) of the Ombudsman Act, which provides as follows:

For the purposes of an investigation under this Act, the Ombudsman may, by notice in writing, require—

- (a) the complainant;
 - (b) if the complaint was made to the Ombudsman by the complainant at the request of another person or of a body of persons—that other person or a person included in that body of persons;
 - (c) an officer of a Department, or of a prescribed authority, who is, in the opinion of the Ombudsman, able to give information relevant to the investigation; or
 - (d) with the approval of the Minister, any other person who is, in the opinion of the Ombudsman, able to give any such information,
- to attend before him at a time and place specified in the notice and there to answer questions relevant to the investigation.

This provision should be read together with the following provision of the Act:

The Ombudsman may administer an oath or affirmation to a person required to attend before him in pursuance of section 9 and may examine the person on oath or affirmation.

Rather surprisingly, this provision is section 13 of the Act, separated from section 9(2) by a considerable number of provisions dealing with unrelated matters.

Section 9(2) should also be read in the light of section 38 of the Act, which provides as follows:

The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters that are required or permitted by this Act to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to this Act and, in particular, prescribing matters in connexion with fees and expenses of witnesses appearing before the Ombudsman.

No regulations prescribing matters in connection with fees and expenses of witnesses appearing before the Ombudsman have yet been made. Their absence could undoubtedly cause hardship to people summoned by the Ombudsman. Could such people argue that section 9(2) is

inoperative until such regulations have been made? Certainly, section 9(2) itself gives no ground for such an argument, but perhaps section 38 does. It could be argued that such regulations fall within the class referred to in section 38 of regulations prescribing matters "necessary . . . to be prescribed for carrying out or giving effect to [a provision of] this Act". In support of such an argument one could point to the fact that since at least 1562-1563 no person has been compelled to comply with a subpoena to be a witness in a civil case unless the party serving him tenders an amount to indemnify him for his expenses incurred in attending the trial.⁵⁷ On the other hand, it could be argued that section 9(2) is certainly *capable* of implementation without such regulations, onerous as that might be for those against whom it is implemented, so that such regulations cannot be said to be necessary in that sense.

Let us assume, probably justifiably, that the argument that section 9(2) is inoperative in the absence of regulations prescribing matters in connection with fees and expenses of witnesses would fail. That need not mean that a person summoned by the Ombudsman would be compelled to comply with the notice, no matter how onerous. If the courts considered that a requirement that a person attend before the Ombudsman at a particular time and place were unreasonable, it is submitted that they would react by holding the Ombudsman's notice to be void on the ground of *ultra vires*. It would be said that the Ombudsman had either failed to take a relevant consideration into account in the exercise of his discretion or acted unreasonably.⁵⁸

What other matters arising out of section 9(2) are worthy of attention, excluding those which raise issues identical to those already discussed in connection with section 9(1)? A reading of subsection (2) in isolation might lead one to believe that every investigation undertaken by the Ombudsman must be based on a complaint he has received. This is not so, as an examination of section 5(1)(b) of the Act makes clear. Could it then be suggested that section 9(2) was intended to apply only to those investigations based on a complaint and not those conducted on the Ombudsman's own initiative? Such an interpretation seems possible,

⁵⁷ 5 Eliz. c. 9 (1562), s. 12.

⁵⁸ The argument is similar to that which has been made in connection with the Ombudsman's discretions to fix a time within which information is to be furnished to him in writing under s. 9(1) and to fix a place at which documents are to be produced to him under the same section. In *Bank of America National Trust & Savings Association v. Douglas* (1939) 105 F. 2d 100, the Securities and Exchange Commission served subpoenas on the cashier and vice-president of a San Francisco bank, requiring them to appear in Washington, D.C. In invalidating the subpoenas as unreasonable, the United States Court of Appeals for the District of Columbia said, *id.* 107, "While it is true the [Securities Exchange] Act authorizes the [Securities and Exchange] Commission to subpoena witnesses from any part of the United States, we think it a fair statement that Congress never intended that the power should be exercised to bring from one side of the country to the other the principal officers of a bank . . . to appear before an examiner of an administrative commission".

but it is to be hoped that it would not be accepted by the courts, should the issue arise. It should also be noted that the four paragraphs of section 9(2), describing the four classes of people whom the Ombudsman can require to attend before him to answer questions, are linked by the word "or". Presumably, this word would be read as "and".⁵⁹ Next, it should be noted that the class of people referred to in paragraph (d) of section 9(2) is treated differently from the classes of people referred to in paragraphs (a), (b) and (c), in that the Ombudsman cannot summon people in this last class without Ministerial approval. While admittedly the only qualification for appointment of the Ombudsman specified in the Act is that he be under the age of sixty-five years,⁶⁰ it does seem strange that he is not to be trusted sufficiently to allow him to decide alone which people to summon other than those mentioned in paragraphs (a), (b) and (c). Perhaps the approval requirement was inserted to deal with those situations in which the Ombudsman might wish to summon a Minister for questioning.⁶¹

Further on this requirement of Ministerial approval in section 9(2)(d), the question might be asked whether approval is required to take any particular form to be effective. Would oral Ministerial approval suffice or would writing be required? A comment by the Privy Council in *Musson v. Rodriguez*⁶² suggests that the courts would hold that written approval was required. The case arose from an order made for Musson's deportation from Trinidad and Tobago after his failure to comply with a notice to leave. The validity of this notice depended on a decision by the Governor-in-Council that Musson was an "undesirable". The Crown in the deportation proceedings had been unable to produce a written decision by the Governor-in-Council that Musson was an "undesirable", but the magistrate presiding at the deportation proceedings had accepted oral evidence of the making of the decision. The Privy Council, relying on a particular provision of the relevant Interpretation Ordinance, held that a written decision was required, but before considering the applicability of the Ordinance, it made some comments of general application. It first pointed out that the Governor-in-Council's power was a "drastic" one "to interfere with personal liberty"⁶³ and that a person affected by it had no right to be heard before it was exercised. He also had no right of appeal from, or review of the exercise of, the power. It was then said:

⁵⁹ As was done by a Full Court of the Federal Court in respect of a comparable provision in *Re Trade Practices Tribunal; ex parte Tooheys Ltd* (1977) 16 A.L.R. 609, 616.

⁶⁰ S. 22(2).

⁶¹ It should, incidentally, be noticed that s. 9(2)(c) is so worded that the Ombudsman is able to summon without Ministerial approval officers of *any* Department or prescribed authority, not only those in the particular Department or prescribed authority whose action is under investigation.

⁶² [1953] A.C. 530.

⁶³ *Id.* 533.

Their Lordships consider that it would be unfortunate if the proof of the decision of the Governor-in-Council under section 4(1)(h) of this Ordinance [the relevant Immigration (Restriction) Ordinance] were to be subject to the uncertainties which attend proof by oral evidence.⁶⁴

While it is not suggested that the Minister's power to approve the Ombudsman's summoning a person referred to in section 9(2)(d) is as drastic a power to interfere with personal liberty as was the Governor-in-Council's in *Musson's* case, it seems that, like the power of the Governor-in-Council, it could be said that it would be unfortunate if proof of its exercise were to be subject to the uncertainties of oral evidence.

The next matter to be mentioned in connection with section 9(2) is that the power conferred by it to require attendance to answer questions is not coupled with a power to require the person attending to produce documents. This seems a most inconvenient omission from the sub-section.⁶⁵

The last matter is this: section 9(2) says nothing about whether a person summoned for questioning can have a lawyer present with him to give him legal assistance during his examination. Is legal representation permissible?⁶⁶

Section 8 of the Act may offer guidance. For instance, section 8(2) provides that investigations shall be conducted "in private". However, it seems hardly likely that these words are directed to the question of whether lawyers can be present to represent people being examined under section 9(2). After all, provisions which require trials to be held in private do not prevent the litigants therein from being legally represented. Next, section 8(7) may have some significance. The context in which it appears is as follows. First, section 8(4) provides:

Subject to sub-section (5), it is not necessary for . . . any . . . person to be afforded an opportunity to appear before the Ombudsman . . . in connexion with an investigation. . . .

Next, section 8(5) requires the Ombudsman to afford a person the opportunity to appear before him before the completion of his investigation if he proposes to criticise that person in his report on the action investigated. Finally, section 8(7) provides that when such a person avails himself of this opportunity, ". . . the person may, with the approval of the Ombudsman . . ., be represented by another person".

This explicit reference in section 8(7) to the matter of representation is equivocal. It may be argued that the reference shows that Parliament directed its mind to the question of representation under the Act and

⁶⁴ *Ibid.*

⁶⁵ *Cf.* s. 155(1)(c) of the Trade Practices Act 1974 (Cth).

⁶⁶ The High Court refused to answer a similar question in *Testro v. Tait* (1963) 109 C.L.R. 353, 361-362, 371.

decided to provide for it only in the hearing contemplated under section 8(5). On the other hand, it may be argued that in the absence of section 8(7) the person being heard under section 8(5) would have had a *right* to be represented and that the purpose of section 8(7) was to convert what would otherwise have been a right into a privilege conferrable at the discretion of the Ombudsman.⁶⁷ On this latter interpretation, section 8(7) has no significance so far as the question of legal representation under section 9(2) is concerned.

On the assumption that the issue is unaffected by section 8(7), it is submitted the best approach to resolving it is to consider the reasons why a person being examined by the Ombudsman could legitimately want legal representation. It is appropriate to begin by repeating a view expressed by Stephen J. in the *Smorgon* case.⁶⁸ It will be recalled that when dealing with a notice to Smorgon requiring him to attend and give evidence concerning his and other people's income or assessment, Stephen J. said:

If, in the course of questioning, answers were to be sought relating to matters unrelated to the income or assessment of the persons named in the schedule to the notice addressed to him [Smorgon] he could not properly be required to answer such questions. . . .⁶⁹

In other words, Smorgon had the right to object to irrelevant questions put to him during his examination.

Next, let us consider the views expressed by Lord Denning, with the concurrence of Shaw L.J., in the Court of Appeal in *Re Westinghouse Electric Corporation*.⁷⁰ The case arose under the Evidence (Proceedings in Other Jurisdictions) Act 1975 (U.K.). A party to litigation in America sought under the Act to examine a number of people orally and obtain certain documents for the purpose of the trial of American litigation. After dealing with the documents aspect of the matter, Lord Denning said:

So far as evidence is to be given by word of mouth, the witnesses can, I think, be required to answer any questions which fairly relate to the matters in dispute in the foreign action. . . . The only practical test of any question is: is it relevant? does it relate to the matters in question?[sic] No one would wish the witnesses to be asked about irrelevant matters or to go into other things with which the dispute is not concerned. But it is said there is a difficulty. The witnesses are not conversant with the issues in the case. They do not know what is relevant, and what is not. Any difficulty on that score is readily overcome. By agreement (and I think even without agreement) these witnesses, when they are asked to give evidence,

⁶⁷ On the question of whether, in the absence of s. 8(7), a person being heard under s. 8(5) would have been entitled to be represented, see generally Whitmore and Aronson, *op. cit.* 107-109.

⁶⁸ (1976) 134 C.L.R. 475.

⁶⁹ *Id.* 492.

⁷⁰ [1977] 3 All E.R. 703; reversed without reference to this point, in *Rio Tinto Zinc Corp'n v. Westinghouse Electric Corp'n* [1978] A.C. 547.

can and should have legal advisers at their elbow. . . . If a question is irrelevant the witness will be told and advised not to answer.⁷¹

It may be doubted whether Lord Denning's view that the witnesses were entitled to object to questions put to them on the ground of irrelevance is wise or even correct law.⁷² Be that as it may, the significance of his view is that, on the basis that a non-party witness in litigation is entitled to object to irrelevant questions, Lord Denning considers that the witness is also entitled to legal assistance to help him exercise that entitlement. There is no reason to assume that Lord Denning would not take the same view with respect to any other person under a legal duty to answer relevant questions, but with a right to object to answering irrelevant questions. A person being examined under section 9(2) of the Ombudsman Act is, relying on Stephen J. in the *Smorgon* case, just such a person. Therefore, Lord Denning's view in the *Westinghouse* case, given with the concurrence of Shaw L.J., supports the conclusion that a person being examined under section 9(2) is entitled to legal representation.

Is there any other reason why a person being examined under section 9(2) might want legal representation? A person being examined might want to claim privilege to refuse to answer a question put to him by the Ombudsman, on a ground similar to that on which he could claim privilege to refuse to answer it in litigation. Section 9(4) of the Ombudsman Act makes it clear that to some extent privilege claims which could be made by witnesses in litigation cannot be made before the Ombudsman, but that subsection certainly does not cover the whole field of privilege. A witness before the Ombudsman could well want legal representation to make a claim of privilege not excluded by section 9(4).

What is the position of the non-party witness in litigation who wants to claim privilege to refuse to answer a question? Can he be legally represented for the purpose of making the claim? According to *Phipson*,⁷³ relying on the 1841 case of *Doe v. Egremont*,⁷⁴ he cannot. However, *Doe v. Egremont* was said by the English Court of Appeal in *Senior v. Holdsworth: ex parte Independent Television News*⁷⁵ to be no longer good law. It should be pointed out that, although *Phipson* does not differentiate in its statement of the law between claims of privilege to refuse to answer questions and claims to refuse to produce documents, both *Doe v. Egremont* and *ex parte Independent Television News* involved documents rather than answers to questions and it may therefore be argued that these cases provide no assistance on the question of legal representation to argue a claim of privilege to refuse to answer a question. However, it is submitted that *Phipson's* treating the two situations

⁷¹ [1977] 3 All E.R. 703, 710.

⁷² *Wigmore on Evidence* (1961) viii, para. 2210.

⁷³ *Phipson on Evidence* (12th ed. 1976) para. 583.

⁷⁴ (1841) 2 M. & Rob. 386, 174 E.R. 326.

⁷⁵ [1976] Q.B. 23 (referred to *supra* n. 51).

together is justified, so that the *Independent Television News* case can be taken as an authority for the proposition that a non-party witness in litigation can be legally represented for the purpose of claiming privilege to refuse to answer a question.

If this proposition is accepted, there seems no reason to treat a person appearing before the Ombudsman to answer questions under section 9(2) any differently from a non-party witness in litigation. Thus it seems that recent authority in the English Court of Appeal could be relied on to found an argument that, for two reasons, a person summoned under section 9(2) is entitled to have a lawyer with him during his examination: first, to assist him on questions of relevance and, secondly, to assist him on questions of privilege.

This discussion of the Ombudsman's power to compel testimonial activity for the purpose of an investigation has disclosed a number of problems in sections 9(1) and (2) of the Act, the provisions which confer that power on the Ombudsman. The most serious relate to his power to compel the production of documents. In particular, he has been given no independent power to compel the production of documents, nor has he been given a power to compel their production ancillary to his power to require people to attend before him for questioning. Furthermore, difficulties arise as to the precise nature of his power to compel the production of documents ancillary to his power to compel the furnishing of information in writing. The discussion has also disclosed a problem in section 36 of the Act, which does not appear to create an offence of refusing without lawful excuse to furnish information in writing to the Ombudsman when required by him to do so.

These matters are worthy of the Government's attention when amendments to the Ombudsman Act are next contemplated. Another matter worthy of its attention and one which could and should be dealt with quickly and easily is the making of the regulations specifically contemplated by section 38 of the Act regarding the fees and expenses of witnesses appearing before the Ombudsman.