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REPORT

OF THE

ATTORNEY GENERAL

FOR THE

Year Ending June 30, 1985



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To the Honorable Senate and House of Representatives:

I have the honor to transmit herewith the Report of the Department of the Attorney General for the year ending June 30, 1985.

Respectfully submitted,

FRANCIS X. BELLOTTI
Attorney General

DEPARTMENT OF THE ATTORNEY GENERAL

Attorney General
FRANCIS X. BELLOTTI

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Kathleen Bowers⁶¹
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Cynthia Canavan
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Francis Chase
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Cheryl Connor
John Cratsley
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Paula DeGiacomo
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Maria Lopez
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Michael Magistrali¹²
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Paul Matthews
Janet McCabe⁵
Kathleen McDermott⁴
Susan McHugh
Edward McLaughlin
Georgianna McLoughlin
William McVey
Paul Merry
James Milkey⁷
William Mitchell
Paul Molloy
Paul Muello

Sherry Mulloy⁷
Kim Murdock
Thomas Norton
Henry O'Connell
Carlo Obligato⁵⁵
Stephen Ostrach
Howard Palmer
William Pardee
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Assistant Attorneys General Assigned To Division of Employment Security

Robert Lombard
Willie Carpenter⁹
John Harvey⁵³

Wendy Thaxter¹²
Robin Ultcht

Chief Clerk
Edward J. White

Assistant Chief Clerk
Marie Grassia

APPOINTMENT DATE

TERMINATION DATE

- 1. 7/23/84
- 2. 8/15/84
- 3. 8/20/84
- 4. 9/4/84
- 5. 9/5/84
- 6. 9/10/84
- 7. 9/17/84
- 8. 9/24/84
- 9. 10/1/84
- 10. 10/9/84
- 11. 10/10/84
- 12. 10/15/84
- 13. 10/29/84
- 14. 11/19/84
- 15. 11/26/84
- 16. 12/3/84
- 17. 12/10/84
- 18. 2/4/85
- 19. 2/12/85
- 20. 2/15/85
- 21. 2/19/85
- 22. 2/20/85
- 23. 2/25/85
- 24. 6/3/85
- 25. 6/18/85
- 26. 7/1/85

- 50. 8/31/84
- 51. 9/4/84
- 52. 9/7/84
- 53. 9/14/84
- 54. 11/30/84
- 55. 12/28/84
- 56. 3/1/85
- 57. 3/4/85
- 58. 4/9/85
- 59. 5/17/85
- 60. 6/13/85
- 61. 6/28/85

DEPARTMENT OF THE ATTORNEY GENERAL
STATEMENT OF FINANCIAL POSITION
FOR FISCAL YEAR ENDED
June 30, 1985

<i>Account Number</i>	<i>Account Name</i>	<i>Appropriation</i>	<i>Expenditures</i>	<i>Advances</i>	<i>Encumbrances</i>	<i>Balance</i>
0810-0000	Administration	\$10,920,976.30	\$ 9,810,214.55	\$5,271.39	\$119,006.95	\$ 986,483.41
0810-0014	Public Utilities Auth. by Ch.1221 1973	500,000.00	494,096.61	0.00	4,903.29	1,000.10
0810-0017	Judicial Proceedings Relevant to Fuel Charge	75,000.00	49,952.85	0.00	25,047.15	0.00
0810-0021	Medicaid Fraud Control Unit	1,839,287.00	1,417,331.46	217.58	116,809.86	304,928.10
0810-0031	Local Consumer Aid Fund	499,693.00	493,555.94	.50	6,021.75	114.81
0810-0032	Local Consumer Aid Fund Deposit	64,972.35	33,000.00	0.00	0.00	31,972.35
0810-0035	Antitrust Div. Adm.	411,061.00	362,075.19	0.00	47,916.56	1,069.25
0810-0201	Insurance: Auth. by Ch.266, 1976	400,000.00	382,209.40	0.00	17,778.70	11.90
0810-0410	Forfeited Funds	338,665.96	5,000.00	3,000.00	33,687.00	296,978.96
	TOTALS	<u>15,049,655.61</u>	<u>13,047,436.00</u>	<u>8,489.47</u>	<u>371,171.26</u>	<u>1,622,558.88</u>
Schedule 2	TOTALS	\$ 458,298.92	\$ 280,156.10	\$ 0.00	\$ 0.00	\$ 178,142.82
	GRAND TOTALS	<u>\$15,507,954.53</u>	<u>\$13,327,592.10</u>	<u>\$8,489.47</u>	<u>\$371,171.26</u>	<u>\$1,800,701.70</u>

**FEDERAL GRANTS
RECEIPTS AND DISBURSEMENTS
July 1, 1984 to June 30, 1985**

<i>Account Name</i>	<i>Account Number</i>	<i>Balance July 1, 1984</i>	<i>Receipts</i>	<i>Disbursements</i>	<i>Balance 6/30/85</i>
Attorney General Trust Fund	0810-6614	\$313,406.78	\$ 0.00	\$187,294.60	\$126,112.18
Water Pollution Control Program	0810-6630	6,238.13	60,000.00	48,885.14	17,352.99
Air Pollution Control Program	0810-6631	2,135.49	10,000.00	8,159.48	3,976.01
Anti-trust Enforcement Program	0810-6643	152.17	0.00	0.00	152.17
New England Bid Monitoring Project					
Coastal Zone Management	0810-6661	38,510.35	0.00	35,816.88	2,693.47
Program Implementation	0810-6662	27,856.00	0.00	0.00	27,856.00
Pesticide Regulation Program					
Enforcement Activities					
TOTALS		<u>\$388,298.92</u>	<u>\$70,000.00</u>	<u>\$280,156.10</u>	<u>\$178,142.82</u>

**SUSPENSE FUNDS
RECEIPTS AND DISBURSEMENTS
July 1, 1984 to June 30, 1985**

<i>Account Name</i>	<i>Account Number</i>	<i>Balance July 1, 1984</i>	<i>Receipts</i>	<i>Disbursements</i>	<i>Balance 6/30/85</i>
Thomas C. McMahon v. Nyanza	0810-6732	\$ 3,679.42	\$ 0.00	\$ 0.00	\$ 3,679.42
Owens Motors	0810-6773	1,500.00	0.00	0.00	1,500.00
King B's Auto Mart	0810-6774	14,300.00	700.00	0.00	15,000.00
William Hartwick, et al	0810-6781	6,575.00	0.00	0.00	6,575.00
Personnel Data Systems	0810-6782	568.00	0.00	568.00	0.00
Chrysler Corp.	0810-6784	10,000.00	0.00	0.00	10,000.00
Patrick Ciampo & Howard Johnson a/k/a Edward Miller	0810-6793	3,156.25	3,950.00	0.00	7,106.25
Charles Kasparian AOK Prod.	0810-6798	10,972.37	0.00	10,972.37	0.00
Robert Wilcox d/b/a Robert's Auto Sales	0810-6805	2,500.00	0.00	1,500.00	1,000.00
William H. Johnson III & J&G Auto Salvage	0810-6808	2,646.84	0.00	0.00	2,646.84
Gordon Kalil, Will D. Lagrange, & Will O'Brien	0810-6810	4,591.50	0.00	0.00	4,591.50
Steven Sesser Const. Co. & Wonder Const. Co.	0810-6811	1,500.00	2,000.00	3,120.00	380.00
Edward J. Borlem	0810-6812	700.00	0.00	0.00	700.00
Paul Solas, T. William Solas, d/b/a Center Reh.	0810-6813	1,817.71	0.00	0.00	1,817.71
John Lavalee d/b/a N.E. Auto	0810-6814	8,100.00	1,900.00	0.00	10,000.00
John J. Muldoon & Ronald M. Nolan	0810-6818	3,636.38	0.00	0.00	3,636.38
Allen C. Keene	0810-6819	2,842.63	0.00	0.00	2,842.63
N.J. McDonald & Son Inc. & Edward J. McDonald	0810-6820	663.32	0.00	0.00	663.32
Lawrence Callahan's Children's Serv. Inc.	0810-6822	12,313.84	0.00	12,313.84	0.00
Diamedic Weight Control Centers, Inc. John Cipolla & Sandor Feher	0810-6825	225.85	0.00	225.85	0.00
Fiore Depot Motors, Inc.	0810-6829	26,000.00	0.00	13,300.00	12,700.00
R.B. Freitas Assoc. Inc.	0810-6835	250.00	0.00	0.00	250.00
Janet Strom Enterprises	0810-6836	466.00	0.00	0.00	466.00
Bennett St. Auto Sales Inc.	0810-6841	12,478.40	16,498.00	12,000.00	16,976.40
Dean St. Auto Sales Inc.	0810-6842	13,143.02	11,000.00	15,178.50	8,964.52
Stephen R. Hamparian d/b/a Comm. Tow & Repair	0810-6843	650.00	611.00	0.00	1,261.00
The World Guild Inc.	0810-6844	61.56	0.00	(170.94)	232.50
Richard & Janet Cecca	0810-6845	750.00	0.00	0.00	750.00
Majestic Auto Buyers	0810-6850	12,500.00	5,000.00	0.00	17,500.00
Plymouth County Memorial Park Inc.	0810-6851	6,400.00	2,767.12	8,705.40	461.72

Leigh Alano, d/b/a Lee's Auto Sales	0810-6855	2,250.00	0.00	0.00	2,250.00
Olympic Auto Sales	0810-6857	20,000.00	0.00	0.00	20,000.00
Ventura Auto Sales	0810-6858	500.00	0.00	0.00	500.00
Festino Fuel Inc., Joseph Vincent Festino	0810-6859	7,000.00	45,000.00	18,190.00	33,810.00
Carnival Cruise Lines Inc.	0810-6860	.20	0.00	0.00	.20
H.J. Wassar Co., Inc.	0810-6861	0.00	(149.40)		149.40
Century Auto Appraising Inc. R&P Stone, Jr., & Peter Slate	0810-6862	1,000.00	1,000.00	0.00	2,000.00
Anthony Parrino, d/b/a Parrino Auto Sales & Towing Service	0810-6863	2,100.00	1,900.00	2,625.00	1,375.00
Boston Bullion Ltd.	0810-6864	2,400.00	0.00	0.00	2,400.00
Joseph & Janet B. Pierce	0810-6865	340.87	932.29	0.00	1,273.16
Porter Chevrolet Inc.	0810-6866	11,833.33	41,666.65	17,647.20	35,852.78
A&A Auto Sales & Rental	0810-6867	1,500.00	0.00	1,500.00	0.00
James Zbikowski	0810-6868	750.00	0.00	750.00	0.00
Exchange Auto	0810-6869	0.00	3,400.00	3,400.00	0.00
Eden Roc Inc. Tucker Const.	0810-6870	0.00	3,000.00	582.34	2,417.66
Ronald G. Decoste	0810-6871	0.00	3,545.00	3,545.00	0.00
Pasco Realty & DPC Realty	0810-6872	0.00	3,700.00	3,700.00	0.00
CastleBlue d/b/a Coppercraft	0810-6873	0.00	10,000.00	6,959.07	3,040.93
Border Buick Inc.	0810-6874	0.00	4,650.00	3,600.00	1,050.00
Adventure Travel Unl.	0810-6875	0.00	3,170.00	2,370.00	800.00
American Income Life	0810-6876	0.00	115,000.00	109,720.95	5,279.05
Pampalone Music School Vito Pampalone	0810-6877	0.00	2,571.55	2,525.05	46.50
Leonidas & Ralph Benzan d/b/a Tropicana Oil Co.	0810-6878	0.00	1,000.00	0.00	1,000.00
Scott Geller	0810-6879	0.00	3,100.00	3,100.00	0.00
Richard O'Riley d/b/a O'Riley Auto Acres	0810-6880	0.00	17,000.00	0.00	17,000.00
Maria Monge d/b/a J&R Auto Repair & Used Cars	0810-6881	0.00	31,500.00	0.00	31,500.00
FeelFit Health Center Ltd. Edward Matthey	0810-6882	0.00	3,000.00	0.00	3,000.00
G.A. Molloy Inc. d/b/a Car Wholesaler	0810-6883	0.00	17,000.00	0.00	17,000.00
Alfred J. Fabrit, Brian R. Dimeires	0810-6884	0.00	9,600.00	0.00	9,600.00
Eric Bartlett d/b/a Bartlett Assoc. & Fix, Co.	0810-6885	0.00	200.00	0.00	200.00
Silver City Ford & Robert Barboza, et al	0810-6886	0.00	500.00	0.00	500.00
Bruce Ledbury d/b/a Cars International	0810-6887	0.00	11,500.00	0.00	11,500.00
Ozzella Dodge Sales	0810-6888	0.00	120,000.00	0.00	120,000.00
Janet & George Enes d/b/a Janes Day Care	0810-6889	0.00	287.00	0.00	287.00
Travelers Ins. Co.	0810-6890	0.00	28,500.00	919.00	27,581.00
Michaud Tours	0810-6891	0.00	1,075.76	0.00	1,075.76
TOTALS		<u>\$214,662.49</u>	<u>\$528,224.37</u>	<u>\$258,697.23</u>	<u>\$484,189.63</u>

DEPARTMENT OF THE ATTORNEY GENERAL
STATEMENT OF INCOME
FOR FISCAL YEAR ENDED
June 30, 1985

<i>Account Number</i>	
0801-40-01-40	Fees, Filing Reports, Charitable Organizations
0810-40-02-40	Fees, Registrations, Charitable Organizations
0801-40-03-40	Fees, Professional Fund Raising Council
0801-41-02-40	Fines & Penalties, Civil Actions
0801-62-01-40	Reimbursement for Services, Cost of Civil Actions
0801-62-02-40	Reimbursement for Services, Cost of Investigations
0801-62-03-36	Local Consumer Aid Fund-Reimbursement For Service
0801-67-67-40	Reimbursement, Indirect Cost Allowances
0801-67-01-40	Reimbursements, For Service
0801-68-04-36	Forfeitures
0801-69-99-40	Miscellaneous
	<u>216,195.00</u>
	<u>25,968.33</u>
	<u>193,288.55</u>
	<u>300.00</u>
	<u>72,170.55</u>
	<u>57,262.70</u>
	<u>437,248.83</u>
	<u>1,054,245.17</u>
	<u>0.00</u>
	<u>136,044.09</u>
	<u>\$2,193,683.22</u>

COMMONWEALTH OF MASSACHUSETTS

For the past ten years I have written introductions for this annual report with a decidedly parochial slant. The tendency each year has been to write about what I have done as Attorney General or to stress the singular accomplishments of the Department. The unintended impression that these introductions might convey is that we in this office believe we are solely responsible for advancing the cause of truth and justice in the Commonwealth.

The fact of the matter is that the hallmark of this office throughout my tenure has been working with others in the public interest. Throughout the office the Department of the Attorney General is imbued with a sense of cooperation. We recognize that we are but one cog — albeit an extremely important one — in the machinery of government. This year as I near the end of my third term as Attorney General, I would like to use these pages to highlight our cooperative efforts to keep that machine running.

Perhaps the clearest examples lie in the domain of the Criminal Bureau. The criminal law enforcement network is extremely broad. There are scores of federal, state, county and local agencies with various police powers operating in Massachusetts, even as there are a United States Attorney and eleven district attorneys with whom I share prosecutorial responsibilities. Coordinating the activities of all these agencies is a critical function, not just because we may duplicate one another's work but because we can actually interfere with each other. Recognizing this fact, the United States Attorney and I formed a Law Enforcement Coordinating Committee at the start of this term. The success of that committee is difficult to measure, but communication is at an all time high and I can think of not a single significant governmental corruption case over the past several years in which there was not some form of interagency coordination.

Another prime example of the cooperative approach to law enforcement lies in the efforts of the statewide drug task force, formed by the Governor, this office and the eleven district attorneys. The premise of the task force is that an anti-drug program must attack not only those who traffic in drugs — the supply side of the equation — but also those who use them — the demand side. While we work with our federal counterparts to stem the flow of drugs into the Commonwealth, we are most effective breaking up distribution within the state. Hence we have established units in each of the district attorneys' offices, staffed by more than one hundred state and local police officers, whose activities are supported by computerizing intelligence services provided by this Department. During the period covered by this report, the statewide task force made 1,377 arrests, seized almost two million dollars in cash and drugs valued as high as seventy-five million dollars as well as scores of motor vehicles, weapons and even boats. Meanwhile, the Governor has attacked the demand for drugs with a comprehensive education program, giving the state an effective battle plan in the war against drugs.

Sometimes our cooperative networks are far less global in scope. During this reporting period we worked with the Massachusetts Bay Transit Authority to develop cases against 34 "T" employees who had allegedly stolen hundreds of thousands of dollars in fares. Similarly, we developed criminal tax cases with the Department of Revenue and Division of Employment Security that have produced truly

noteworthy effects. The atmosphere of deterrence we have created is now so significant that it is widely credited with boosting collections to an all time high. Working with the Inspector General we put together the first significant commercial bribery cases under the statute enacted at the behest of the Ward Commission, cases involving hundreds of thousands of dollars allegedly diverted from the M.D.C.

On other occasions coordination has meant exercising our civil authority in conjunction with criminal prosecutions brought by the district attorneys. For instance, the district attorneys from Berkshire and Norfolk counties initiated prosecutions of their respective treasurers during fiscal year 1985. At various points in time as many as five other state agencies were involved in the matter. Furthermore, we filed and the legislature enacted a bill authorizing judicial proceedings to remove county treasurers, filling a gap in an otherwise comprehensive removal scheme, and then brought proceedings under that law resulting in the forced resignation of the Norfolk County Treasurer. While this case may be the ultimate example of coordination, invoking civil and criminal law enforcement work it is not unique. During the reporting period, staff from the Civil Rights and Environmental Protection divisions worked hand in glove with the district attorneys, bringing dozens of injunctive cases while the county officials initiated criminal proceedings. Lawyers from the Consumer Protection Division helped form the Northeast Regional Odometer Task Force and filed a series of civil odometer tampering actions, even as the district attorneys criminally prosecuted the cases we had developed in cooperation with the Registry of Motor Vehicles.

Cooperation frequently means working with my fellow Attorneys General from around the country. Fiscal 1985 may have been the high water mark for such nationwide efforts in the public interest. Three cases involving billions of dollars in consumer monies dominated these efforts. The first of the three involved overcharges passed on to ultimate users of petroleum products by oil companies who contended its price was for new oil not subject to federal price control. I chaired the states oil overcharge committee through the year, and our efforts in federal court will produce more than a hundred million dollars in revenue being returned to Massachusetts. Public Protection Bureau staff also directed the activities of the state in the Baldwin-United case, resulting in millions of dollars in repayments to purchasers of Baldwin-United annuities, and assumed a leadership role for the states in the Johns-Manville bankruptcy proceeding, where again hundreds of millions of dollars are at stake. Working together, the nation's Attorneys General have proven to be an irresistible force in each of these three cases.

Cooperation is not just a phenomenon in our affirmative, glamorous cases. The traditional defensive work of the Department is carried out in the Civil and Government Bureaus. Working with our clients in the various state agencies is the key to a successful defense of the programs and policies of the other branches of government. Each of those Bureaus handled hundreds of cases last year, bearing mute witness to the way the Commonwealth's various agencies pull together towards a common goal.

To summarize even a handful of those cases is beyond the scope of this introduction. Rather than make the attempt, I leave the task to the ensuing pages of this annual report, which is submitted in accordance with the provisions of section 11 of chapter 12 and section 32 of chapter 30 of the General Laws.

**MONEY RECOVERED AND SAVED
FOR THE COMMONWEALTH AND ITS CITIZENS**

MONEY RECOVERED FOR THE COMMONWEALTH TREASURY

A. Charitable Registrations and Certificate Fees	242,250.00
B. Escheats	350,808.37
C. Collections, Rent	70,000.00
D. Collections, General	299,539.42
E. Delinquent Unemployment Compensation Claims	2,208,120.42
F. Fraudulent Unemployment Compensation	274,948.73
G. Criminal Delinquent Tax Recovery	<u>1,400,000.00</u>
TOTAL	\$4,855,666.94

MONEY RECOVERED AND SAVED FOR COMMONWEALTH CITIZENS

A. Antitrust Recoveries	140,000.00
B. Judgments, Settlements and Restitution in Consumer Protection Division Court Cases	371,393.59
C. Consumer Recoveries, Non-Court Cases	440,757.51
D. Insurance Rate Savings	136,000,000.00
E. Utility Rate Savings	31,350,000.00
F. Medicaid Fraud Fines and Restitution	1,050,268.00
G. Civil Penalties-Costs and Grants in Environmental	<u>557,375.00</u>
TOTAL	\$169,909,794.10

TOTAL TABLES I AND II **\$174,765,461.04**

CIVIL BUREAU

The responsibility of the Contracts Division generally falls into three areas: 1) Litigation involving matters in a contractual setting; 2) Advice and counsel to state agencies concerning contractual matters; and 3) Contract review.

A. Litigation

The Contracts Division represents the Commonwealth, its officers, and agencies, as both party plaintiff and defendant in all civil actions involving contract and contract related disputes.

A majority of the cases handled by the Division concern public building, state highway, and public work construction disputes. Other typical cases in the Division involve claims arising from the interpretation of leases, employment contracts, statutes, rules, regulations, and surety bonds.

In contract actions against the Commonwealth, G.L., c. 258, § 12, is, for the most part, the controlling statute.

At the commencement of contract actions, litigants often seek temporary restraining orders and preliminary injunctions against the Commonwealth, its agencies, and officers. The granting of such relief would delay the execution of contracts, increase contract costs, and result in additional claims for damages. During the fiscal year, Division attorneys successfully resisted all such attempts for injunctive relief.

Government contract disputes have become increasingly complicated. There has been a tendency for the actions to involve multiple parties, including architects, consulting engineers, subcontractors, materialmen, and surety companies.

The discovery stage often involves the retrieval of massive numbers of documents which, subsequently, have to be reviewed and analyzed.

Trials of public contract actions often involve lengthy hearings before the court or before court appointed masters. The procedure before masters has been cumbersome and awkward and has tended to delay rather than expedite the legal process. This has resulted in efforts by the attorneys to resist references to masters resulting in more trials before the court. At the end of the fiscal year, court rules were modified to simplify the procedure before masters, thus, increasing the probability that future actions may be resolvable before masters.

In one instance during the fiscal year, an action was forced to arbitration before the American Arbitration Association. The appeal of this action was pending at the end of the fiscal year.

The impact of the Omnibus Bill "To Improve The System Of Public Construction In The Commonwealth, C. 579, Acts of 1980, Sponsored By The Special Commission Concerning State And County Buildings" continued to be evident during the fiscal year. A number of actions have been initiated involving interpretation of the statute vis-a-vis the validity of the minority and women-owned "set aside" provisions.

Actions pursuant to G.L., c. 30, § 39N, and G.L., c. 30, § 39O, relating to contract equitable adjustments had also been brought with increasing frequency.

Seventy-seven (77) new actions were commenced during the fiscal year and 110 cases were closed. As of June 30, 1985, there were three hundred sixteen (316) pending cases in the Division.

B. Advice and Counsel to State Agencies

On a daily basis, the Division receives requests for legal assistance from state agencies and officials. Problems involve formation of contracts, performance of contracts, bidding procedures, bid protests, contract interpretation, and numerous other miscellaneous matters. The most frequent requests received during the fiscal year concerned indemnification clauses in leases and arbitration provisions in construction contracts.

On a weekly basis, the Contracts Division also receives requests for assistance in purchasing matters. Economic conditions have heightened competition, and bid awards are often bitterly contested. Members of the Division counsel the Purchasing Agent and his staff, interpret regulations, and attend informal protest hearings.

The Division plays a similar role with respect to the Department of Public Works, Metropolitan District Commission, Secretary of Transportation, Board of Regents of Higher Education, Data Processing Bureau, Mental Health, Youth Services, Environmental Management, Water Resources, State Lottery Commission, and Public Welfare, Division of Capital Planning and Operations.

C. *Contract Review*

The Division reviews many state contracts, leases, and bonds submitted by state agencies. All contracts are logged in and out, and a detailed status record is maintained. The average contract is approved within forty-eight (48) hours of its submission to the Division.

During the fiscal year, the Division received for approval as to form a total of 1,575 contracts. One hundred seventy (170) contracts were rejected and later approved after the deficiencies were corrected.

EMINENT DOMAIN

The major function of the Eminent Domain Division is the representation of the Commonwealth in the defense of petitions for the assessment of damages resulting from land acquisition by eminent domain. The Commonwealth acquires land for a variety of purposes, including rights of way for roads, land for state colleges, land for recreation and park purposes, land for flood control and land for easements. The division deals primarily with the Department of Public Works, the Metropolitan District Commission, the Department of Environmental Affairs, State Colleges, the University of Massachusetts, the Armory Commission and the Department of Food and Agriculture.

The Division also provides legal advice to the Real Estate Review Board to assist in settling damage claims on takings of government-owned land for highway purposes; and in some instances, the Division is called upon to testify before the Governor's Council prior to their granting approval for the payment of land damage cases settled by the Department of the Attorney General.

Informal advisory services, both written and oral are rendered to practically every state agency and many cities and towns. Agencies with eminent domain or real estate questions or problems either write or call the division for consultation and advice. The division also appears before Legislative Committees to give advice on legislation of importance to the Department of the Attorney General as well as other state agencies.

Chapter 79 of the General Laws prescribes the procedure in eminent domain proceedings. Under Chapter 79, when property is taken, the taking agency makes an offer of settlement known as a pro tanto, which makes available to the owners an amount the taking agency feels is fair and reasonable but reserves to the prior owners the right to proceed, through the courts, to recover more money. In the event of a finding by the court or jury, the pro tanto payment is subtracted from the verdict and the taking agency pays the balance, with 10% interest from the date of the taking to the date of the judgment.

If occupied buildings are situated on parcels acquired by eminent domain, the occupants remaining become tenants of the Commonwealth and are obligated to pay rent under a lease agreement or for use and occupancy. The problem of rent collection is handled by a Special Assistant Attorney General who is assigned to the Department of Public Works on a full-time basis. He is under the direct supervision of the Right of Way Bureau with review supervision from the Eminent Domain Division. His primary function is to represent the Department of Public Works in all matters related to state owned property being leased or rented to the

general public. This includes negotiating settlements, closing out uncollectibles, suits to enforce the payment of rent, as well as eviction matters. In those cases wherein rent is owed to the Commonwealth and there is a land damage case pending, the Eminent Domain Division trial attorney handles both matters at the time of trial. During the past fiscal year, 60 rent cases were closed out and approximately \$70,000.00 was collected and turned over to the State Treasurer. During fiscal 1986, approximately 51 land damage cases were disposed of, the majority by trial before juries in the various Superior Courts throughout the Commonwealth. The disposition of these cases resulted in a savings to the Commonwealth of approximately three million dollars. There were in excess of two hundred cases disposed of in the Land Court as well.

The Eminent Domain Division also has the responsibility of protecting the Commonwealth's interests in all petitions for registration of land filed in the Land Court. In each case, a determination must be made as to whether or not the Commonwealth, or any of its agencies or departments, has an interest which may be affected by the petition. If such a determination is made, no decree issues without the Division being given a full and complete opportunity to be heard. Some of these issues are tried to a conclusion while others are amicably agreed upon and the rights of the Commonwealth are protected by stipulation.

Land Court matters involve the full-time activities of an Assistant Attorney General. Its jurisdiction covers every type of land transaction from foreclosure, tax takings to determination of title absolute as well as all the equity rights arising therefrom.

The Eminent Domain Division is involved in almost every petition to confirm or register title. The involvement requires the determination of all interests in state highways, the preservation of the taking lines, the determination of drainage and other easements and the assurance that the decree is entered subject to all of the above.

Further, the Land Court determines so-called "water rights." As indicated in the reports of past years, this is becoming a new problem area in that many rivers and streams have been cleaned and improved as a result of federally funded projects, bringing into question the Commonwealth's rights and responsibilities. Also, the tidal areas of the Commonwealth are creating continual litigation, particularly where the Colonial Ordinances are concerned. Litigation is developing whereby the public is asserting possession and prescriptive rights in the flats of the tidelands and access to beaches. The land registration process continues to involve diverse issues. Many railroad rights of way appear in registration cases. Serious questions arise as to whether they have been abandoned and the effect upon the total railroad right of way. The Commonwealth, by way of the Secretary of Transportation, has acquired railroad rights of way to be used not only for passenger service but for recreational purposes as well. The reversionary rights and the effects upon Commonwealth title are important issues.

The Commonwealth has become involved with problems due to filling and dredging that have taken place along the shores and areas developed by beach associations, especially on the Cape and Islands. Dredging has been done with the material dredged being placed upon the shores, changing private access rights to and from the beaches.

All rental agreements, pro tanto releases, general releases, deeds of grants and conveyance, and documents relating to land under the control of any of the state's departments or agencies must be reviewed and approved as to form by the Eminent Domain Division.

The Division continues to assist the Department of Food and Agriculture to expedite and to carry out the mandates of Chapter 780 of the Acts of 1977, known as the Agricultural Preservation Restriction Act. This act helps to preserve the limited farm land remaining in Massachusetts by providing a method whereby the farmers receive compensation for the so-called "developmental rights" in their land without destroying its productive capacity and value as farm land. A deed is then filed in the appropriate county registry wherein the land use is restricted in perpetuity to farming and agricultural uses. Since the inception of this program in 1977, more than fifteen thousand acres of farmland have been permanently protected in Massachusetts.

Fiscal 1986 promises another busy year for the Eminent Domain Division. The Massachusetts Department of Public Works, as well as the Metropolitan District Commission, predicts a heavy workload for fiscal year 1986. The Department of Environmental Management is still deeply committed and involved in the Heritage State Park Projects in Lowell, Lynn, Holyoke, North Andover and Lawrence. These ambitious undertakings are expected to cost in excess of 100 million dollars and can be expected to result in extensive litigation for this Division.

In addition, the Massachusetts Department of Transportation is anticipating that federal funding and authorization will be received from Congress this year, to depress the Central Artery and to construct a third harbor tunnel. Needless to say, such an event would give rise to a serious increase in law suits against the Commonwealth, as well as create serious relocation problems for residents of the North End as well as the many businesses located in close proximity to the Central Artery Corridor.

INDUSTRIAL ACCIDENT DIVISION

The Industrial Accident Division serves as legal counsel to the Commonwealth in all worker's compensation cases involving state employees. Pursuant to G.L. c. 152, § 69A, the Attorney General must approve all payments of compensation benefits and disbursements for related medical and hospital expenses in compensable cases. In contested cases the Division represents the Commonwealth before the Industrial Accident Board and in appellate matters before the Superior Court and the Supreme Judicial Court.

There were 12,959 First Reports of Injury filed during the last fiscal year for state employees with the Division of Industrial Accidents. Of the lost time disability cases the division reviewed and approved 2,212 new claims for compensation. In addition, the Division worked on and disposed 134 claims by lump-sum agreements.

The Division appeared for the Commonwealth on 1,098 formal assignments before the Industrial Accident Board and before the Courts on appellate matters. In addition to evaluating new cases, the Division continually reviews the cases, that is, those which require weekly payments of compensation, to bring them up to date medically and to determine present eligibility for compensation.

Total disbursements by the Commonwealth for state employees' industrial accident claims, including accepted cases, Board and Court decision and lump-sum settlements, for the period July 1, 1984 to June 30, 1985, were as follows:

*General Appropriation
(Appropriated to the Division of Industrial Accidents)*

Incapacity Compensation	\$11,099,300.86
Medical Payments	<u>1,861,029.11</u>
TOTAL DISBURSEMENTS	\$12,960,329.97

*Metropolitan District Commission
(Appropriated to M.D.C.)*

Incapacity Compensation	\$576,029.85
Medical Payments	<u>162,976.93</u>
TOTAL DISBURSEMENTS	\$739,006.78

The Industrial Accident Division also has the responsibility of defending the "Second Injury Fund" set up by G.L. c. 152, § 65, against claims for reimbursement made under G.L. c. 152, §§ 37 and 37A. During the past fiscal year the Division appeared on 145 occasions to defend this fund against claims for reimbursement by private insurers. As of June 30, 1985, the financial status of this fund was:

Unencumbered Balance	\$448,289.32
Invested in Securities	<u>747,000.00</u>
TOTAL	\$1,195,289.32
Payments Made to Fund	\$1,373,492.45
Payments Made Out of Fund	\$1,373,443.52

Pursuant to G.L. c. 33, App. §§ 13-11A, the Chief of the Industrial Accident Division represents the Attorney General as a sitting member on the Civil Defense Claims Board. This involves reviewing and acting upon claims for compensation to unpaid civil volunteers who were injured while in the course of their volunteer duties.

This Division also represents the Industrial Accident Rehabilitation Board. When an insurer refuses to pay for rehabilitative training for an injured employee, this Division presents the case to the Industrial Accident Board on behalf of the Industrial Accident Rehabilitation Board.

During the past fiscal year the attorneys of this Division were called upon numerous times to assist workers in private industry who contacted the Division regarding problems they were having with their compensation claims against private industry and their insurers. Every effort was made to assist these employees in resolving their difficulties or in referring them to appropriate persons or agencies.

TORT DIVISION

The main activities of the division continued unchanged from the previous year; the bulk of the attorneys' time was focused on the defense of tort and civil rights suits brought against the Commonwealth and its employees, though the investigation and preparation of reports for the district court on Petitions for Compensation to Victims of Violent Crime also absorbed significant staff resource.

The overall case load of the division decreased slightly over the year. New cases totalled 252. A total of 174 cases were closed, 57 more than the previous year's total. With this increased number of closings, there was a carry-over of 248 cases in the past two years, a significant reduction from the 455, cases carried over in the previous two year period. However, many of these claims involve potentially large awards against the Commonwealth and the once constant trickle of cases which reached trial is fast becoming a torrent as suits under the Tort Claims Act reach maturity. The increased number of attorneys in the Tort Division, the dissemination of cases throughout the other divisions and the effective utilization of investigators and other support personnel in the Civil Bureau are the fundamental reasons for success in the perennial effort to cope with the ever increasing tort caseload. There remains, however, the crucial problem of the unavailability of funds to settle claims as more cases approach trial. If a viable solution to this problem could be reached, a beneficial effect would be created which would reach all tort claims. When liability cases can be settled prior to trial, there is generally a substantial saving for the Commonwealth.

Some of the more specific cases include several suits against the Commonwealth and individual providers of medical services because of fatal or debilitation reactions to mandated inoculations with DPT vaccine, which is manufactured by the Commonwealth. Claims from reactions to DPT inoculations are mushrooming into a national problem and the federal government may have to intervene since private manufacturers of DPT cannot obtain insurance and have terminated production of the vaccine.

A number of suits involve claims for the wrongful deaths of patients at various mental health facilities alleging a failure to supervise and formulate effective treatment plans for psychiatric patients. Also, an increasing number of claims involving fatal accidents on the state's highways are being pursued under the Tort Claims Act, alleging negligent design or maintenance, rather than under the defect statutes with their limited recoveries. A pivotal case is now before the Appeals Court which may resolve this issue.

The division attorneys obtained mixed results, of course, from cases tried to conclusion during fiscal 1985. Plaintiffs prevailed in nine cases, three for substantial judgments. Verdicts for the Commonwealth were obtained in eighteen cases, as opposed to twelve in fiscal 1984. Eleven cases were settled without trial, while dismissals or summary judgments were obtained in fifty-six cases.

There were 469 new Petitions for Compensation to Victims of Violent Crimes forwarded to the Torts Division for investigation and, if necessary, litigation. This number represents a slight decrease from the previous year's filings. Exactly \$935,302.63 was paid out by the Treasurer during this period on 219 claims for an average of \$4,270.79 per claim. In the course of the year, 416 violent crime compensation cases were closed out by the division, a significant increase in this area.

The total amount of money collected on debts due to state agencies through the Torts Division in fiscal 1985 was \$229,539.42 and 114 claims were processed. Both figures reflect significant increases.

II. CRIMINAL BUREAU

The Criminal Bureau of the Department of the Attorney General is composed of four Divisions: 1) The Trial Division, 2) The Appellate Division, 3) The Criminal Investigation Division, 4) The Division of Employment Security.

Several special units or task forces also operate within the Bureau — the Tax and Insurance Prosecution Task Force, the Government Integrity Unit, the Organized Crime Information Section, the Governor's Auto Theft Strike Force and the Governor's Statewide Drug Task Force, a unit organized to insure an exchange of data among drug law enforcement officials throughout the Commonwealth.

During the 1985 fiscal year, the Bureau continued to prosecute a wide variety of cases developed by its own investigations division, as well as those referred by other government agencies or the offices of the district attorneys. The Bureau concentrated its resources on certain classes of crime including white collar crime, government malfeasance, and the disposal of hazardous waste.

TRIAL DIVISION

The following cases are a sampling of the kinds of criminal litigation in which the Criminal Bureau has been involved in pursuit of its goal — of keeping the Commonwealth safe for all of its residents.

M.B.T.A. — Thirty-four employees of the Massachusetts Bay Transportation Authority were charged with larceny. All of the "T" workers were involved in the surface line revenue collection process and were accused of larceny from three vault rooms and the central money room. The investigation of this matter included the use of sophisticated video surveillance equipment.

All thirty-four employees were convicted and eighteen received substantial prison or House of Corrections sentences.

Hazardous Waste — A major national corporation was convicted of failing to notify the State Department of Environmental Quality Engineering of a spill of contaminated oil and the corporation was fined \$20,000.

The owner of a truck which discharged the contents of a transformer onto routes 213 and 495 resulting in property damage to a number of vehicles and personal injury to motorists, was convicted of illegal storage of hazardous waste and fined \$62,500.

The president of a metal machine shop pleaded guilty to discharging poisonous wastes of a metal plating operation which percolated into the ground water.

The president and two of the employees of another corporation were convicted of transferring possession of hazardous wastes to an unlicensed hauler, illegal transportation, and disposal of hazardous waste.

Welfare Fraud — Three former employees of the Department of Public Welfare were arraigned on charges that they were involved in a scheme to defraud the department by illegally cashing welfare recipients' benefits checks.

Vouchers totalling as much as \$100,000 were stolen by workers at a neighborhood service center and redeemed at a local grocer. Four defendants were arraigned on larceny charges involving the theft of these vouchers.

A defendant who worked for I.B.M. in Cambridge was convicted of collecting welfare at the same time as she received a \$29,000 annual salary.

The co-director of a child care agency contracting with the Department of Social Services was arraigned on charges that she had siphoned state funds from a non-profit corporation to pay personal expenses such as her mortgage, carpeting for her residence, and an expensive automobile.

Tax — During the fiscal year the tax prosecution program initiated 41 new cases involving meals, sales, withholding, income, and special fuel taxes. The total amount of taxes identified in indictments during the year amount to slightly less than \$1,400,000. In half the cases which reached disposition during the fiscal year, a jail term was recommended for the tax violator, and in two cases defendants received House of Correction sentences. All of the cases have been treated as a criminal violation rather than a simple tax collection case. The result of this effort has been an increase in voluntary compliance with the tax laws and a commensurate increase in tax collection by the Department of Revenue.

Auto Theft — A joint investigation by this office and the Governor's Auto Theft Strike Force resulted in the arraignment of seven people on charges alleging their involvement in a stolen luxury car ring.

Consumer Crime — A defendant was charged with soliciting advertising orders from business men for ads to be placed in a local yellow pages when in fact, none of the directories were ever delivered.

Crimes Against Government — A Boston heating oil dealer was charged with larceny after he allegedly picked up 3500 gallons of fuel from a community action program that assists low income residents with their home fuel bills and subsequently delivering only 100 gallons, filing false delivery slips with the agency stating that he had delivered the oil.

A teller in the Registry of Motor Vehicles was convicted of larceny after it was proven that he stole money which should have been sent to the Department of Revenue for sales tax.

Commerical Bribery — Two employees of Boston University and two electrical contractors were charged with commercial bribery when the employees allegedly received kickbacks from vendors in return for favorable treatment in the bidding and award of construction contracts.

Violent Crime — Two defendants were indicted on charges of armed assault in a dwelling and assault and battery with a dangerous weapon when they invaded a home and beat a 76 year old man and his son with a gun and a blackjack. After police responded, one of the defendants held a police officer at gun point before being subdued by other officers. One defendant was found guilty and sentenced to fifteen to twenty-five years at M.C.I., Cedar Junction. The other defendant had not yet been sentenced at the end of the fiscal year.

CRIMINAL INVESTIGATIONS DIVISION

The investigative arm of the Criminal Bureau is the Criminal Investigations Division. The Division is headed by an Assistant Attorney General and is staffed by State Police, Boston Police, Metropolitan District Commission Police and civilian investigators with specialized expertise in white collar crime and tax investigations.

In addition to the investigations conducted by the Department of the Attorney General, the Division engages in cooperative efforts with the District Attorneys, the Inspector General, the United States Attorney as well as state and local police departments. The Division has ongoing and continuing relationships with such state agencies as the Department of Revenue and the Department of Environmental Quality Engineering which assist in the investigation of tax and environmental violators. The Governor's Drug Task Force is also coordinated through the Division at the direction of the Attorney General, and an Assistant Attorney General assigned to the Division acts as counsel to the Governor's Auto Theft Strike Force.

One example of the types of investigations conducted by the division was the investigation and indictment of 16 individuals and 7 corporations in the largest commercial bribery case in the Commonwealth's history. The indictments charging larceny, conspiracy, violation of pollution control laws, and commercial bribery involve the theft of nearly one million gallons of gasoline, oil, and jet fuel from Texaco's terminal in South Boston and Exxon's facility in Everett. The 15 month investigation revealed that nearly \$250,000 in commercial bribes were delivered to oil company executives to facilitate the thefts.

In addition to that investigation the Division made over 50 arrests for welfare fraud, tax violations, illegal hazardous waste disposal, controlled substance violations, and organized and white collar crime activities. These were in addition to the numerous cooperative efforts with other agencies and continuing investigations.

The activities undertaken in fiscal 1985 coupled with the assistance of and countless referrals to other law enforcement agencies demonstrates the unqualified success that a unified command within the Department of the Attorney General can have in coordinating law enforcement for the protection of the citizens of the Commonwealth.

CRIMINAL APPELLATE DIVISION

The number of new cases defended by the Criminal Appellate Division, primarily involving defense of state correctional authorities, rose to two hundred and sixty in fiscal 1985. An additional one hundred and five prisoner suits were referred to the Department of Correction for representation.

Approximately one hundred and thirty inmate suits challenging conditions of incarceration, procedures surrounding disciplinary hearings, and various Department of Corrections regulations were filed in the state trial court. An additional twenty-five cases alleging violation of constitutional rights were filed in the federal district court pursuant to 42 U.S.C. § 1983. Thirty-seven habeas corpus petitions challenging the constitutionality of state criminal convictions were also filed in the federal district court.

On the appellate side, the Division continued to prevail. In two cases argued in the Supreme Court of the United States, the Division sought and obtained reversal of decisions of the Supreme Judicial Court regarding constitutionally required procedures governing prison disciplinary hearings. The Division also successfully opposed five petitions for Writ of Certiorari to the United States Supreme Court.

Twelve cases were argued in the Court of Appeals for the First Circuit including an *en banc* rehearing of a case involving alleged age discrimination in the Massachusetts jury selection system. The Division also intervened in a case in which the First Circuit had held the Massachusetts wiretap statute unconstitutional. After our intervention, the Court on *en banc* rehearing reversed itself.

Six cases were argued in the Supreme Judicial Court and five cases in the Appeals Court of Massachusetts. Three hundred and fifty-four cases are presently pending.

The Division continues to represent the Commonwealth in all cases involving yearly review of inmates' status as sexually dangerous persons committed to the Treatment Center at Bridgewater. This year forty-four such petitions were filed and thirty-five disposed of in three unified hearings in the Superior Court.

The Appellate Division also processes the rendition of fugitives from justice. Demands from both law enforcement officials of the Commonwealth and Governors of other states are examined, and an opinion rendered on the legality of each demand. Two hundred and fifteen such opinions were rendered in fiscal 1985.

EMPLOYMENT SECURITY DIVISION

The purpose and intent of the Attorney General's Employment Security Division is to provide the Director with whatever legal assistance and representation is necessary to enforce the Employment Security Law, otherwise known as G.L.C. 151A.

The Employment Security Law is highly complex and its language technical as well as legal. Under the Law, employers with one or more employees become subject to c. 151A and are expected to comply with its provisions. The efficient and economical administration of the employment security program in Massachusetts depends in large measure on the cooperation and compliance of well-informed employers throughout the Commonwealth, for it is they who pay the entire costs of its operations. The employment security program also insures individuals who become unemployed through no fault of their own a weekly benefit check if they meet the requirements of the law on a claim filed with the Division of Employment Security.

Whenever an employer fails to comply with the Employment Security Law and does not file the necessary reports required by law or pay the taxes owed by law to the Division of Employment Security, civil proceedings are initiated by the Division's Legal Service and judgments are obtained from the court covering damages and court costs. If the judgments are not satisfied, the matters are referred to the Attorney General's Criminal Division for criminal prosecution.

The assistant attorneys general make every effort to fully inform the employers of their rights and obligations under the law. As a result, a certain percentage of the tax matters are settled immediately thereby avoiding the expense of criminal prosecutions, creating a savings to the Commonwealth and its taxpayers.

During the fiscal year ending June 30, 1985, 1881 employer tax cases were handled by this Division. As of July 1, 1984 there were 1768 cases on hand, 113 additional cases were received during the fiscal year, and 427 cases were closed leaving a balance of 1454 employer tax cases on hand as of June 30, 1985.

Applications for criminal complaints were brought in the Boston Municipal Court, charging 313 individuals with 2866 counts of nonpayment of taxes, totaling \$4,744,358.37 in monies owed the Commonwealth's agency by the delinquent employers. The Boston Municipal Court issued complaints against 233 individuals for 1865 counts of nonpayment of taxes totaling \$3,450,147.31. In addition, during the fiscal year ending June 30, 1985, the Division obtained 25 convictions on employer tax cases and the court found facts sufficient to warrant a finding of guilty in an additional 65 cases. This represents an approximately 180% and 260% increase respectively over the fiscal year ended June 30, 1984.

Two million, two hundred and eight thousand, one hundred and twenty dollars and forty-two cents (\$2,208,120.42) in overdue taxes were collected during the fiscal year ending June 30, 1985 and deposited to the Massachusetts Unemployment Compensation Fund.

Whenever individuals are found to be collecting unemployment benefits fraudulently on claims they have filed while gainfully employed and earning wages, the fraudulent matters are referred to the Employment Security Division for prosecution of the criminal offenses. Criminal complaints are brought only when the facts surrounding the offense have been investigated, reviewed with the individual involved and the criminal intent substantiated by the evidence obtained. Criminal action is brought in the court holding jurisdiction over the offense for larceny under G.L. c. 266, § 30, and/or under G.L. c. 151A, § 47, of the monies stolen from the Commonwealth's agency.

During the fiscal year ending June 30, 1985, 1284 fraudulent claims for unemployment benefits were handled by this Division. As of July 1, 1984, 1163 cases were on hand, 131 additional cases were received during the fiscal year, and 249 cases were closed leaving a balance of 1035 fraudulent cases on hand June 30, 1985.

Applications for criminal complaints were brought in various courts of the Commonwealth holding jurisdiction over the offenses involved, charging 167 individuals with 2951 counts of larceny totaling \$339,335 in unemployment insurance benefits fraudulently collected from the Commonwealth's agency. The courts issued complaints against 108 individuals for 1752 counts of larceny totaling \$211,905. In addition, during the fiscal year ending June 30, 1985, this Division obtained 26 convictions on larceny cases and the court found facts sufficient to warrant a finding of guilt in an additional 34 cases. This represents an approximate 175% and 485% increase respectively over the fiscal year ended June 30, 1984.

The amount of \$274,948.73 was collected from the fraudulent claimants during the fiscal year ending June 30, 1985, and has been restored to the Unemployment Insurance Fund of the Massachusetts Division of Employment Security.

Five of the criminal actions involving CETA fraud brought in years past remain, pending court disposition. Default warrants have been issued and are outstanding after exhaustive searches have been made to locate the defendants. As a result of earlier prosecutions made on the CETA claims, the caseload during the fiscal year ending June 30, 1985, remained the same minimal cases presently pending court disposition.

During the fiscal year ending June 30, 1985, there were 21 actions brought against or by the Director of the Massachusetts Division of Employment Security. There were 38 cases in the Supreme Judicial Court of the Commonwealth that were handled by the Employment Security Division during the fiscal year. Twenty-four of which were argued before and decided by the Court.

III. MEDICAID FRAUD CONTROL UNIT

At the conclusion of fiscal year 1985, Attorney General Francis X. Bellotti issued *The Attorney General's Medicaid Fraud Control Unit: Protecting the Public From White Collar Crime and Patient Abuse in the Health Care System*. That report detailed the unit's activities since its inception in August of 1978. Those activities demonstrate Attorney General Bellotti's commitment to the prosecution of white collar crime, to the improvement of the Medicaid system, and to the protection of those of our citizens — particularly the elderly — who are unable to protect themselves.

Attorney General Bellotti established the Medicaid Fraud Control Unit in 1978, and has maintained a highly effective unit ever since that time. Rated as one of the most effective state units in the nation, the Massachusetts Medicaid Fraud Control Unit has investigated more than a thousand cases, covering the full range of provider groups. The Unit has criminally convicted or secured admissions of guilt from 197 persons — 185 individuals or corporations who defrauded the Medicaid system or committed other financial crimes impacting on medical costs, and twelve persons who committed patient abuse.

In addition to securing these criminal convictions, the Unit has identified more than \$8 million in money owed to the Commonwealth or to nursing home patients. The Unit has collected this money directly or through the courts, or referred the amounts to the Department of Public Welfare, or Revenue, or the Rate Setting Commission, for collection or for reduction in future rates. Providers have paid more than \$600,000 in fines, and damages.

In the four years since the Patient Abuse Law has been in effect, the Attorney General's staff has received more than 400 allegations of possible abuse, neglect or mistreatment, investigated more than 200 of the complaints, and prosecuted 14 cases criminally. In addition, in a number of neglect cases, the Attorney General's Public Protection Bureau, working with the Department of Public Health, has obtained emergency court orders such as injunctions or receiverships to protect patients.

The Unit's efforts continued in fiscal year 1985. In many of the abuse cases investigated, no witnesses to the cause of the injury can be found. Often the victim, who is frail, very old, and senile, is unable to testify. Unfortunately, therefore, most cases cannot be the subject of court proceedings.

In the 14 cases prosecuted criminally, the Attorney General has brought criminal charges of patient abuse and mistreatment, as well as assault and battery, indecent assault and battery, and robbery. The courts have found that criminal patient abuse was committed in 11 of the 14 prosecutions brought to date under the abuse law, entering guilty findings in eight cases, and finding facts sufficient to warrant guilty findings and imposing probationary periods with conditions in the three other cases. In one other case brought before the patient abuse law was in effect, the courts convicted a nursing home orderly of assault and battery. The twelve persons found

by the courts to have committed criminal patient abuse include one licensed practical nurse, ten nurse's aides or orderlies, and a janitor.

Because of the complex and specialized nature of financial reimbursement fraud by health care providers, the criminal investigations conducted by the Medicaid Fraud Control Unit require specialized knowledge and take several months to be completed. For this reason the Attorney General has sought, and the Chief Justice of the Superior Court has convened, a series of nine Special Grand Juries for the specific purpose of investigating Medicaid Fraud, patient abuse, and related crimes.

Each Special Grand Jury has met for six months, plus any additional time required to complete an investigation. The first Special Grand Jury was authorized in 1978. The ninth Special Grand Jury is currently in session. In total, the Special Grand Juries have been in session for more than 4½ years, conducting the majority of investigations of health care provider fraud in the Commonwealth and issuing most of the indictments resulting from the Unit's efforts.

By bringing three cases of white collar crime in the Medicaid program to the attention of the Massachusetts judiciary, Attorney General Bellotti has had a significant impact upon the sentencing of white collar criminals in Massachusetts. The former Chief Justice of the Trial Courts, Judge Lynch, has noted that as a result of Medicaid fraud prosecutions, he and a number of his judicial colleagues have imposed prison sentences upon "first offenders" — convicted health care providers with no previous criminal records.

In the majority of the 197 prosecutions, the courts entered guilty findings and criminal convictions. In a smaller number of cases, the courts found sufficient facts, but continued the cases for periods of time, without criminal findings, but with probationary conditions. Normally, the courts required the defendants whose cases were continued to serve probationary periods and to pay restitution and costs.

In all, the courts convicted 147 persons of crimes (125 individuals and 22 corporations) and continued 50 cases without findings (38 individuals, 12 corporations).

Providers found guilty of fraud or related crimes have paid a range of criminal penalties, from a sentence of three to five years in state prison to shorter terms of probation and community service work. Twenty persons have been sentenced to prison or jail. In addition, providers convicted of Medicaid fraud have been suspended from participating in the Medicaid program.

In investigating provider groups, the Unit has found certain common patterns of fraud. Individual providers have most frequently been found to be billing for services not rendered or billing for more expensive services than they actually provided. For instance, dentists have billed Medicaid for filling teeth they did not fill or dentures they did not provide, psychologists have billed for tests they did not perform, and doctors have billed for examining family members they did not examine. Psychiatrists have spent 15 minutes with psychotherapy patients and billed Medicaid for 50 minutes, taxi companies have billed for driving more miles or carrying more passengers than they actually did, and an equipment provider has billed for motorized wheelchairs and provided ordinary chairs to recipients. Such overcharges can inflate the cost of the Medicaid program considerably, and because Medicaid recipients do not ordinarily see the bills for the services they receive, these false billing patterns can be difficult to detect and prove.

In institutions such as nursing homes, a common fraud pattern seen is the claiming of Medicaid rate reimbursement for goods or services not actually purchased,

or, if purchased, not used for the nursing home residents — for instance, billing for work not done and keeping false invoices, billing for remodeling done at an owner's home, or billing for salaries of employees who did not actually work at the nursing home. A second common pattern seen is the stealing of residents' personal spending money.

In addition to the detection of fraud patterns, the recovery of money, and the conviction of white collar criminals for fraud and patient abuse, the Medicaid Fraud Control Unit has worked to secure improved Medicaid laws, regulations, and program administration. The Medicaid False Claims Act and the Patient Abuse Reporting Act were adopted in 1980, and the Nursing Home Receivership Act in 1981. The unit has worked for clarified provider billing requirements, improved computer screening for fraud, and enforcement of the rule that providers may not charge more for Medicaid services than they charge to private patients. The unit has contributed to stronger law and policy at the federal level. It is frequently invited to train other states in Medicaid fraud and patient abuse investigations and prosecutions.

All of these results achieved by the Medicaid Fraud Control Unit demonstrate Attorney General Bellotti's active concern with controlling white collar crime, with improving the Medicaid system, and with protecting Medicaid recipients — especially the frail elderly — from criminal fraud, abuse and neglect.

IV. EXECUTIVE BUREAU

ELECTIONS DIVISION

A. Campaign and Political Finance

One of the primary functions of the Elections Division is to enforce compliance with the state's campaign finance law by candidates and political committees. G.L. c. 55. In fiscal year 1985 the Office of Campaign and Political Finance reported 117 individual candidates or treasurers who had failed to file the required financial disclosure reports. Through administrative action taken by the Division, compliance was obtained in 60 instances. The Division brought civil suit against 57 individuals.

B. Lobbyists

The Election Division also enforces the state statute that requires legislative agents and their employers to file financial disclosure statements with the office of the State Secretary. G.L. c.3, §§ 43, 44, 47. In fiscal year 1985, 12 violations of these sections were reported by the Secretary. As a result of administrative action taken by the Elections Division, the required statements were filed by seven of these individuals.

C. Jury Commissioner

The Division also assisted the State Jury Commissioner in his efforts to have cities and towns submit lists of inhabitants in a timely manner so that the new jury selection system of "one day-one trial" could be efficiently implemented. Full compliance with the law was obtained without the need to resort to actual litigation.

D. *Litigation*

During fiscal year 1985 the Elections Division was involved in several lawsuits concerning the preparation and layout of the state primary and election ballots. The Division successfully defended decisions of the State Ballot Law Commission concerning whether candidates had filed the required number of certified signatures. The state statute requiring that independent candidates not have been enrolled in any political party for the ninety days prior to filing nomination papers was successfully defended. The Division was also involved in cases concerning the early filing deadline for independent candidates and a lawsuit concerning the right of an individual under a limited guardianship to be able to register to vote.

The Division successfully defended the District Attorney of Bristol County in a Federal District Court jury trial against allegations that secretaries employed by his office were fired for failure to perform political work.

VETERANS DIVISION

The Veterans Division serves primarily as an informational agency referring private citizens to appropriate federal and state offices for assistance in veterans matters. The Division serves as litigation counsel to the Commissioner of Veterans Services and the Veterans Affairs Division of the Department of the Treasury.

V. PUBLIC PROTECTION BUREAU

The Public Protection Bureau is the largest of the Bureaus in the Attorney General's Office. Its work is carried out by seven Divisions: Antitrust, Civil Rights, Consumer Protection, Environmental Protection, Insurance, Utilities and Public Charities, as well as a Complaint Section, an Investigative Section, and a Local Consumer Aid Fund coordinator. The Bureau brings affirmative litigation on behalf of the public, and represents the public in insurance and utility rate hearings. The Bureau also represents several state agencies and boards whose duties involve actions in the public interest. These include the Division of Environmental Quality Engineering, the Outdoor Advertising Board, the Pesticide Control Board, and the Architectural Barriers Board.

The work of the Bureau includes litigation support activities and training programs for staff attorneys. The litigation support work includes review of all new complaints prior to filing, discussion and approval of settlements, and review of draft briefs due in appellate courts. In addition, Bureau attorneys conduct moot courts prior to each attorney's argument in the Appeals Court, Supreme Judicial Court, or First Circuit Court of Appeals. During fiscal year 1985, the Bureau ran two major training programs to improve the skills of the staff. In the late summer of 1984, the Bureau, together with the Advocacy Training Institute and the New England School of Law conducted a negotiation program in which each participant negotiated various mock situations. Both attorneys and non-attorneys participated and each was videotaped and then evaluated by experienced attorneys from within and outside the Department. In the winter months, a series of lectures were conducted for the non-legal

staff by attorneys from various divisions. These focused on such topics as M.G.L. Chapter 93A, the workings of the court system, and concepts of bankruptcy.

The Bureau participates in the litigation of cases handled in the various Divisions as well as conducting selected litigation carried out at the Bureau level. During the fiscal year 1985, Bureau attorneys assisted the Consumer Protection Division in the Plymouth Memorial Park litigation and various odometer spinning cases, the Environmental Protection Division in the DeCotis litigation and in the Seabrook nuclear power station licensing and the Antitrust Division in the CRINC and Pepsi-Metro litigation.

The Bureau also committed additional resources and took new steps to pursue the Commonwealth's claims in the Johns-Manville bankruptcy. On January 30, 1985, after months of collecting data on the amount of asbestos in state-owned buildings, the Bureau filed a nearly \$122 million claim on behalf of the Commonwealth for past and future expenses associated with asbestos removal. The Bureau had previously coordinated the effort by Attorneys General nationwide to extend the final date for filing such claims from October 31, 1984 to January 31, 1985. At the same time, the Bureau amended the claim they first made in 1984 on behalf of the Commonwealth and 42 cities and towns for defective water pipe from \$7.5 million to over \$71 million.

The Bureau also coordinates litigation and legislative activity across Bureau lines. For example, the Bureau worked closely with the Criminal Bureau in the initiation of criminal prosecution of several contempt proceedings. These included criminal contempt proceedings against defendants alleged to have violated civil injunctions obtained by the Civil Rights Division and a criminal contempt charged against an individual for fund-raising activity in violation of civil restrictions obtained by the Public Charities Division. The Bureau also worked closely with the Civil Bureau in preparing a comprehensive set of amendments to the Victims Compensation Act which were close to enactment as the fiscal year ended.

Finally, the Bureau represents the Attorney General in several important public activities. In January, 1984, shortly after the enactment of M.G.L. Chapter 258B, "The Victim's Bill of Rights," Attorney General Bellotti designated the Chief of the Public Protection Bureau, as his designee to chair the newly created Victim/Witness Assistance Board. As a result, the first distribution of funds was made to all eleven District Attorneys. Over 40 new victim advocates were hired with the approximately \$72,000 given to each county.

Later in fiscal year 1985, the Victim/Witness Assistance Board began the process of reviewing grants for fiscal year 1986, and after due deliberation chose a formula to distribute over two million dollars which was expected to accumulate in the Victim and Witness Assistance Fund. This formula takes account of such factors as pending cases, population, open criminal sessions, and crime index.

The Bureau Chief also continued to represent the Attorney General at meetings of the Governor's Anti-Crime Council and participated on the Sentencing and Corrections Subcommittee in a series of presentations reflecting various roles of the Department in the criminal justice system.

A substantive development of particular significance for the Bureau is the growth of alternative dispute resolution mechanisms for consumer matters. In developing alternatives to consumer litigation, the Bureau helped establish face-to-face mediation programs in additional local consumer groups bringing total number of face-to-face programs to six.

The Bureau also continued the work on two important task forces during fiscal year 1985 — one on meeting the legal needs of the elderly and the second on health care. With respect to the elderly, plans continued for a major conference to be held in fiscal year 1985 focusing on how the staff of the entire Department could better help elderly advocates. The health care working group, representing the Insurance, Civil Rights, and Public Charities Divisions, devoted most of their energies to legislation designed to protect medicare recipients from discrimination as Massachusetts moves to the federally mandated DRGs (Diagnostically Related Groups).

COMPLAINTS SECTION

During fiscal year 1985, the Consumer Protection Division's Complaint Section opened 6,519 cases, closed 3,633 cases and assigned 3,482 cases to Complaint Section personnel.

The section recovered for consumers \$371,393.59 in refunds, savings and the value of goods or services they would not have received but for the intervention of the Department.

In addition 3,952 written complaints were referred to other Massachusetts agencies, agencies of other states, federal agencies, to local consumer groups, or sent back to consumers for lack of jurisdiction or other miscellaneous reasons.

The telephone information staff received a total of 119,777 calls during the past year. As a result of these calls, 15,312 citizens were sent Complaint/Inquiry Forms, 18,686 were given information, and 85,799 were referred to local consumer groups or other state or federal agencies.

The staff also received 262 calls concerning civil rights issues. As a result of these calls, 142 citizens were sent Complaint/Inquiry Forms, and 120 citizens were given information relating to civil rights inquiries.

The section monitored the individual consumer complaints of two major bankruptcy cases in which the Consumer Protection Division intervened (Puritan Furniture and Tech Hi-Fi). This involved the handling of consumer calls, correspondence, documentation and notification of almost 3,000 consumers who filed complaints.

The section continued to send out arbitration kits to consumers who were affected by the FTC/GM Agreement. As of June 30, 1985, 3,412 arbitration kits were sent to consumers.

INVESTIGATIVE SECTION

In fiscal year 1985 the Investigative Section continued to upgrade the level of services provided through the hiring of an additional secretary and the recruitment of experienced investigators to fill staff vacancies. Reconstruction of existing office space affording investigators more privacy and the installation of a word processing terminal to expedite written reports added to the professionalism of the unit.

Staff training was emphasized again this year with lectures by Department personnel on the structure of the court system, Chapter 93A and illustrations of the various stages of the litigation process. Investigators also participated in a Bureau wide negotiation training seminar and attended presentations in the areas of banking,

insurance, cable television and bankruptcy. A three day seminar presented by the Institute of Governmental Services sharpened investigators' writing skills and helped standardize report writing within the unit.

Investigators worked on cases in the following subject areas: home repair schemes (*Commonwealth v. Gordon Poulos*, *Commonwealth v. DeCoste*, *Commonwealth v. Thomas C. Sweeney, et al*); condominium conversion problems (*Commonwealth v. Lewis J. Busconi d/b/a Shadowbrook*); landlord-tenant disputes (*Commonwealth v. Eden Roc, Tucker Constructions, et al*); bait and switch tactics (*Commonwealth v. Warehouse Pools, Inc./Allied Pool Distributors, Inc.*); deceptive practices by mortgage lenders (*Commonwealth v. Cabot Mortgage*); health spas closures (*Commonwealth v. Woman's World Health Spas of America, Inc.*); travel company frauds (*Commonwealth v. Michaud Tours*); and misrepresentations by professional career counselors (*Commonwealth v. Ranbar Associates, Inc.*). Issues facing elderly consumers were specifically investigated in *Commonwealth v. Hazel and Irvin Whitlow* and *Commonwealth v. Cranberry Village, Inc.*

The Section expanded its effort to combat odometer tampering through coordinated efforts with the Registry of Motor Vehicles, the Northeast Region Odometer Task Force, the National Highway Safety Authority and the F.B.I. A joint project undertaken with the Registry of Motor Vehicles resulted in referrals of information to this unit involving over 750 "spun" odometers by year's end. In each instance owners of these vehicles were informed of their right to return the auto to the seller based on violations of the Commonwealth's implied warranty laws.

As a result of this project investigators discovered over 200 spinbacks by one dealership resulting in fines and restitution to consumers of \$120,000. Another major case involving five defendants resulting from this project was *Commonwealth v. Gerald P. Malloy, et al* and *Commonwealth v. Lagoon Motors, et al* involving at least 38 odometer alterations and payment of over \$25,000 in civil penalties.

During the past fiscal year several investigations of alleged violations of civil rights were conducted resulting in successful litigation. Several other civil rights cases involved juvenile defendants.

In *Commonwealth v. Earlene Montgomery, et al*, two investigators conducted numerous surveillances and interviews over an extended period of time to document that the defendants were providing unlicensed child care in substandard facilities in violation of Office for Children regulations.

Along with the Division of Public Charities, investigators continued to monitor Las Vegas nights and investigate suppliers of gambling equipment throughout the state. Section personnel also conducted interviews, prepared affidavits and reviewed financial records in *Bellotti v. United Funding, et al*, *Commonwealth v. Charles Manfredi*, *Commonwealth v. M&M Publishing Co., et al*, *Bellotti v. Events International, Inc., et al* and *Bellotti v. Dumaine d/b/a Project H.E.L.P.* cases.

Working closely with attorneys from the Antitrust Division, investigators continued to monitor and respond to allegations that various retailers and redemption centers were acting in violation of the state's bottle redemption law. Emphasis was also placed on the identification and investigation of businesses engaging in resale price maintenance, price fixing and other unfair methods of competition. This effort has resulted in the development of a number of pending cases currently being litigated by attorneys in the division.

The Investigative Section was called upon by the Environmental Protection Division in a number of cases this fiscal year including *Commonwealth v. Advance Coatings Company*, *Commonwealth v. AVX et al*, *Metropolitan District Commission v. Alpha Industries, Inc.* and *Commonwealth v. Edward J. Lyons, Jr.* With respect to these cases investigators were requested to conduct extensive corporate background and property history checks on individuals or companies responsible for illegal landfills or hazardous waste dumps. Financial investigators performed asset checks and reviewed financial statements to determine if a party claiming an inability to pay for clean up costs could, in fact, afford to correct the problem.

Throughout the year investigators assisted in the bureau wide effort involving the Johns-Manville Corporation matter and on occasion were called upon to assist the Insurance and Utilities Divisions.

Additionally, investigative resources were sought by other bureaus within the Department. Extensive property research was conducted in conjunction with a hazardous waste case being pursued by the Criminal Bureau. Investigators assisted the Government Bureau in matters before the Boards of Registration.

LOCAL CONSUMER GROUP AND DISPUTE RESOLUTION ACTIVITIES

In fiscal year 1985, Attorney General Bellotti distributed \$459,432 from the Local Consumer Aid Fund for consumer complaint resolution services in 26 local consumer organizations. The funds provide consumer complaint resolution on a local level through the efforts of consumer advocates and mediators located in various sponsoring agencies. City and town halls, legal services offices, CAP agencies, one district attorney's office, and volunteer consumer organizations throughout the Commonwealth receive the grants and provide consumer complaint resolution services.

Funds totalling \$391,922 were distributed in 1985 and were used to support consumer self-help and telephone mediation by consumer advocates in 26 locations through the state. The remaining \$67,510 was awarded to six of these groups to fund more intensive face-to-face mediation services which can be used when telephone mediation is unsuccessful.

The 26 local consumer groups received 14,000 written complaints from consumers in the past year. They assisted an additional 50,000 to 60,000 consumers by providing self-help advice to the consumers over the telephone. In all of the 14,000 written complaints some contact with the business was initiated by the consumer group, and attempts to negotiate settlements were often effective. On average 75% of the 14,000 written complaints are resolved, with the remaining 25% of the cases being referred to the legal system for further action.

In addition to providing funding for the local consumer groups the Attorney General's office conducted ten in-service training meetings concerning on-going developments in consumer law, and three additional training programs for new staff in the local groups were conducted by the Attorney General's Public Protection Bureau personnel. The groups continue to submit information on each consumer complaint for entry into the central consumer protection computer. In this way, the local consumer groups continue to help document statewide and local patterns of consumer problems which can be reviewed by consumer protection attorneys for possible legal action.

ANTITRUST DIVISION

INTRODUCTION

During fiscal 1985, the Antitrust Division continued its vigorous enforcement of the state and federal antitrust laws. The Division continues to place priority upon pursuing those violations which directly impact upon the state, its municipalities, schools and consumers, namely bid rigging, price fixing and resale price maintenance. The Division continued its leadership role in oil overcharge litigation involving all 50 states and over \$2 billion.

In the Matter of Warner Amex Cable Communications of Lynn, Inc.

In February 1985, the Commonwealth filed an Assurance of Discontinuance, from Warner Amex Cable Communications of Lynn, Inc., in the Suffolk Superior Court. Warner Amex was accused of unlawfully acting to prevent dealers of cable television accessories from selling remote control transmitters, compatible with the converters distributed by Warner Amex in Lynn and Swampscott, to cable television subscribers in those cities. Warner Amex was renting the remote control units to its customers for \$3.95 per month and the units had been available for sale for about \$20.00 prior to the alleged antitrust violations.

Under the terms of the settlement, Warner Amex agreed to compensate all Lynn and Swampscott cable television subscribers, who had been paying the monthly rental fee for the remote control device (and had potentially been prevented from purchasing the device), by allowing them three free months of remote service. Warner Amex also agreed not to enter into, or engage in any unlawful agreement concerning the distribution of remote control devices to consumers, and paid the Attorney General \$40,000 as reimbursement for the costs of the investigation.

General Instrument Corporation

The Attorney General also received a letter of assurance from the General Instrument Corporation, whose Jerrold Division manufactures cable television accessories, including converters and handheld remote control transmitters. In the letter, General Instrument agreed not to enter into or engage in any agreement to restrict or limit the distribution of the remote control transmitters in Massachusetts. It further agreed to fill in good faith all orders for remote control transmitters placed by its customers in Massachusetts.

Commonwealth of Massachusetts v. Ashland-Warren, Inc., (ERG Investments, Inc., et al, and Commonwealth of Massachusetts v. Ashland-Warren, Inc. et al (Simeone Corporation)

These two actions, alleging that the defendant companies had engaged in bid rigging and price fixing in connection with the sale of bituminous concrete and the paving of roads and state highways in eastern Massachusetts, were filed in February of 1982. The Attorney General seeks damages under the federal antitrust laws, on behalf of the Commonwealth and cities and towns in Massachusetts, for treble the amount that those entities were overcharged for bituminous concrete during the years of the alleged conspiracy. The Commonwealth has already reached settlement with five

of the original defendants in the suit, George Brox, Inc., Keating Brothers, Inc., Ashland-Warren, Inc., Tilcon Warren, Inc., and Old Colony Crushed Stone and Construction Co., Inc. The Antitrust Division continues to pursue its claims against the remaining six defendants, Trimount Bituminous Products, Co., Essex Bituminous Corporation, ERG Investments, Inc., Jowalco, Inc., James Walsh, Inc. and the Simeone Corporation.

Oil Overcharge Litigation

In April 1983, the Division was granted leave to intervene in the Stripper Well Exemption Litigation in the United States District Court for the District of Kansas. This suit seeks distribution to the Commonwealth of approximately \$40 million dollars.

The Stripper Well Exemption Litigation involves the validity of certain regulations issued by the United States Department of Energy during the period of price controls concerning the qualification of oil producing properties for certification as producing new oil. The oil company plaintiffs challenging the regulations were permitted under a court order to charge the higher "new" oil price and pay the difference between the new oil and old oil price into the court's escrow during the period of 1978 through 1981. The regulations were ultimately upheld in 1983 and the issue pending before the District Court is how the money in escrow should be distributed. As of January 1, 1984, the escrow account, including interest, contained in excess of one billion dollars.

The District Court referred the question of identifying who was injured by the overcharges to the Office of Hearings and Appeals (OHA) of the Department of Energy. During fiscal 1985 OHA held 20 days of hearings to determine who was injured by the overcharges. The Antitrust Division took a leadership role on behalf of 43 states and 3 jurisdictions in this matter during fiscal 1985. A division attorney acted as one of the two lead counsel for the States at these hearings and represented the States at oral argument in Kansas City in November, 1984.

OHA issued its decision in June, 1985. The decision was a major victory for the States and jurisdictions. OHA found that the refining industry had at most been injured to the extent of no more than 8% of the total amount of the overcharges. At the close of fiscal year 1985, the matter was still pending before the District Court and comments on the report by OHA were to be filed.

U.S.A v. Exxon Corporation

This action involves the sale of crude oil at the Hawkins Field location in Texas during the 1970s. The District Court in 1983 found that Exxon had improperly certified oil produced at that property as new oil, not subject to price controls, and ordered that the entire amount of the excess charges be distributed to the States and jurisdictions on a pro rata basis for use in the various energy related programs. Exxon had appealed this decision and the Antitrust Division intervened and assisted in the writing of a brief submitted to the Temporary Emergency Court of Appeals on behalf of 42 States arguing in favor of an affirmance of the District Court's decision. In June, 1985 the Temporary Emergency Court of Appeals affirmed this decision. Exxon has appealed this decision to the United States Supreme Court.

Massachusetts' share of the escrow fund, before distribution to the States, is approximately \$70 million dollars.

Commonwealth v. Pepsi-Cola Metropolitan Bottling Co., Inc., No. 62882 (Suffolk Sup. Ct., filed July 15, 1983)

The Commonwealth's Bottle Deposit Law authorizes the Attorney General to enforce its provisions and during fiscal 1985, that responsibility was carried out by the Antitrust Division. The complaint against Pepsi-Cola alleges that the defendant soft drink distributor unlawfully refused to accept empty beverage containers collected by several Massachusetts redemption centers. The complaint seeks permanent injunctive relief and civil penalties. A preliminary injunction was entered in August 1983 restraining the defendant from refusing to accept containers from redemption centers. In February 1984, the Superior Court ruled in the Commonwealth's favor on the sole legal issue of the case: whether a distributor may refuse to accept containers from redemption centers which obtain cans and bottles from retailers as well as consumers. That ruling was appealed by the defendant to the Appeals Court during fiscal year 1985, which in February 1985 remanded the case to the trial court for specific findings of fact and conclusions of law. The case was ordered on the advanced section of the jury-waived list in Suffolk Superior Court and the parties await its assignment to a trial judge.

Commonwealth v. Mass. CRInc., et al., No. 60280 (Suffolk Sup. Ct., filed March 7, 1983)

During fiscal year 1985, the largest case ever brought under the Massachusetts Antitrust Act was settled with the entry of a Final Judgment By Consent and the payment of \$100,000 to the Antitrust Enforcement Fund. The action was brought against thirteen beer wholesalers and their wholly-owned container collection service and the complaint alleged that the defendants engaged in price fixing, boycotting, and monopolization, as well as violating the Massachusetts Consumer Protection Act and the Bottle Deposit Law. The consent decree, which has a duration of five years, requires Mass. CRInc. to deal with all redemption centers and third party collection agents. It also prohibits CRInc. from imposing a commingling fee or requiring that dealers, redemption centers, or third party collection agents employ CRInc.'s bag-in-box system. Finally, retailers cannot be required to use CRInc.'s collection services and they are free to utilize their service of choice.

CIVIL RIGHTS AND LIBERTIES DIVISION

A. INTRODUCTION

A nearly five-fold increase in the number of an injunctive relief filed under the state Civil Rights Act highlighted the Division's work in fiscal year 1985. The increase reflected the on-going training and outreach efforts by the Division; almost two-thirds of the cases arose in cities and towns outside of Boston, and almost half involved Asian American victims.

The Division continued its work in a variety of other case areas which are described below. To enable it to investigate and bring major cases involving patterns and practices of discrimination, the Division sought legislative authorization for issuing civil investigative demands.

B. MAJOR CASE AREAS

1. *Civil Rights Act Enforcement*

The Division filed fourteen actions for injunctive relief in fiscal year 1985, including the first case, *Commonwealth v. Tilton, et al.*, filed entirely for the protection of witnesses who had testified in an earlier civil rights case. Most of the cases, however, involved issues of equal access, protecting the rights of people to live in their homes, walk down the street, and go to school or work, without interference because of their race, color, or national origin.

Several such cases were referred to the Division by the Community Disorders Unit of the Boston Police. In *Commonwealth v. R.G.*, the Attorney General charged that a juvenile had committed repeated attacks on people of Vietnamese origin as they walked down the street. In *Commonwealth v. Mancuso, et al.*, the Attorney General alleged that eight defendants, both juvenile and adult, had attacked Vietnamese residents of South Boston, beating one, and smashing the doors and windows of their homes. Vandalism, including the writing of ethnic slurs, to a Chinese restaurant and the cars of its employees, led to the filing of *Commonwealth v. Tierney*. In *Commonwealth v. Riley*, the defendant was charged with threatening a Black and a Hispanic child in a predominantly white housing project. In *Commonwealth v. Gardner*, the defendant was charged with assaulting a Black woman in a place of public accommodation. Injunctions were obtained in each of these cases.

In the first civil rights action filed in Worcester, *Commonwealth v. Johnson*, the Attorney General obtained an injunction to protect Vietnamese American workers at the Madison Wire plant. The complaint alleged that the defendant had attacked one Vietnamese worker and had chased and threatened others.

Two actions were filed to protect the rights of people of Cambodian origin living in Revere, *Commonwealth v. A Juvenile* and *Commonwealth v. Stephens, et al.* Interference with the rights of Cambodian Americans living in Lowell was alleged in *Commonwealth v. Dube, et al.* Injunctions were issued in all three cases.

Injunctions were also obtained in several cases brought in communities other than Boston to protect the right of Black or interracial families to live peacefully in their homes. These included *Commonwealth v. Doe, et al.*, in Somerville; *Commonwealth v. Mannett, et al.*, in Brockton; *Commonwealth v. Ogara*, in Springfield; and *Commonwealth v. Simonetti*, in Lowell.

Injunctions were obtained against a total of fifty-seven defendants in fiscal year 1985. Most complied with the orders, however, a few actions for contempt were filed. Two actions for civil contempt were resolved by the entry of judgments acknowledging violations and providing for the imposition of specific sanctions for any future violations. Complaints for criminal contempt were brought against two juvenile defendants for violations of orders issued in fiscal year 1985. In one of these cases, the defendant was committed to DYS for 90 days, with 10 days to be served in a DYS detention facility, the balance suspended until the defendant's 18th birthday, with

strict terms of probation. The other case was pending at the end of the year. Two adults were charged with criminal contempt for violation of an order issued in fiscal year 1984; their cases were also pending at the end of the year.

In *Commonwealth v. Grover*, a single justice of the Appeals Court rejected a challenge to a Civil Rights Act injunction based on vagueness and overbreadth. No further appellate review was sought.

The Division engaged in a number of activities other than litigation to increase the effectiveness of the Civil Rights Act. To encourage reporting of violations by groups which face special linguistic and cultural barriers, the Division issued a series of pamphlets on "Your Civil Rights Under Massachusetts Law" in bilingual formats for the Vietnamese, Cambodian, and Laotian community.

Increasing police awareness of the Civil Rights Act is also essential, and is steadily improving. In fiscal year 1985, the Massachusetts Association of Police Chiefs adopted the model policy on civil rights cases which had been proposed last year. Training programs sponsored by the Criminal Justice Training Council were held several times during the year, at different locations. In addition, the Division participated in special programs for police in Worcester, Medford, University of Massachusetts-Amherst, Norfolk County, and the Metropolitan Police.

2. Health Care

The unavailability of specialized medical services for Medicaid patients was the major health care issue addressed by the Division in fiscal year 1985. The Division approached it through enforcement of the community service obligation of the federal Hill-Burton Act, which requires that hospitals which received Hill-Burton funds insure that all medical services provided by the facility are available to Medicaid patients, even if staff physicians do not participate in the Medicaid program.

The Division reached an agreement with Cape Cod Hospital to insure that gynecological services were available to Medicaid patients. The hospital agreed to continue a referral system among its staff physicians until it expanded the staff at obstetrical clinic so it could provide gynecologic services as well. Beverly Hospital agreed to require physicians in specialities where there were no Medicaid providers to participate in a referral system which it established. The affected specialities included orthopedics, general surgery and dermatology. A similar arrangement was worked out with Salem Hospital, where the referrals involved orthopedics, dermatology, and plastic surgery.

The Division also resolved complaints involving alleged refusals to provide emergency care and discriminatory treatment of Medicaid patients.

3. Housing

The Division's work in the housing area in fiscal year 1985 was focused on the problem of access to decent, affordable housing. Litigation continued in the case of *Bellotti v. Harold Brown*, in which the Attorney General is seeking to obtain defendant's compliance with state laws prohibiting discrimination against persons receiving governmental rental assistance.

As a result of intervention by the Division, the City of Holyoke lifted a moratorium on the development of subsidized housing. The city began to cooperate with the efforts of Nueva Esperanza, a community development corporation seeking to develop low cost housing in the Hispanic neighborhood of Holyoke.

In the course of its community outreach efforts on discrimination and violence issues, the Division frequently became aware of other housing problems, such as health code violations or illegal evictions. In many instances, in addition to lacking familiarity with their rights, the tenants spoke little or no English. The Division assisted such complainants to obtain representation by legal services and other non-profit agencies.

4. Education

In *Braintree Baptist Temple, et al. v. Holbrook Public Schools, et al.*, a suit challenging the constitutionality of the state compulsory education law requiring all children to attend an approved school, the federal court dismissed the claims against the state defendants. The Court also dismissed eight of plaintiff's twelve substantive claims.

The schedule of hearings and negotiating sessions accelerated in *Morgan v. Nucci*, as the Boston school desegregation case moved toward conclusion. Judge Garrity's final orders were expected to be issued soon after the end of fiscal year 1985.

In several instances, the Division also acted in an advisory capacity to the Department of Education, with regard to bilingual education and equal access issues.

5. Children

The Division filed two actions against unlicensed child care facilities. In *Commonwealth v. Montgomery, et al.*, the Division obtained an injunction prohibiting the defendants from operating or transporting children to such facilities. In *Attorney General, et al. v. Donovan*, the complaint charged that the defendant continued to operate a family day care facility after the emergency suspension of her license. In a consent judgment, defendant agreed to cease providing services.

The Division continued to monitor conditions at a facility for the treatment of emotionally disturbed children, to insure compliance with state regulations on restraint and seclusion.

6. Employment

An agreement was reached with Grass Instrument Co. and Cannon Manufacturing Company of Quincy to make individual and family health insurance coverage available to all employees. Previously, only employees whose family members were "dependent" within the companies' definition could elect family coverage, a policy the Division alleged adversely affected female employees. Grass and Cannon also agreed to modify an employment application to avoid invasion of privacy.

The Division resolved several other complaints by employees involving privacy issues, including the illegal use of lie detectors.

7. *Voting Rights*

In November, 1984, the Division sent a team of investigators from the offices of the Attorney General and the Secretary of State to observe the conduct of the election and to assess Worcester's compliance with state voting laws, especially those which seek to ensure that registered voters whose names are not on voting lists are afforded an opportunity to vote. Certain deficiencies were noted, and steps were taken to assist the Registrar of Voters in Worcester to correct these deficiencies.

8. *Insurance*

Jointly with the Insurance Division, the Division presented testimony to the Commissioner of Insurance in support of a regulation which would require insurance companies to include maternity coverage in comprehensive health insurance. Such coverage, the Division argued, would be consistent with insurance company practice in employer group policies, in which maternity coverage is mandated by law, and with the Equal Rights Amendment.

9. *Public Records, Fair Information Practices, Open Meeting*

The Appeals Court issued its decision in *General Chemical v. Commissioner of the Department of Environmental Quality Engineering*. The Court ruled that the operator of a hazardous waste facility was entitled to judicial review of the Commissioner's determination that reports submitted to him by the facility about its activities did not contain trade secrets.

As the designee of the Attorney General on the Records Conservation Board, a member of the Division initiated a comprehensive review of the Board's policies and procedures in light of the requirements of the state Fair Information Practices Act, which regulates the transfer of personal data among state agencies. The review was prompted by the opening of a new state Archives Building, which could accommodate many additional records.

Several Open Meeting Law complaints filed with the Division during fiscal year 1985 were resolved without litigation, or were referred to the District Attorneys. The Division participated in a public forum on the Open Meeting Law sponsored by the League of Women Voters.

10. *Citizen Complaints/Community Outreach*

The Division responded to over 400 individual written complaints and inquiries in addition to numerous phone calls. Most of the complaints were referred to other government agencies or to the private bar, but several resulted in action by the Division.

The Division continued to work with community groups representing a broad range of civil rights concerns, including the Greater Boston Civil Rights Coalition. Division staff spoke at numerous community meetings and conferences on issues ranging from violence against Asian Americans to using the Hill-Burton Act to improve access to health care.

The Division also continued its work with community groups and governmental agencies on civil rights issues affecting individuals who have been settled in the Commonwealth as refugees. This has included close cooperation with the Massachusetts Office for Resettlement and the Governor's Advisory Council on Refugee Affairs, as well as the mutual assistance associations of the various refugee communities.

CONSUMER PROTECTION DIVISION

I. INTRODUCTION

The Consumer Protection Division brings enforcement actions against businesses which use unfair and deceptive practices to injure consumers. The Division concentrates on cases where consumers cannot reasonably obtain relief through their own efforts. Its caseload consists primarily of large-scale class actions brought on behalf of consumers affected in similar ways by a business's illegal activities. In 1985, the Division filed suit against violators in traditional areas such as auto sales, landlord-tenant, and construction and home improvement. At the same time, it expanded its leading role in national consumer advocacy, developed new legal theories for use against "deep pocket" defendants and failing businesses, and continued to give special emphasis to the problems of vulnerable elderly and low income consumers.

II. NATIONAL LITIGATION/NEW LEGAL THEORIES

A. Appellate Cases

In fiscal 1985 the Division established several precedents with national ramifications, litigating in state and federal appellate courts, including the Supreme Court of the United States.

For example, in April, the Supreme Court unanimously upheld G.L. c.175 § 47B, a Massachusetts statute that requires insurance companies to include minimum mental health benefits in their policies, against constitutional challenges by the *Metropolitan Life Insurance Co.* and *Travelers Life Insurance Co.* The Division sued these two companies in 1980 for their failure to provide the required coverage to policyholders. The Attorney General's victory ensures that Massachusetts residents will receive the full range of mental health care provided by law.

Another constitutional challenge arose from the Division's enforcement of the Massachusetts licensing requirements for debt collection agencies against the Pennsylvania-based *Allied Bond* agency. On this appeal the Massachusetts Supreme Judicial Court upheld the constitutionality of Massachusetts' laws, which require such companies to be licensed and bonded and to maintain offices in the state. The Court's decision could have implications in many other states. According to briefs filed by the defendant, 27 states have a license requirement for debt collection agencies, 30 states require the posting of a bond, and 15 states require a local office.

In September, 1984, continuing a two-year program of advocacy on behalf of the Federal Trade Commission's new Credit Practices Rule, we participated as amicus curiae in the case of *American Financial Services Association v. F.T.C.*, in the District

of Columbia Circuit Court of appeals. The credit industry had challenged the rule, which prohibits lenders and retail installment sellers from using coercive debt collection methods, virtually upon promulgation.

The rule prohibits such oppressive tactics as creditors threatening to use security interests in household goods to seize and sell clothing, furniture, and other household possessions of a defaulting debtor. Twenty state Attorneys General joined our amicus brief. The Court of Appeals upheld the rule; a Supreme Court appeal is possible.

B. *New Legal Theories: Deep Pocket Liability and Failing Enterprises*

During fiscal 1985, Division lawyers used new legal strategies to deal with problem defendants, and obtained encouraging results. The first such strategy was to sue alternative "deep-pocket" defendants whenever the primary business defendant is insolvent and cannot pay restitution or comply with an injunction. The most common alternative defendants are the officers and shareholders of defendant businesses and other affiliated companies, such as parent corporations and franchisors.

The second legal theory advanced by the Division was that financially unstable companies which take deposits for goods and services must either warn consumers of the company's condition or make arrangements to protect consumers, such as buying insurance policies or establishing escrow funds for deposits. A company which fails to take these protective measures, the Division argued, has violated the Consumer Protection Act.

The Division used both theories to recover \$117,000 in consumer restitution in the *Michaud Tours* case. In 1983, Michaud took large deposits from hundreds of elderly consumers for bus tours, then suddenly closed its doors without either providing the tours or refunding the deposits. The Division charged Michaud with deceiving consumers by taking payments for services it knew it probably could not provide. In addition, since the tour company was insolvent, Michaud's president and an affiliated company were advised that they were to be held responsible as well for having participated in the deception. The result was an important settlement on behalf of elderly consumers.

Similar theories were applied to obtain an attachment of \$50,000 against the personal assets of the president of *Puritan Furniture Co.* and to obtain a \$10,000 contempt penalty (and later an \$80,000 attachment) against the chief executive officer of the *Woman's World Health Spas* chain, in lawsuits based on the failure of each business to honor consumer contracts.

In the *Warehouse Pools* case, the Division protected consumers against a series of companies both in and out of state which sold outdoor pools to Massachusetts residents by using bait-and-switch advertising and sales tactics. Preliminary injunctions were obtained against the Massachusetts and New York companies, and also against their presidents, for their direct and individual involvement in the deceptive scheme. Again, the Division's theories of extended liability were the basis for the successful result.

III. SPECIAL ENFORCEMENT PROGRAMS

Certain kinds of unfair and deceptive practices, their nature, subtlety, or application to target groups, are difficult if not impossible for consumers to detect and defeat on their own. Schemes to take advantage of the poor and elderly, deceptive advertising, and odometer spinning typify these kinds of practices. In 1985 the Division used special enforcement projects to identify the most egregious violators in these areas and to curtail their illegal practices.

A. *Vulnerable Consumers: The Elderly and the Poor*

Elderly and low income consumers are both especially vulnerable to unfair and deceptive business practices and particularly unable to recover their losses through self-help or the courts. Last year the Division began to place special emphasis on protecting these consumers, and that effort continued in fiscal 1985.

Nursing home patients epitomize the plight of elderly, poor and physically or mentally handicapped consumers. Because patients are virtually defenseless against inadequate or abusive treatment by unscrupulous nursing home operators, the Division aggressively litigates on their behalf. In the *Westelm Nursing Home* case, for example, the Division was called in a few days before Christmas to obtain an emergency order to protect the home's elderly and mentally infirm patients from violations of the Patient Abuse Statute, G.L. c. 111, § 72F. The Division's action stopped the home's use of psychotropic drugs as chemical restraints and remedied its failure to provide necessary medical care or to properly administer prescribed medications to patients. The order also provided for independent doctors to immediately reevaluate the medical needs of all Weltelm's patients and for those patients to receive adequate medical care, as prescribed by the doctors. Later the Division obtained a court order appointing a receiver to operate the home in compliance with the stipulation.

Condominium conversions displace many elderly and low-income consumers. The new state condominium conversion status provides protection against the hardships of displacement, but the Division was concerned that some profiteers would disregard the law, and began an active program to enforce it. For example, in two similar cases, *Back Bay Restorations* and *Coventry Gardens*, the Division successfully stopped illegal evictions and conversions and obtained judgments requiring the defendants' compliance with the condominium law.

In *Back Bay Restorations* the court approved a judgment that required the defendants to maintain four apartment buildings as rental units for at least three years before attempting a condominium conversion and to pay relocation benefits to tenants of another building who had been illegally displaced. In the *Coventry Gardens* case, the Division obtained a preliminary injunction barring an illegal 84 unit conversion and freezing rents and other charges until the case is tried on the merits. The owners of *Coventry Gardens* were in the process of evicting tenants and marketing their apartments as condo units before the Division obtained the court orders protecting tenants.

The Division brought another housing-related suit against *Cranberry Village*, a retirement community mobile home park in Carver. When the owner/developer first opened the park he induced fixed-income retirees to purchase homes from him and become park tenants by giving them a written guarantee that their lot rent would remain fixed for their lifetimes. After approximately 125 elderly people bought homes

and rented lots from the owner, he raised the rent. Suit was filed and an order freezing the rents until trial was obtained. After three years of litigation the case came to trial last December. The Court's decision was that the park owner's rent increase was illegal. A consent judgment was then entered based on the judge's ruling, saving the tenants approximately \$125,000

B. *Deceptive Advertising*

In fiscal 1985, the Division began an Advertising Project whose goal was to ensure compliance with the Attorney General's retail advertising and automobile advertising regulations. The Division initiated the project by writing to trade associations, advertising agencies and the media explaining our enforcement efforts and describing the most frequently seen violations. Investigators then systematically reviewed selected advertisements in major metropolitan and local media and referred deceptive ads to the attorneys assigned to the project.

The project's most notable victory was the simultaneous entry of consent judgments against six major state and national clothing retailers. Anderson Little, CWT, Hit or Miss, Chess King, Casual Corner, and Cummings all agreed to judgments barring them from using deceptive "former price" comparison tags when our investigation showed that they never sold clothes at the "former price" and, had in fact, imported clothes which arrived at the Port of Boston with "sale" tags already on them. These companies also paid more than \$50,000 to the Commonwealth, in lieu of consumer restitution. In a seventh case, the Division sued a national retailer, The Limited, and obtained an injunction against the company.

During fiscal 1985, the Division obtained a total of 273 letter agreements, assurances of discontinuance and consent judgments from various businesses which agreed to terminate deceptive retail advertising practices.

The Division also obtained more than two dozen consent judgments and assurances of discontinuance against auto dealers for deceptive advertising practices. The most common violations included dealers who deceptively advertised cars using a bogus "invoice price," dealers who advertised prices which were less than the car's actual selling price, and dealers who advertised cars at low monthly payments, but failed to disclose that the advertised transaction was a lease rather than a sale.

C. *Odometer Spinning*

The Division also actively prosecuted odometer spinners throughout fiscal 1985, aided by a new referral program created with the Registry of Motor Vehicles. This effort produced numerous consent judgments, which provide collectively for the payment of over \$225,000 in consumer restitution. *Ozella Dodge*, which altered more than 200 odometers, was the most notorious violator. After investigators discovered the extent of Ozella's illegal scheme, attachments and injunctions were obtained to stop its practices. The case was settled with a consent judgment which required Ozella to pay \$120,000 in consumer restitution, the largest amount the Division has ever recovered in an odometer spinning case. This money has been distributed to the consumers Ozella victimized.

IV. SUBJECT AREAS

During the past year, the Division maintained its longstanding presence in traditional consumer problem areas such as automobiles, health spas, travel, and retail sales, obtaining significant remedial orders and restitution for consumers harmed by deceptive schemes. The following cases illustrate the Division's recent work in these and other subject areas.

In many cases consumers have no way of knowing that they have been defrauded, because they are given a false measure of the product they purchase. The *Festino Fuel* case typifies this kind of fraud. The Festino company used a hidden "bypass" valve on its oil trucks to divert a portion of the oil back into the truck. A judgment was obtained against Festino, and enforced by foreclosing a mortgage on Festino's property. Festino then agreed to pay \$45,000 in cash to settle the case; the proceeds were used for consumer reimbursement and the surplus was placed in the Local Consumer Aid Fund to further community programs for consumer protection. In a similar case the Division obtained a final judgment against *Ken's Fuel Oil Service*, a home heating oil dealer in the Springfield area, which prohibited the defendant from overcharging low income fuel aid recipients for home heating oil.

Other kinds of consumer losses do not lend themselves to individual remedies, for example because the business is out of state, or is a large corporation that has established an unfair or deceptive policy. Two such cases exemplify the Division's intervention on behalf of large groups of similarly situated consumers.

In *Commonwealth v. Castlebleu, Inc. d/b/a Coppercraft Guild* refunds were obtained for consumers in 19 states who were defrauded by this now-defunct mail order business.

In *Commonwealth v. General Motors Acceptance Corporation* an Assurance of Discontinuance was obtained in which GMAC agreed to stop selling repossessed motor vehicles at auctions without providing consumers with implied warranties of merchantability. The assurance also required GMAC to give consumers contracts which comply with the Attorney General's Motor Vehicle Regulations.

In addition to ongoing litigation against the Commonwealth's largest health spa chain, *Woman's World of America*, action was taken in fiscal 1985 to protect numerous consumers injured by spa closings. For example, when the *Feel Fit Health Spa* in western Massachusetts closed but the owner sought to escape responsibility for memberships, the Division insisted that the defendant provide restitution. The consent judgment obtained in that case also required Feel Fit's owner to post a bond before opening any other health spa.

In *Commonwealth v. Adventures Travel Unlimited, Inc.* suit was brought against a travel agency which failed to provide promised vacations. A final judgment places restrictions on the business' practices and requires the defendant to refund deposits when trips are cancelled.

The field of professional services covers a wide spectrum of businesses which purport to fill particular consumer needs for expertise and assistance. In many cases the providers are only ostensibly professional, and inadequately or completely fail to perform the expensive service they sold to consumers. Since many such services offer only "assistance," consumers often complain that they never received anything tangible from the business. In *Commonwealth v. Ranbar Associates Inc.*, for example,

the Division sued a career counseling agency which charged high fees but consistently failed to provide services which justified those fees. The resulting consent judgment against Ranbar requires it to make a series of affirmative disclosures and bars its use of a wide range of deceptive practices.

In *Commonwealth v. Suzanne Champney*, an adoption facilitator was sued for conducting unlicensed adoption activities and a preliminary injunction obtained preventing her from committing numerous unfair and deceptive practices, including misrepresenting to prospective parents a child's health, its availability for adoption, and the time it would take to complete the adoption process.

Consumers can lose substantial sums of money to contractors who do shoddy construction work, whether doing home improvement work or building new homes under contract. When such large sums are involved, and a contractor shows a pattern of unfair and deceptive business practices, the Division has obtained injunctive relief and restitution for injured homeowners.

One such case was against *Thomas Sweeney*, a Hingham home improvement contractor. Sweeney collected money and failed to do any work, did electrical, plumbing, and contracting work without the proper licenses, failed to properly do the work he did perform, and repeatedly ignored consumer complaints. After suit was brought, an injunction was obtained which safeguards consumer deposits with mandatory escrow accounts, calls for specific contract terms, and requires disclosures about Sweeney's financial status.

The Division used alternative dispute resolution methods for the first time during this past year to establish damages in a case against a housing contractor, *Gordon Poulos*. The Division obtained a judgment against Poulos holding him liable for defects in homes purchased by ten consumers and requiring that he participate in mediation to establish and pay damages due the ten consumers. Mediated damages settlements were reached in all cases and fully paid within 90 days of inclusion in the judgment.

Finally, in a construction-related field, we recently obtained nine Assurances of Discontinuance against home inspectors who agreed to stop disclaiming responsibility for the accuracy of statements and observations made pursuant to their home inspections. The filing of these assurances culminated a long term project in this new field, in which we reviewed the advertisements, brochures and report forms of approximately 90 home inspectors throughout Massachusetts.

V. CONCLUSION

During the past year the Consumer Protection Division experimented with innovative legal theories, continued traditional enforcement efforts, and created special litigation projects. Each of these efforts contributed to our overall goals, to combat deceptive business practices while giving special protection to the most vulnerable citizens of the Commonwealth.

ENVIRONMENTAL PROTECTION DIVISION

General Laws c. 12, § 11D establishes the Environmental Protection Division in the Department of the Attorney General. The Division is litigation counsel on environmental issues for all of the agencies of the Commonwealth, principally those within the Executive Office of Environmental Affairs. In this role the Division handles all of the Commonwealth's civil litigation to enforce environmental protection programs established by state laws and regulations. The Division brings suits to enforce the Commonwealth's regulatory programs governing air pollution, water pollution, wetlands, hazardous waste, solid waste, pesticides, and billboards, and it defends administrative decisions made by state agencies that administer environmental programs. In addition, based on the Attorney General's broad authority to protect the environment of the Commonwealth, the Division initiates and intervenes in state and federal litigation and in administrative hearings before federal agencies on issues of significance to the environment.

As a result of its role in environmental enforcement the Division receives substantial grant money from the United States Environmental Protection Agency.

During the year the Division recovered through litigation \$557,375 in penalties and other payments. In addition, many of the Division's cases have resulted in private parties undertaking cleanups, at substantial cost, which the Commonwealth would otherwise have had to perform.

Oil and Gas Leasing on Georges Bank

In September 1984, together with a coalition of environmental groups, the Division brought suit in federal court against the United States Department of Interior. For the third time since 1978, the Department of the Interior had planned to auction offshore oil and gas leases in an area including Georges Bank, one of the world's richest fishing grounds and a vital economic resource for the Commonwealth. United States District Court Judge A. David Mazzone enjoined the sale, agreeing with the Division's arguments that the final environmental impact statement prepared by the Department of the Interior for the lease sale was inadequate under the National Environmental Policy Act, and that the Department's failure to delete tracts critical to the Georges Bank fishery, as requested by Governor Dukakis, violated the Outer Continental Shelf Lands Act. Hours after the injunction issued, the Department of the Interior cancelled the sale for lack of bids. On December 31, 1984, the Department of the Interior also cancelled a planned second phase of the sale and deferred further offerings on the Outer Continental Shelf off the New England coast until after 1987.

Silresim Chemical Corporation (Commonwealth of Massachusetts v. Neil H. Pace, et al.)

The Commonwealth has continued to pursue its claims for cost recovery against non-settling defendants in the first of its federal court actions under the United States and Massachusetts superfund laws (the Comprehensive Environmental Response, Compensation and Liability Act, and the Massachusetts Oil and Hazardous Material Release Prevention and Response Act). In this lawsuit filed in December 1983, the Commonwealth sought recovery of approximately \$3 million for hazardous waste

cleanup and other measures carried out by the Commonwealth at the site of the bankrupt Silresim Chemical Corporation in Lowell. Settlements with nine additional defendants this year brought the Commonwealth's total cost recovery to more than \$2,023,000 and the total number of settlement agreements negotiated in the case to 263. The Commonwealth has been actively pursuing the litigation against three remaining defendants.

New Bedford Harbor (Commonwealth of Massachusetts v. AVX, et al.)

In two consolidated lawsuits filed in federal court in December 1983, the Commonwealth of Massachusetts and the United States have sought recovery for costs and damages to natural resources in connection with the polychlorinated biphenyl (PCB) contamination of the New Bedford Harbor. Following extensive briefing by the parties and two days of oral arguments, the United States District Court ruled on March 26, 1985 on all of the parties' pretrial motions. The Court ruled in favor of the Commonwealth and the United States in granting the plaintiffs' motions to dismiss the defendants' counterclaims, and in denying the defendants' motions to dismiss the plaintiffs' complaints. The Court's decision disposed of numerous important issues under the new state and federal superfund laws.

Nassr v. Commonwealth of Massachusetts

In May of 1985, the Supreme Judicial Court issued its opinion in this important public nuisance case in which the Division represented the Commonwealth. While ruling that the Commonwealth was not entitled to restitution in this case, the SJC, agreeing with the Commonwealth, ruled that an "innocent" landowner has a responsibility to abate a public nuisance on his property created by a third party and may be liable for restitution to the Commonwealth for clean up costs.

Charles George Landfill (Commonwealth of Massachusetts v. Charles George, Sr., et al.)

The Charles George Land Reclamation Trust Landfill in Tyngsboro has been the subject of ongoing litigation in state and federal courts. Improper disposal practices and the use of the landfill for hazardous wastes has caused contamination of the ground and surface waters near the landfill and has necessitated the closure of several private water supply wells. In June 1985 the Division filed suit in United States District Court to recover more than \$2 million in past costs and anticipated expenditures by the Department of Environmental Quality Engineering to clean up the landfill and to install a pipeline to provide nearby residents with an alternate water supply. The suit was filed against members of the Charles George family who owned and operated the landfill and against the Charles George Trucking Company, Inc. which transported wastes to the site. The complaint also alleges fraudulent conveyance by Charles George family members of real estate valued at more than \$1.2 million. The case is being pursued in coordination with a similar suit by the U.S. Environmental Protection Agency.

DEQE v. Robert Silva and Wiley Taylor

Following a week-long trial in Suffolk Superior Court in August of 1984, a judgment was issued by the Court in December of 1984 against both defendants for \$124,575. This judgment covers costs the Commonwealth spent to clean up a site in Rehoboth owned by Silva near a public water supply where Taylor had dumped hundreds of barrels of waste oil and chemicals.

Metropolitan District Commission v. Alpha Industries

The Division filed suit against Alpha Industries in Woburn alleging a six-year history of illegal discharges to the sewer system, including discharges of toxic organic chemicals and acidic wastes. The Division negotiated a consent judgment with Alpha Industries that required it to install pretreatment equipment, to conduct a study to determine how best to control its organic wastes, and to pay a penalty of \$60,000.

Commonwealth of Massachusetts v. Alto-Tronics Corporation

In December 1984, the Division and the U.S. Environmental Protection Agency as co-plaintiff obtained a consent judgment against Alto-Tronics Corporation of Holliston. The company agreed to pay \$125,000 in penalties to settle the governments' claims that it discharged untreated industrial wastes containing metals and toxic chemicals into the Metropolitan District Commission sewer system. Alto-Tronics also agreed to comply with a rigorous schedule to upgrade its treatment system and to pay additional penalties to the Commonwealth and the United States if it fails to operate its treatment system properly in the future.

Department of Environmental Quality Engineering v. Coastal Metal Finishing

The Division brought suit against Coastal Metal Finishing for a major spill of industrial waste containing heavy metals. Following negotiations, the company agreed to pay a \$15,000 penalty for the spill and to institute strict monitoring and recording procedures in order to prevent future incidents.

Department of Environmental Quality Engineering v. Microwave Research Corporation, et al.

The Division filed a lawsuit against Microwave Research Corporation of North Andover alleging discharges of untreated toxic metal wastes into the ground and unlawful storage and transport of hazardous waste. The Division obtained an agreed preliminary injunction requiring immediate cessation of all discharges to the ground. The Division continued to pursue issues of remedial action and penalties.

Commonwealth of Massachusetts v. Sandri, Inc.

In June 1985, the Division obtained a consent judgment against Sandri, Inc. of Greenfield for payment of a \$20,000 penalty in a lawsuit brought under the Massachusetts Hazardous Waste Management Act. The Commonwealth's complaint alleged

that Sandri, Inc. violated an administrative order of the Department of Environmental Quality Engineering requiring the company's facility to be licensed as a hazardous waste storage facility.

Department of Environmental Quality Engineering v. King. et al.

A suit was brought to stop the daily discharge from a laundromat of thousands of gallons of contaminated industrial sewage into a field near a playground. Under a settlement agreement negotiated by the Division, the owner paid a penalty of \$10,000 and nearly \$6000 in costs, and the owner and potential purchaser agreed not to resume operations until an approved treatment facility was constructed.

Acid Rain

The Division has continued to be actively involved in lawsuits challenging the failure of the Environmental Protection Agency to take action on acid rain under the federal Clean Air Act. Following oral arguments in August 1984, the United States District Court for the District of Columbia ruled in favor of Massachusetts, six other states, and several environmental groups on motions for summary judgment challenging EPA's delay in ruling on pending administrative proceedings. It ordered EPA to take action on administrative petitions that sought to limit the air pollution emissions of Midwestern states that are the major cause of acid rain in the Northeast. When EPA subsequently denied the petitions, Massachusetts again joined with a coalition of states and environmental groups in seeking judicial review of the agency's decision in the Court of Appeals for the District of Columbia.

In January 1985, Massachusetts and other states and environmental groups also presented arguments to the Court of Appeals for the Sixth Circuit in a pending case concerning the EPA's relaxation of air pollution limits for two Ohio power plants.

INSURANCE DIVISION

The Insurance Division of the Public Protection Bureau represents the interests of Massachusetts citizens who purchase insurance. The Division's budget was doubled in fiscal year 1985 and the Division expanded to seven attorneys, one administrative assistant and two secretaries. The Division intervenes in administrative hearings held to review insurance companies' requests for rate increases and bring affirmative litigation on behalf of victims of unfair and deceptive insurance sales practices, fraud and other illegal insurance activities. In addition, the Division became involved in litigation and administrative hearings concerning the rights of consumers and financial services. As a result, the Division assisted in saving Massachusetts consumers over 136 million dollars this fiscal year.

A. ADMINISTRATIVE HEARING

1. Automobile Insurance Hearing

The Insurance Division intervened in a major administrative hearing relating to a 101 million dollar (7.9%) auto insurance rate increase proposed by the insurance industry for 1985. The Division in its advisory filing on these auto insurance rates,

recommended that auto insurance rates be decreased by 2.5% in 1985. Following a 47 day hearing the Insurance Commissioner announced his decision to decrease the rates by 2% resulting in savings of 127 million dollars to consumers.

2. *Blue Cross/Blue Shield — Nongroup*

The Division intervened on behalf of approximately 110,000 non-group health insurance plan subscribers of Blue Cross and Blue Shield in opposition to the rate increases of 11.5% and 3.8% requested by Blue Cross and Blue Shield. In its advisory filing, the Division contended that the requested \$9.6 million rate increase was at least \$5 million too high. The Insurance Commissioner rejected the proposed increases and Blue Cross and Blue Shield have appealed this decision.

3. *Blue Cross/Blue Shield — Medex*

The Insurance Division, recommended that the Commissioner of Insurance reject a Blue Cross and Blue Shield request for 11.2%, or \$22 million increase in Medex rates. Medex is purchased by approximately one half million Massachusetts senior citizens to supplement Medicare coverages. The Division's filing recommended no more than a 2.3% rate hike. The difference between the two recommendations amounts to more than \$17 million or approximately \$35 per elderly subscriber per year. The Commissioner rejected the BC/BS requested increase resulting in a \$22 million savings to Medex subscribers.

4. *Auto Insurance Competition Hearing*

The Division appeared at a hearing held to determine if automobile insurance rates should be competitively established for 1986. The Division presented testimony which opposed competitively set rates for 1986, arguing that the automobile insurance market in Massachusetts was not currently suitable for competitively setting insurance premiums and that consumers would not benefit from a competitive market until certain reforms were established. The Commissioner of Insurance decided that he would establish automobile insurance rates for 1986.

5. *Pregnancy Benefits Hearing*

The Division appeared in a hearing held by the Commissioner of Insurance concerning availability of pregnancy benefits and strongly urged the adoption of a proposed regulation which would require inclusion of maternity benefits in all health insurance policies and would prohibit the capping of maternity benefits at lower levels than other medical services. This regulation was adopted.

6. *Physician Reimbursement Hearing*

The Division participated in a hearing on physician reimbursement conducted by the Commissioner of Insurance. The Division presented expert testimony which identified the important issues that must be evaluated and resolved to develop a system which can control the growth in health care costs while maintaining consumer access to and quality of care. A decision is pending on this hearing.

B. *Affirmative Litigation*

1. *Baldwin-United*

The Division continued to actively represent the interests of Massachusetts residents who purchased single premium deferred annuities ("SPDAs") from the insurance subsidiaries of Baldwin-United.

The Division monitored settlements in eighteen private class actions against certain brokerage firms who sold Baldwin-United SPDAs. Under this settlement, the brokers will pay approximately \$140 million to their customers. In addition, the Division pursued litigation against certain brokers who are not participating in the national settlements.

We are also working with the many parties involved in an effort to negotiate an overall Enhancement Plan which would provide Baldwin-United policyholders with increased security and a higher rate of return on their money.

2. *American Income Life*

The Division reached a settlement with the American Income Life Insurance Company in litigation resulting from the sale of cancer insurance during 1974-1979. The Division alleged that the company's agents had sold the cancer insurance in a manner which overemphasized the catastrophic financial risk associated with the disease and had inaccurately described the coverage or benefits offered by the policy. Under the terms of the settlement American Income paid \$110,000 to the Division which has been distributed to approximately 4,000 Massachusetts policyholders.

3. *Allan Metal Fab.*

The group health insurance plan established by Allan Metal Fab. was cancelled by Travelers due to nonpayment of premiums by the employer. Sixteen employees, who continued to have deductions taken from their paychecks for their insurance after the insurance was canceled, incurred over \$40,000 of medical claims. The Division secured funds from Travelers Insurance Company to settle the outstanding medical claims of the former employees of Allan Metal Fab.

4. *Group Health Insurance*

The Division has initiated action against several companies for failure to provide mandated benefits under their group health insurance plans including failure to allow an employee to continue his or her insurance for 39 weeks after an involuntary layoff and failure to provide outpatient psychiatric benefits.

C. *Individual Consumer Complaints*

The Division continues to mediate individual consumer complaints related to insurance and monitors these complaints for patterns of unfair business practices.

D. Legislation

The Division continues to assist in the drafting of and support of legislation on insurance issues. The Division has been actively working on legislation which would ban sex discrimination in the sale of life insurance, annuities and other insurance products.

PUBLIC CHARITIES DIVISION

The Division of Public Charities was established pursuant to G.L. c. 12, § 8B. The purpose of the division is to "enforce the due application of funds given or appropriated to public charities within the Commonwealth and prevent breaches of trust in the administration thereof." G.L. c. 12, § 8. To fulfill this role, the first line of defense in enforcement by the division of statutes regulating annual financial reporting (G.L. c. 12, §§ 8A-8M) and charitable solicitation (G.L. c. 68, §§ 18-33). These statutes require registration and detailed annual financial disclosure. They also provide broad powers to carry out the division's stated purpose.

The actual activities of the division fall into three main areas:

(I) Affirmative litigation aimed at protecting the public from misapplications of charitable funds and from fraudulent or deceptive solicitation; (II) Participation in numerous estates and trusts in which there is a charitable interest; and (III) Various administrative functions regarding annual financial reporting and solicitation mandated by G.L. c. 68, §§ 19, 21 and 23. This year the division has also been active with legislation and miscellaneous activities.

I. LITIGATION

During the fiscal year ended June 30, 1985 some of the significant litigation is as follows:

1. *Bellotti v. Hannemann Hospital Corp. et al.*

On February 13, 1985 a petition was filed in the Supreme Judicial Court seeking to determine the validity of the first ever attempt by a Massachusetts non-profit acute care hospital to sell itself to a for-profit health care corporation. This case is being closely watched nationally in that there is a nationwide trend toward for-profit health care institutions purchasing financially troubled non-profit hospitals. The Division believes continuation of the trend will severely affect access to health care by the less affluent as well as affect the types of health care provided to the public. The case also raises, for the first time, the issue of whether a charitable corporation may terminate its affairs by selling all of its assets and good will without court approval. Such an act is generally illegal in a charitable trust setting.

2. *Commonwealth of Massachusetts v O.S.C. Corporation et al.*

On January 21, 1985 the Superior Court handed down a decision in this deceptive police solicitation case. The decision is of major importance in the division's campaign against deceptive police solicitation and in terms of the constitutionality of the Massachusetts Charitable Solicitation Act.

The court imposed a severe preliminary injunction including affirmative disclosure of the fact the defendants receive 65-80% of the proceeds. This case will be appealed to the Supreme Judicial Court on a variety of grounds, the most important being the free speech and equal protection constitutional claims.

3. *Bellotti v. United Funding et al.*

On June 6, 1985 the largest deceptive solicitation award ever in Massachusetts was entered by way of consent judgment. The judgment requires the defendants to pay \$20,000 in G.L. c. 93A contempt penalties, \$30,000 to the Local Consumer Aid Fund as settlement of coercive fines, and \$8,000 to the Commonwealth for costs and fees. The judgment also requires an offer of restitution which could total \$70,000. The defendants are also barred from operating in Massachusetts for four years as well as subject to severe fines and penalties for non-payment.

4. *Commonwealth v. Charles Manfredi*

On May 23, 1985 the division filed its first ever criminal action in a deceptive solicitation case. This criminal contempt complaint alleges numerous violations of a prior court order. The complaint alleges that deceptive fund-raising practices occurred including failure to publish adbooks contracted for, receiving 50%-80% of the revenues as his fees in violation of the 15% compensation limit imposed by G.L. c. 68, § 21 and failing to register or post bond.

5. *Commonwealth v. M&M Publishing Co. et al.*

A Civil Contempt trial commenced on November 13, 1984. The Division alleges that defendants have violated virtually all the provisions of a 1981 Consent Judgment regarding false and deceptive solicitation in the names of local sports and senior associations; that defendants have failed to make the disclosures required by the Consent Judgment and that they have misappropriated charitable assets. After two and one-half days of trial, the defendants announced in court they would concede by admitting all violations and facts alleged by the Division.

Briefs have been filed and the matter has been taken under advisement. The crucial remaining issue is the relief awarded. The Division seeks dissolution of the corporation, a five-year ban on solicitation activities by the individual defendants, restitution to local sports and senior programs and a \$140,000 civil contempt fine. Such drastic relief is essential to make an effective statement in our campaign against false and deceptive solicitation.

6. *Bellotti v. Events International, Inc. et al.*

In October 1985, the division filed another deceptive solicitation case. This case has major importance in that it squarely confronts the constitutionality of the 15% professional solicitor compensation limit imposed by G.L. c. 68, § 21. The defendants allege such a limit violates their free speech rights.

7. *Bellotti v. Dumaine d/b/a Project H.E.L.P.*

On May 8, 1985, this lawsuit was filed against Paul Dumaine to enjoin unfair and deceptive business practices violative of G.L. c. 93A and G.L. c. 68, §§ 27 and 30(e).

The complaint alleges that Dumaine makes his profits by deceiving businesses to believe that they are contributing to charity.

On May 8, 1985, a temporary restraining order was entered enjoining the defendant from misleading the public to believe he is a charitable organization; soliciting charitable contributions for his private benefit; employing unfair and deceptive business practices in conjunction with solicitations, including failure to disclose the for-profit nature of his business, and failure to disclose that he is not affiliated with bona fide, existing organizations which serve handicapped or retarded children.

8. *Bellotti v. Kidnapped, Inc., et al.*

On May 15, 1985 the Attorney General brought this action to compel the defendant charitable corporation, Kidnapped, Inc. ("Kidnapped"), to comply with the reporting and accountability laws in the Commonwealth governing public charities. G.L. c. 12, §§ 8E and 8F; c. 68, §§ 18 *et seq.* In addition, the complaint seeks to enjoin certain unfair and deceptive practices of the defendants in their conduct of a raffle.

The defendant "Kidnapped" has not filed with the Division and has failed to submit any financial records.

A preliminary injunction which requires the defendants to register and to file financial reports as required by c. 12, § 8F, prohibits the defendants from engaging in solicitation activity until they had received a certificate of registration as required by c. 68, § 19, and prohibits them from employing unfair and deceptive practices in conjunction with charitable solicitations in violation of c. 68 § 30(e) and c. 93A § 2(a) was obtained.

9. *Bellotti v. Everett Lions Club*

This case was filed alleging violations of Chapters 12 and 68, specifically failure to register, failure to file financial reports, and failure to obtain a certificate of registration. The complaint also alleges violations of Chapter 93A in that the charity hires a professional solicitor who uses unfair and deceptive methods to solicit funds on behalf of the Lions Club.

A consent judgment was entered, and the defendants were ordered to comply with the provisions of Chapters 12 and 68. They were also ordered to comply with c. 93A by requiring any professional solicitor who raises funds for the Lions Club to disclose that the fund-raising is being done by professionals and what percentage of funds raised will actually go to the Lions Club.

10. *Commonwealth v. John Hanafin d/b/a Associated Planners and Consultants*

A final judgment by consent enjoins the defendant from, *inter alia* raising funds by implying the local organizations endorse his fund-raising activities when such is not the case, misrepresenting to potential donors that he or his employees are local police or fire officers when such is not the case, and contracting with a charitable

organization to receive in excess of 15% of the gross revenue as his own fee. The judgment also requires him to pay \$500 in costs to the Commonwealth and, for three years, to deliver a copy of the judgment to anyone with whom he intends to contract for purposes of fund-raising.

II. *PARTICIPATING IN ESTATES AND TRUSTS WITH CHARITABLE INTERESTS*

The Attorney General is an interested party in the probate of each estate where there is a charitable interest. This year 28 new wills were received and reviewed of which 718 involved charitable bequests of over \$5000. After review, it was determined that the Attorney General had an interest in 1238 of these estates. Six hundred and thirty-eight executor accounts and 1711 trustee accounts.

In addition, the Division reviewed and approved 109 petitions for the sale of real estate, 31 petitions for appointment of trustees and was involved in 2048 miscellaneous probate legal actions.

The Division has continued its efforts to review old probate matters in order to close files where no further action is required and to investigate estates and trusts where additional accountings are required but have not been received by the Division. At the completion of this effort only active cases will remain in the files and as a result the monitoring of such cases will be more effective.

In addition to these routine matters, the Division attorneys handled 174 probate litigation cases.

III. *ADMINISTRATIVE FUNCTIONS*

The Division has numerous administrative and routine responsibilities including: (1) receiving annual financial statements from charities operating in Massachusetts and maintaining these as public records; (2) administering the state's charitable solicitation act (G.L. c. 68, §§ 18-33); (3) registering and regulating professional solicitors and fund-raising counsel; and (4) representing the state treasurer in the public administration of estates escheating to the Commonwealth.

1. *Annuals Registrations Under G.L. c. 12, § 8F*

The Division has completed the process of computerizing registration information. During the past fiscal year a computerized registration information has become operational. These computer programs significantly enhance the Division's enforcement program. This year 1182 new charitable organizations' Articles of Organization received from the Secretary of State's Office were reviewed, determined to be charitable and entered on the computer.

Fees paid to the Commonwealth in fiscal 1985 arising from the annual filings amounted to \$222,940.

2. *Regulation of Charitable Solicitations*

Under G.L. c. 68, § 19, every charitable organization soliciting funds from the public must apply to the Division for a Certificate of Registration prior to engaging in solicitation. Each such application must be reviewed for compliance with the statutory requirements. For the period from July 1, 1984 to June 30, 1985, 1931 applications were received. Certificate fees received were \$19,310.

3. *Registration of Professional Solicitors and Fund-raising Counsel*

Under G.L. c. 68, §§ 21 and 23, all persons acting as solicitors or fund-raising counsel for soliciting organizations must register with the Division and file a bond. Each registration and each professional solicitation contract must be approved by the Director if it meets statutory requirements. During the fiscal year ending June 30, 1985, 87 registrations were received and approved, and total fees were \$870.

4. *Public Administration*

The Division represents the State Treasurer in the public administration of interstate estates where the decedent has no heirs. Such estates escheat to the Commonwealth. During fiscal year 1984, \$350,808.37 in escheats were received.

IV. LEGISLATION

The Division filed legislation designed to completely re-write and modernize the Massachusetts Charitable Solicitation Act. The current law is over twenty years old and has been seriously eroded by United States Supreme Court and Supreme Judicial Court decisions. In addition, new methods of fund-raising have arisen which are not expressly covered by the current act. Since the charitable solicitation is estimated to exceed one billion dollars a year in Massachusetts, modernization of the statute is essential.

On a national level, the Division played a leadership role in the National Association of Attorneys General model solicitation law project. The model law project will develop a new disclosure type of solicitation law which will eliminate unconstitutional regulatory mechanisms currently found in many state statutes. The model law will also provide the possibility of a uniform approach to regulating charitable solicitation throughout the United States.

V. MISCELLANEOUS

A statewide review of charitable trust funds held by the various cities and towns in the Commonwealth was commenced through a mailing of financial reporting forms to all cities and towns. Last year a pilot review project focused on 18 cities and towns in the Boston area. The full scale review began after the pilot project disclosed that Salem had over \$800,000 in unexpended charitable income available for use. The project requires submission by each town of a comprehensive review of its charitable trust funds to the Division, review and analysis of the report, and court proceedings to pursue wrong-doing or to eliminate outdated restrictions so that these assets may be put to full use. The other major elements of the program are to educate local town counsel regarding legal and fiduciary obligations of the cities and towns in relation to their charitable trusts and to establish that our office intends to compel full utilization of these funds.

POLICE SOLICITATION

The Division wrote to each of the 351 local police chiefs, as well as the Chiefs of the State, Capitol, MDC and MBTA police departments, that all police relief organizations which raise or receive in excess of \$5,000 per year in public contributions will be presumed to have to register and account to the Division pursuant to G.L. c. 68, §19, and to comply with the other provisions of the Charitable Solicitation Act, including the 15% limitation of the compensation of professional solicitors. The letter is designed to underscore the office's concern regarding deceptive, fraudulent or high pressure solicitation done in the name of the police.

On September 19, 20 and 21, 1984 the Division hosted the national conference for state charities officials. The meeting was in two parts. On September 20 and 21, the federal NAAG/NASCO meeting commenced. The September 20 session was open to the public; the September 21 session was limited to government participants.

CHARITABLE GAMBLING

Enforcement efforts have continued this year under the charitable gambling regulations promulgated in 1982. Tax returns from the Lottery Commission are examined to ensure compliance with the two per year requirement. Function halls which host frequent Las Vegas events are investigated to determine whether the sponsoring organizations are legitimate and complying with the regulations. When a violation of the two per year rule is discovered, a letter of assurance of future compliance is required from the sponsoring organization. In connection with this program, numerous investigations were conducted and seven compliance letters were obtained.

Investigation of suppliers continues — both investigation of new suppliers and monitoring compliance with the seventeen court orders previously obtained.

The National Association of Gambling Regulatory Agencies (NAGRA) organized to provide a forum for the exchange of information, intelligence and regulatory procedures relating to charitable gambling. As head of the newsletter committee, we published the first NAGRA newsletter. Sixteen states, the District of Columbia and numerous cities and towns are members of NAGRA.

UTILITIES DIVISION

A. Introduction

The Attorney General has been involved in utility matters on behalf of Massachusetts ratepayers since 1973. The Utilities Division continues to operate as the major, and in most instances, the only representative of consumer interests in gas, electric, and telephone rate cases and related matters within Massachusetts. These matters are heard and decided by the Department of Public Utilities (D.P.U.) and the Energy Facilities Siting Council (E.F.S.C.). The Division also appears on behalf of Massachusetts ratepayers before the Federal Energy Regulatory Commission (F.E.R.C.).

The work of the Utilities Division underwent significant change in the past year. In prior years, most of the Division's time and resources were devoted to retail rate cases before the Department of Public Utilities. This year, only two retail rate increase cases were filed and/or decided. By far the bulk of the Division's resources in fiscal year 1985 were devoted to litigation involving the Seabrook nuclear generating project, of which Massachusetts utilities own approximately 30 percent. In the past, the Division was typically placed in a reactive posture with respect to the filings and proposals of utility companies. This fiscal year the Division moved affirmatively in several areas, adding a new dimension to our representation of Massachusetts consumers. Finally, the restructuring of the telecommunications industry has led the Division to focus on the long-term future of that industry from the consumer's perspective.

A more detailed description of the Utilities Division's work in fiscal year 1985 follows.

I. Seabrook Litigation

The Division devoted an unprecedented level of staff and financial resources to Seabrook-related litigation in fiscal year 1985. At the beginning of the year the project faced imminent collapse resulting from the near bankruptcy of its lead participant, Public Service Company of New Hampshire, the "conditional cancellation" of Seabrook Unit 2, and from a long history of escalating cost estimates for the project. The Utilities Division won a significant victory in the spring of 1984 when the D.P.U. held, in a case involving Eastern Edison Company, that it would review utility construction projects in the context of financing proceedings held under G.L.C. 164, §§ 14 and 17. In that decision the D.P.U. held that Eastern Edison had failed to prove that Seabrook was "reasonably necessary" under these statutes, and denied parts of the financing request. Following this decision, four Massachusetts utilities filed a petition with the D.P.U. seeking an investigation to determine the likely cost and on-line date for Seabrook 1. The D.P.U. then opened the so-called "generic case" to investigate those subjects.

The Utilities Division introduced expert testimony in the "generic case" which was critical of the utilities' official cost estimates of \$4.5 to \$4.7 billion for Unit 1, and which presented an independent cost estimate of \$5.8 to \$6.2 billion. The D.P.U. adopted the Utilities Division's presentation concerning the unit's cost and schedule, and in April, 1985 issued an order denying the financing requests filed by the four companies absent an undertaking by the utilities that shareholders and not ratepayers would bear the risk of going forward with Seabrook 1. The D.P.U. also held that the Massachusetts Municipal Wholesale Electric Company should not be permitted to finance its Seabrook participation under any circumstances. This order was appealed to the Supreme Judicial Court by the utilities, and the Court affirmed the D.P.U. order.

In addition to the Seabrook 1 financing litigation, the Utilities Division was active in three other cases in which utilities sought to charge their customers for their investment in Seabrook Unit 2. In the first case, filed at the D.P.U. by Fitchburg Gas and Electric Light Company (FGE), the Division successfully argued that the utility withheld necessary information during the hearings, and that as a result no recovery should be allowed. The D.P.U. denied recovery, and permitted FGE to re-file their request. FGE's second request is pending at this writing. The Utilities Division is

also active in two other pending Seabrook 2 cases; requests filed by Montaup Electric Company and New England Power Company with the Federal Energy Regulatory Commission.

II. *Affirmative Litigation*

The Utilities Division has implemented a program of affirmative litigation designed to add an additional level of ratepayer representation at both the state and federal levels. These affirmative cases included electric rate reductions as the retail level, and an investigation of a major outage of electric power plants. These are described below.

A. *Rate Reduction Cases*

At the state level the Division began a program of monitoring the earnings of Massachusetts utilities, to determine whether certain companies were enjoying excess profits. This program of investigation began in July, 1985 and resulted in three negotiated rate reductions totalling approximately \$18 million. On November 7, 1984, the Department of Public Utilities accepted a stipulation filed by the Attorney General and Cambridge Electric Light Company, which provided for a reduction of \$2.6 million. On November 15, 1984, the Attorney General and Massachusetts Electric Company filed a stipulation with the state D.P.U. providing for a rate reduction of \$10 million. This was followed in April 1985 by a second stipulation between Massachusetts Electric Company and the Attorney General. This second agreement provided for a reduction of \$5 million. The Utilities Division will continue this monitoring program in the future, to ensure that ratepayers share the benefits of the utilities' sound financial condition.

B. *Brayton Point*

On December 6, 1983, the Massachusetts Attorney General, together with other certain parties, requested the Federal Energy Regulatory Commission (FERC) to initiate an investigation of an accident which occurred at the New England Power Company's Brayton Point Unit 3 generating unit on August 26, 1983. This accident caused this unit to remain out of service for six months and forced New England Power Company to purchase substitute power from other utilities. The FERC granted this request and the Division filed expert testimony on September 26, 1984, analyzing the effects of the outage on New England Power Company's ratepayers. The Division concluded that New England Power Company had been negligent in its handling of the unit and requested that the FERC order the Company to refund \$28 million with interest. The Massachusetts affiliate of New England Power Company, the Massachusetts Electric Company, has approximately 750,000 ratepayers whose interest the Attorney General sought to protect in this proceeding. An initial decision is expected from an Administrative Law Judge in the fall of 1985.

III. FERC Wholesale Rate Litigation

A. Montaup Electric Company

Montaup filed with the FERC for permission to charge its customers for its \$10.5 million lost investment in the abandoned Pilgrim II project. The Division intervened in opposition to this request and filed the testimony of two experts who recommended that, due to Montaup's imprudence in agreeing to hold the lead owner of the project, Boston Edison, harmless for all its actions, Montaup's customers should not be charged for the loss.

On April 9, 1985, the Presiding Administrative Law Judge ruled that due to its imprudence, Montaup would be required to refund approximately \$2.75 million, with interest, to Montaup's customers. The parties to this case have taken exception to the Judge's decision with the Commission and final briefs were filed with the Commission on June 27, 1985.

IV. Retail Rate Cases

During the fiscal year the Utilities Division intervened in four gas and electric rate cases filed with the D.P.U. Two of these were rate increase proceedings, and two were rate reduction cases described above in Section II. In the two rate increase cases, \$5,837,113 have been granted out of \$12,679,678 requested resulting in a savings to the consumer of \$6,842,565. The Utilities Division can legitimately claim responsibility for much, if not all, of these savings.

RATE CASE COMPILATION

Colonial Gas Company, D.P.U. 84-94—Filed in April 1984 for an increase of \$2,599,000 for Lowell division and \$1,730,000 for the Cape Cod division. The Division recommended a decrease of \$33,000 for Lowell and a decrease of \$816,000 for Cape Cod. The D.P.U. allowed the Lowell Division \$1,675,000 and the Cape Cod division \$1,162,000.

Fitchburg Gas & Electric Light Company, D.P.U. 84-145—Filed in July 1984 for increase of \$6,899,685 for its Electric division and \$1,450,985 for its gas division. The Utilities Division and the Company agreed on a settlement. The D.P.U. allowed \$2,183,895 for its electric division and \$816,218 for its gas division.

Cambridge Electric Light Company, D.P.U. 84-165—Filed in April 1985. The Company proposed a temporary one-year reduction of its rates in the amount of \$2,260,000. The Division convinced Cambridge Electric, after months of negotiation, not only to make the credit permanent but also to roll back the Company rates by an additional \$348,000. The D.P.U. approved the final settlement to reduce rates by \$2,608,000.

Massachusetts Electric, D.P.U. 84-240—In July 1984 the Utilities Division notified Massachusetts Electric that it was beginning an investigation of its rates. The Company met with the Division several times during the summer and fall to provide requested information and negotiate. Finally, on November 15th an agreement to settle the case by reducing its rates by \$10 million was reached. The D.P.U. approved this settlement, effective January 1, 1985.

V. *Electric Fuel Clause Intervention*

Each electric utility is permitted to collect fuel and purchased power costs through a fuel adjustment clause, changes in which are filed every quarter with the Department of Public Utilities. In addition, the D.P.U. reviews each utility's power plant performance on an annual basis. The Division is provided a separate assessment of \$75,000 per year to enable it to participate in these cases on behalf of electric company ratepayers. During the year the Division intervened in the quarterly fuel clause cases of those companies which have a substantial percentage of their power costs regulated by the D.P.U. The Division also participated in hearings aimed at establishing rigorous generating unit performance standards.

The most significant quarterly fuel charge proceeding this fiscal year involved Boston Edison Company. The Utilities Division represented ratepayers in an investigation into the reasonableness and prudence of Boston Edison Company's management of a 55-week outage at Pilgrim Nuclear Power Plant. Pilgrim was out of service from December 10, 1983, until December 30, 1984. In April 1985 the Department of Public Utilities began hearings regarding Boston Edison's management of this outage. The Utilities Division presented the expert testimony of a nuclear engineer on behalf of ratepayers. At the conclusion of those hearings the Department of Public Utilities found Boston Edison Company liable for the imprudent action of one of its contractors and also found the Company imprudent in certain aspects of its planning for the outage. \$4.2 million dollars was refunded to ratepayers of Boston Edison Company in the August-October fuel charge representing the amount of replacement power costs which was determined to have been imprudently incurred by Boston Edison Company. The amount refunded included interest on the power costs which had been previously collected from ratepayers.

This case established an important principal: Utilities will be held directly responsible for the imprudent actions of contractors performing work on the utility's behalf. Ratepayers will not be required to pay for such imprudence. This decision has been appealed by the company to the Supreme Judicial Court.

VII. *Miscellaneous Cases*

A. *Cogeneration Rulemaking*

The Energy Office petitioned the Department of Public Utilities to issue revised PURPA rules, which govern the rates at which electric utilities must purchase energy produced by cogenerators and small power producers. Cogenerators include those firms and institutions which produce energy for their own heating and lighting purposes and which have available excess energy which can be sold back to the utilities. Small power producers generally refer to hydro power plants.

The Utilities Division intervened in the proposed rule-making proceeding, and sponsored testimony which endorsed rules reform designed to induce optimal levels of cogeneration and small power production. It is the position of the Utilities Division that there is a vast potential of energy in Massachusetts which would be forthcoming if the current sub-optimal rates were increased. Proper signals must be given to investors that there is a viable market for the energy produced by cogenerators and small power producers."

The Commission showed significant interest in this proceeding, as evidenced by the fact that the entire Commission heard the testimony of approximately 30 witnesses during the proceeding. No proposed rules have been issued since the close of the hearing.

B. Boston Edison Coal Conversion

In July, the Department of Public Utilities denied Boston Edison's request to finance the conversion of its oil-fired New Boston Station to coal. The conversion would have cost BECo ratepayers over \$2 billion during the next 15 years. The D.P.U. agreed with the Utilities Division that, considering the evidence produced on cross examination, there wasn't substantial probability that the conversion would save more than it cost. The Department therefore denied BECo's request that its ratepayers finance the project.

VI. WESTERN MASSACHUSETTS DIVISION

The Western Massachusetts Division of the Department of the Attorney General continued to provide a wide range of legal representation for the Commonwealth, its agencies and citizens throughout the four western counties of Massachusetts: Berkshire, Franklin, Hampden and Hampshire. Throughout the fiscal year the Division was responsible for a number of referrals from most of the Bureaus and Divisions within the Department as well as for a number of consumer protection matters originating in the Western Massachusetts Division.

In addition to the usual types of cases referred by the various divisions during the fiscal year, the Western Massachusetts Division also handled Department of Employment Security Criminal prosecutions, Industrial Accident Board claims hearings in the four western counties and personnel from the Springfield office served on the Board of Appeal on Motor Vehicle Liability Policies and Bonds.

In addition to the active cases, attorneys in the Western Massachusetts Division responded to a number of requests to make court appearances on behalf of the various divisions in Boston. These court appearances ranged from answering calls of the trial list to filing various pleadings and/or motions before the court. At these times, attorneys from the Western Massachusetts Division will appear in court on that particular matter but not handle the entire case. The ability of the Western Massachusetts Division to respond on short notice to these requests contributes to the overall efficiency and effectiveness of the Department as a whole because of the savings that result from not having to send an attorney from the Boston office.

Investigators assigned to the consumer protection section conducted numerous investigations of firms or individuals suspected of unfair and deceptive practices. The investigations covered a wide range of businesses including but not limited to

automobile sales and service, business franchise sales, rental listing firms advertising practices, charitable solicitations, home improvement firms, heating oil sales, health insurance sales and firewood sales.

During this past year the Division continued investigating automobile dealers suspected of odometer tampering. These investigations resulted in the filing of civil suits against five (5) used car dealers. In conjunction with the filing of the civil complaints, court orders were obtained attaching the bank accounts of the defendants. The suits sought restitution of \$126,000 and fines and penalties of \$21,500.

In another matter, a final judgment was entered against a home heating oil dealer in the Springfield area prohibiting the defendants from overcharging low income fuel aid recipients for home heating oil. The judgment also requires the defendants to pay \$800 in fines. Restitution of approximately \$4,000 was paid to the fuel assistance program as part of the settlement. It should be noted that the local fuel assistance program was extremely helpful in developing and resolving this case.

The actions taken by the public protection section resulted in 9 judgments, 11 assurances of discontinuance, 12 letter agreements and restitution to consumers in the amount of \$172,004 and penalties and costs of \$27,005.

In addition to investigations involving widespread patterns of deceptive practices, the Division attempts to resolve consumer complaints where there is no local consumer group or where a merchant refuses to negotiate with the local group.

During the fiscal year, the Western Massachusetts Division continued to provide a high level of service to the various divisions of the Department of the Attorney General and the citizens of Western Massachusetts.

VII. GOVERNMENT BUREAU

The Government Bureau has four functions: (1) defense of lawsuits against state officials and agencies concerning the legality of governmental operations; (2) initiation of affirmative litigation on behalf of state agencies and the Commonwealth; (3) preparation of Opinions of the Attorney General; and (4) legal review of all newly-enacted municipal by-laws, pursuant to G.L. c. 40, § 32.

A report of activity during fiscal year 1985 in each of these areas follows.

A. *Defense of State Agencies*

The Government Bureau defends the Commonwealth and its officials and agencies in litigation in state and federal courts, and, in certain cases, before federal administrative agencies. These proceedings typically involve challenges to the validity of governmental decisions, initiatives, regulations, or statutes, and raise important issues of administrative and constitutional law in diverse subject-matter areas.

During fiscal year 1985, the Bureau opened 428 new cases and closed a total of 358 previously active cases. In addition, the Bureau supervised and monitored the trial court defense, by Department of Public Welfare attorneys, of 160 new welfare benefits cases.

The Government Bureau represented the Commonwealth successfully in several cases decided by the Supreme Court in FY 1985. In *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, the Court examined G.L. c. 176A,

§ 2, which permits Massachusetts banks to be acquired only by bank holding companies based in another New England state affording reciprocal privileges to Massachusetts bank holding companies. The Court held that the Massachusetts statute was valid under the federal Bank Holding Company Act and that it violated neither the Commerce Clause, the Compact Clause, nor the Equal Protection Clause of the federal constitution. In *Atkins v. Parker*, the Supreme Court upheld the validity of a Department of Public Welfare notice mailed to 16,000 food stamp recipients informing them of changes in federal law. In so doing, the Court reversed a decision of the First Circuit (*Foggs v. Block*, decided in FY 1984) which held that Massachusetts had violated the Food Stamp Act and the Due Process Clause of the Constitution. In *United States v. Maine, et al.*, the special master appointed by the Supreme Court decided that Vineyard Sound is historic inland waters and, therefore, within the coastal boundaries of the Commonwealth. Massachusetts may also claim title to Nantucket Sound if it is not required to prove its case by evidence that is "clear beyond doubt." The final resolution of the ownership of these coastal waters should be decided by the Supreme Court during FY 1986. Finally, in *Town of Burlington v. Department of Education* the Supreme Court affirmed a decision of the state's special education authorities requiring a local school department to reimburse retroactively parents who secured at their own expense private special education for their child while the appropriate level of education was being litigated.

Government Bureau lawyers argued 11 cases before the Court of Appeals for the First Circuit which resulted in reported opinions during fiscal year 1985.¹

In two of these, the Bureau represented the Commonwealth in appeals arising from the affirmative action obligations of various state agencies. In *Devereaux V. Geary*, the Bureau successfully defended an eight-year old affirmative action consent decree, setting minority hiring and promotional goals in five state agencies, against a challenge based on the Supreme Court's decision in *Firefighters v. Stotts*. The *Stotts* decision also figured in the First Circuit's final disposition of *Boston Chapter, NAACP v. Beecher*. In this case, which had been remanded from the Supreme Court for reconsideration in light of *Stotts*, the Court ruled that the controversy was moot.

In other cases before the First Circuit this year, the Government Bureau obtained favorable results in *Danvers Pathology Associates v. Atkins* (upholding the Massachusetts system for reimbursing hospital-based laboratories for Medicaid services), *School Committee of Town of Rockland v. Massachusetts Department of Education* (upholding a ruling by the state to deny a federally-funded vocational education grant to a town that had refused to comply with state vocational education law), *Mahoney v. Trabucco* (upholding as a bona fide occupational qualification for the State Police a state law imposing mandatory retirement at age 50), *Limerick v. Greenwald* (affirming a summary judgment in favor of a former banking commissioner in a personal damages action), *Grendel's Den v. Larin* (substantially reducing the amount of attorneys' fees awarded to plaintiffs' counsel by the district court), and

¹ The Government Bureau briefs and argues many more appeals in the United States Court of Appeals, the Supreme Judicial Court, and the Massachusetts Appeals Court than result in reported decisions. Although briefing and argument of these cases requires the same professional effort as any others, the issues presented in such cases are relatively insignificant or are already settled and, consequently, are disposed of in unreported summary decisions or by rescript opinion. Such cases are not included in the description of the Government Bureau's appellate decisions for this fiscal year.

Casagrande v. Agoritsas (holding that decisions of the Civil Service Commission and the state courts were protected from collateral attack in federal court under the guise of a civil rights action).

A considerable portion of the Government Bureau's resources was dedicated in fiscal 1985 to the litigation of cases in the United States District Court. Among the more significant of the many federal district court cases are those involving the following issues: the relationship of the federal and state governments in the context of grant programs (e.g., *Hogan v. Heckler*); various issues arising from programs to assist handicapped and learning disabled children in residential or special educational placements (e.g., *Burlington v. Department of Education, DeSisto Schools, Inc. v. Lawson*); implementation of consent decrees concerning the state institutions for the mentally retarded (*Massachusetts Association for Retarded Citizens v. Dukakis* and consolidated cases); the validity, under the antitrust laws, of Blue Shield's ban on balance billing (*Kartell v. Blue Shield*); and affirmative action (e.g., *Devereaux V. Geary, Massachusetts Association of Afro-American Police, Inc. v. Boston Police Dept.*).

Government Bureau lawyers were involved in 46 cases decided by the Supreme Judicial Court during the fiscal year. Among them were fourteen cases involving the defense of the Commissioner of Revenue, whose energetic enforcement and collection activities has led to increased litigation in the tax area. Typical of these revenue cases are *Lambeth Corp. v. Commissioner of Revenue*, in which the Court held that the imposition of a use tax upon a yacht bought out of state does not violate the Commerce Clause, *Tilcon-Warren Quarries v. Commissioner of Revenue*, in which the Court upheld a ruling that a quarry operation that produces sand and gravel is not a manufacturer for purposes of a statutory tax exemption, and *Coca-Cola Bottling Co. of Northampton v. Commissioner of Revenue*, in which the Court affirmed the Commissioner's refusal to abate the use tax on the company's purchase of empty containers from out-of-state vendors. Another significant victory in the tax enforcement area was achieved in *Walden v. Board of Registration in Nursing*, in which the Court upheld a provision of the REAP legislation that requires all persons holding professional licenses from the state (except lawyers) to certify their compliance with the tax laws as a condition of licensure. One case with especially significant revenue impact decided this year was *Polaroid Co. v. Commissioner of Revenue* in which the Bureau unsuccessfully defended the Commissioner's claim of authority to impose unitary allocation of income to multi-corporate groups.

The Bureau successfully defended the Department of Public Utilities in two significant cases involving nuclear power. In the first, *Fitchburg Gas & Electric v. Department of Public Utilities*, the Court found no error in the DPU's denial of approval of a proposed issuance of securities pending completion of an investigation of the company's role as a joint owner of the Seabrook project. In the second case, *Boston Edison Co. v. Department of Public Utilities*, the Court approved the DPU's decision to deny Edison recovery of higher fuel costs incurred during the 1981-1982 outage of the Pilgrim I plant on the ground that Edison's imprudent conduct delayed the return of Pilgrim I to service, resulting in higher costs of power.

Fiscal 1985 saw fewer appeals from the Division of Insurance than in previous years, but the two that reached the Supreme Judicial Court generated mixed results. In *Massachusetts Ass'n of Older Americans v. Commissioner of Insurance*, the court affirmed the Commissioner's Medex rate decision against challenges by both Blue

Cross and a group representing the purchasers of Medex coverage. In *Medical Malpractice Joint Underwriting Ass'n v. Commissioner of Insurance*, the Commissioner's attempt to control the soaring cost of medical malpractice insurance was reversed as incorporating the incorrect burden of proof and unsupported by the evidence.

Proposition 2½ continues to be a subject of litigation as the Court held in *Town of Lexington v. Commissioner of Education* that St. 1983, c. 663, is ineffective to require Lexington and Wellesley to provide school transportation to private students because it does not comply with the "local mandates" requirement of Proposition 2½.

The Attorney General's disapproval of a local by-law was upheld in *Town of Wendell v. Attorney General*. The Court approved the Attorney General's action, holding that the by-law was not a proper exercise of municipal powers under the Home Rule Amendment because it permitted a local decision-maker to decide certain pesticide matters that the Legislature has committed to a state agency, thus frustrating the legislative purpose of creating a uniform and centralized regulatory scheme.

In the area of privacy and public records, the Court continued a trend toward disclosure. In *George W. Prescott Publishing Co. v. Register of Probate*, the Court decided that the interest of a public official in maintaining his privacy with respect to matters which he is required to disclose to his wife in a divorce action is outweighed by the general principle of publicity and the specific interest in the conduct of public officials.

In addition to the foregoing cases, the Supreme Judicial Court decided four appeals from the various boards of registration, in each case upholding the ruling of the board. By contrast, the Court ruled against the Commissioner of Welfare in the five cases in which adverse benefits decisions reached the high court this year. The remaining cases decided by the Court in 1985 involved routine matters arising from the Teachers Retirement Board's rulings on teacher dismissals, custody and adoption petitions by the Department of Social Services, liability for program costs and attorneys' fees in special education cases, health care provider rate determinations by the Rate Setting Commission, the conduct of trial court judges sought to be reviewed by the Supreme Judicial Court under its superintendency powers, and a ruling by the Alcoholic Beverages Control Commission on the licensure of an establishment serving liquor.

Government Bureau lawyers also participated in eight cases decided in the Massachusetts Appeals Court this year. Two of these involved tax issues, and the others determined questions arising from the application of the state building code, the administration of teachers retirement, the sanctioning of a liquor establishment, the application of the electrical code, welfare benefits, and continuing education requirements for nurses.

B. *Affirmative Litigation*

The Affirmative Litigation Division was established in the Government Bureau to represent the Commonwealth and its officers and agencies when performance of their official duties or protection of their interests requires resort to state or federal courts. Affirmative litigation cases which the Government Bureau brings may be divided into four broad and sometimes over-lapping categories: (1) advocacy litigation; (2) federal program litigation; (3) enforcement litigation; and (4) quasi-criminal

litigation. The first category includes cases commenced on behalf of a state agency with an advocacy responsibility or in the furtherance of the Attorney General's independent obligation to advance the public interest or to protect the interest of the Commonwealth as a sovereign. The second category, litigation related to federal programs, continues to account for a substantial portion of the Bureau's affirmative litigation efforts. These cases also tend to be the most significant ones in terms of financial value since federal government programs involve hundreds of millions of dollars due to the Commonwealth and its citizens. In cases of the third category, the Bureau performs the traditional enforcement function of the Attorney General by commencing suit on behalf of state regulatory and licensing agencies. The final category involves suits for civil recovery of funds criminally obtained from state agencies. It serves as a supplement to normal criminal prosecution. The following paragraphs contain brief descriptions of significant or representative cases litigated during the fiscal year.

In an unusual example of advocacy litigation, the Government filed a brief with the Supreme Judicial Court opposing a petition for adoption of rules creating a press shield rule. The Attorney General, together with other public officers including the President of the Senate and several District Attorneys, argued that the proposed rules should not be adopted because there was a lack of consensus or even substantial agreement on either the merits or the form of such rules among news organizations and the public, and because the serious policy and constitutional issues involved in the area made it unsuitable for resolution by rulemaking. The Supreme Judicial Court agreed and rejected the proposed rule.

The Bureau also participated either as a plaintiff or as *amicus curiae* in several cases in which municipalities used their zoning ordinances to frustrate efforts to establish small residential facilities to provide care and treatment for mentally retarded or emotionally disturbed persons. These actions, usually initiated on behalf of the Department of Mental Health, are designed to further the public policy of mainstreaming retarded or emotionally disturbed citizens by maximizing their opportunity to participate in ordinary life.

In another example of advocacy litigation, the Government Bureau continued its practice of bringing actions against nursing homes and other health care institutions to obtain appointment of receivers to take over their operation. In *Attorney General v. Avalon School, Inc.*, the Bureau completed its involvement in a case begun in 1984 in which it obtained appointment of a receiver for a group of schools in Berkshire County providing special education to approximately two hundred special needs children. The receivership was necessary to prevent financial collapse and the resulting harm to the children residing at the schools. The receiver reorganized the schools and put them on a sound financial footing. The schools have now been sold and are operated by a new corporation which will ensure continuance of needed care for the children involved.

An example of federal program litigation is *Commonwealth v. Auchter*, in which the United States Court of Appeals in Philadelphia ruled on a petition for review of regulations issued by the Secretary of Labor which would preempt Massachusetts' right to know law. Although ruling against the Bureau's position on several points relating to protection of workers, the court did accept the Attorney General's argument that the federal regulation did not preempt the community right to know provisions of state law. Another example of federal program litigation is *Commonwealth*

v. Heckler, an action commenced by the Government Bureau challenging the disallowance by the federal Grant Appeals Board of approximately \$6 million in medicaid reimbursement for treatment of clients at the state's intermediate care facilities for the mentally retarded. After the close of the fiscal year the United States District Court ruled in the Commonwealth's favor.

A case which represents both advocacy and federal program litigation is the continuing case of *Avery v. Heckler*. The original purpose of that intervention was to halt the federal government's policy of forcing the state to use improperly strict rules for reviewing payments of Social Security disability benefits and to require the federal government to cease its practice of ignoring adverse legal precedents. That result has now been achieved by statute, and the Bureau's involvement in *Avery* is intended to ensure the proper implementation of that statute, both prospectively and retroactively. Continued prosecution of *Avery* is designed to benefit both the disabled, many of whom were improperly denied disability benefits due them, and the Commonwealth itself which has to pay General Relief to some of those who have been denied such federal benefits. After passage of the new statute, the United States District Court remanded the case to the federal government to notify improperly terminated persons and to restore the benefits due them, and that decision was affirmed by the Court of Appeals.

As in past years, the Government Bureau brought several lawsuits to enforce the licensure requirements, regulations, and orders of state agencies. For example in *Attorney General v. Sheriff of Suffolk County*, the Bureau sued the Sheriff and, subsequently, other Suffolk County officers, to compel progress on construction of a new Suffolk County jail to replace the present jail which was built in 1848. The size and condition of the present jail were insufficient to provide care for all persons ordered to be held by the Sheriff which resulted in a crisis with prisoners being kept overnight in the courthouse because of a lack of jail space. The Attorney General argued that in such circumstances the county was failing to satisfy its statutory duty to provide an adequate jail. A single justice of the Supreme Judicial Court issued an injunction establishing a schedule for construction of a new jail and the full court unanimously affirmed that order.

The Bureau has also continued to assist the Department of Revenue's stepped up tax enforcement program by filing several seizure and forfeiture actions. In those cases, the Bureau, on behalf of the Commissioner of Revenue, files actions seizing the property of businesses with large unpaid state tax bills after other, less drastic efforts at tax collection have failed.

Another case, which combines enforcement with federal program litigation, is *Northeast Bancorporation v. Board of Governors of the Federal Reserve System*, in which the Bureau filed a brief with the United States Supreme Court in a case involving the constitutionality of the Massachusetts interstate banking statute which limits acquisition of Massachusetts banks to banks located in New England. This statute had been challenged by other banks, principally several very large banks located in New York. The Supreme Court affirmed a lower court decision upholding the Massachusetts statute.

C. Opinions and By-Laws Division

(1) Standards for Issuing Opinions

The Attorney General is authorized by G.L. c. 12, § 3 to render legal advice and opinions to state officers, agencies, and departments on matters relating to their official duties.

Following in large part the established practice of previous Attorneys General, opinions have been given only to state agencies, departments, and the officials who head those entities. Opinions are not rendered to individual employees of a state agency; questions posed by county or municipal officials or by private persons or organizations are not answered.

The questions considered in legal opinions must have an immediate, concrete relation to the official duties of the state agency or officers requesting the opinion. In other words, hypothetical or abstract questions or questions which ask generally about the meaning of a particular statute, lacking a factual underpinning, are not answered. Opinions are not offered on questions raising legal issues which are or soon will be the subject of litigation or that concern collective bargaining. Questions relating to the wisdom of legislation or administrative or executive policies are not addressed. Generally federal statutes are not construed and the constitutionality of state or federal legislation is not determined.

(2) Procedures for Requesting Opinions

In an effort to make the opinion-rendering function as effective, helpful, and efficient as possible, the Opinions Division has established a number of procedural guidelines to govern opinion requests.

Opinion requests from state agencies (or heads of state agencies) which come under the jurisdiction of a cabinet or executive office must first be sent to the appropriate executive secretary for his or her consideration. If the secretary believes the question raised is one which requires resolution by the Attorney General, the secretary then requests the opinion on behalf of the agency or submits the agency's request with his or her approval noted.

There are two reasons for this rule. The first concerns efficiency. Opinions of the Attorney General, because of their precedential effect, are thoroughly researched and prepared. If a question can be satisfactorily resolved more quickly within the agency or executive office — by agency legal counsel or otherwise — everyone is better served. The second reason relates to the internal workings of the requesting agency and its executive office. It would be inappropriate for this Department to be placed in the midst of an administrative or even legal dispute between these two entities. The rule, therefore, helps to ensure that the agency and its executive office speak with one voice insofar as Opinions of the Attorney General are concerned.

If the agency or executive office requesting an opinion has a legal counsel, counsel should prepare a written memorandum explaining the agency's position on the legal question presented and the basis for it. The memorandum should accompany the request.

When an agency request raises questions of direct concern to other agencies, governmental entities, or private individuals or organizations the Opinions Division solicits the views of such interested parties before rendering an opinion.

The issuance of information opinions is strongly discouraged. Informal opinions are often relied upon as if they were formal Opinions of the Attorney General. In a number of instances, this reliance has been seriously misplaced. As a result, the issuance of informal opinions is strictly limited to situations of absolute necessity.

(3) *By-Laws*

Town by-laws, home rule charters, and amendments thereto are reviewed and must receive the approval of the Attorney General prior to becoming effective. The review function is performed by attorneys in the Government Bureau. During the fiscal year ending June 30, 1985, the Bureau reviewed over 1525 by-laws and 17 home rule charter actions.

The by-laws received this year consisted of 694 general by-laws and 831 zoning by-laws. General by-laws pertain to town government and the exercise of municipal power. The zoning by-laws are a continuing exercise of the police power over the use of land by all the owners thereof.

This year saw a diminishing concern with time sharing but an increased attempt to control or regulate growth. The two most prevalent approaches to control growth were moratoriums on development of the imposing of overlay districts to protect ground water sources.

July 12, 1984

James S. Hoyte, Secretary
Executive Office of Environmental Affairs
100 Cambridge Street
Boston, Massachusetts 02202

Dear Secretary Hoyte:

You have requested my opinion concerning the use and dissemination of pre-qualification statements filed by bidders on public contracts. Specifically, you question whether the Metropolitan District Commission (MDC) may disclose information contained in such statement to the Inspector General.¹ For the reasons set forth below, it is my opinion that when the Inspector General has reason to believe that a contractor has submitted fraudulent information in order to qualify to bid on an MDC contract, he is authorized to have access to the pre-qualification statement submitted by that contractor.

You have informed me that in the course of an investigation, the Inspector General gathered certain information indicating that an MDC contractor had submitted fraudulent information in a particular prequalification statement. When the Inspector General asked to inspect that prequalification statement to ascertain whether the statement submitted was fraudulent, the MDC denied the request on the basis that the provisions of G.L. c. 29, § 8B, preclude any such disclosure without the contractor's consent. Fearing that his investigation would be compromised by communication with the contractor, the Inspector General declined to ask the MDC to obtain

¹ The MDC is one of the agencies within the Executive Office of Environmental Affairs.

the contractor's consent. As a result, the Inspector General has been unable to investigate the allegation that a fraudulent prequalification statement was filed by the contractor in question. In order to resolve this controversy, which is likely to recur in the future, you join with the Commissioner of the MDC and the Inspector General in requesting this opinion.

Your request turns essentially on the terms of two arguably conflicting laws. The first of those statutory provisions is G.L. c. 29, § 8B, which provides, in pertinent part, as follows:

The commissioner of public works or the commissioner of the metropolitan district commission . . . shall require that any person proposing to bid on any such work . . . submit a statement under the penalties of perjury setting forth his qualifications to perform such work.

Any such statement filed with either such commissioner by a prospective bidder shall be used only by the department of public works or the metropolitan district commission, as the case may be, in determining the qualifications of such prospective bidder to perform work for said department or commission . . . No information contained in such statement shall be imparted to any other person without the written consent of said bidder.

At apparent odds with this statutory provision is G.L. c. 12A, § 9, which authorizes the Inspector General to:

. . . have access to all records, reports, audits, reviews, papers, books, documents, recommendations, correspondence, including information relative to the purchase of services or anticipated purchase of services from any contractor by any public body, and any other data and material that is maintained by or available to any public body involved in the expenditure of public funds . . . which in any way relate to the programs and operations with respect to which the Inspector General has duties and responsibilities except records under the provisions of section eighteen of chapter sixty-six as defined in section three of said chapter sixty-six.²

He may request such information, cooperation and assistance, including information relative to the purchase of services or anticipated purchase of services from any contractor by any public body, from any state, country or local governmental agency as may be necessary for carrying out his duties and responsibilities.

Upon receipt of such request each . . . public body involved in the expenditure of public funds . . . shall furnish to the Inspector General . . . such information, cooperation and assistance, except records under the provisions of section eighteen of chapter sixty-six as defined in section three of said chapter sixty-six.

² This exception, which pertains to records of the General Court and the Office of Veterans' Services, is not pertinent here.

On the one hand, the plain language of G.L. c. 29 § 8B, prohibits the use of pre-qualification statements for any purpose other than determining the qualifications of a contractor to bid on a public contract. On the other hand, G.L. c. 12A, § 9, plainly evidences a legislative intent that the Inspector General have access to all records related to activities within the jurisdiction of his office.

Although if literally applied these two statutes are in apparent conflict, a cardinal rule of statutory construction requires me to construe these statutes together in order to constitute a harmonious whole consistent with their legislative purposes so that both may be given effect. *Attorney General v. School Committee of Essex*, 387 Mass. 326 (1982); *Registrar of Motor Vehicles v. Board of Appeals on Motor Vehicle Liability Policies and Bonds*, 382 Mass. 580, 585 (1981); *Board of Education v. Assessor of Worcester*, 368 Mass. 511, 513-14 (1975); *County Commissioners of Middlesex County v. Superior Court*, 371 Mass. 456 (1977). Such a construction must begin with an analysis of the legislative history of each statute.

Chapter 12A of the General Laws, establishing the office of the Inspector General, was drafted by the Special Commission on State and County Buildings³ and was passed by the Legislature in response to findings of widespread corruption and waste in the award and performance of public design and construction contracts. *See Final Report to the General Court of the Special Commission Concerning State and County Buildings* (December 31, 1980). By combining both an auditing and investigative function in a politically independent agency, the office of the Inspector General was intended to serve as watchdog over the expenditure of public funds by governmental bodies for the procurement of construction, supplies, and services. Accordingly, G.L. c. 12A, § 7, authorizes the Inspector General:

to prevent and detect fraud, waste and abuse in the expenditure of public funds, whether state, federal or local, in programs and operations involving the procurement of any supplies, services or construction, by agencies, bureaus, divisions, sections, departments, offices, commissions, institutions and activities of the commonwealth . . .

He is required to carry out this mandate in two ways: (1) by making recommendations for legislative or administrative action, G.L. c. 12A, § 8; and (2) by conducting investigations or audits relating to individual contractors or vendors which may serve as the basis for a referral to an appropriate prosecutorial agency for criminal or civil prosecution. G.L. c. 12A, §§ 10, 11. As a necessary adjunct to the Inspector General's mandate to prevent, discover, and expose dishonesty and maladministration in procurement by publicly funded agencies, the Legislature empowered the Inspector General to seek and obtain relevant information from both public and private entities engaged in the contracting process. G.L. c. 12A, § 9.

Like chapter 12A, G.L. c. 29, § 8B, is designed to insure that MDC contracts are awarded only to those who establish, through the information they provide in a pre-qualification statement, that they are qualified to perform the work. It provides that prequalification statements are to be submitted "under penalties of perjury" and

³ The Special Commission was established by Chapter 5 of the Resolves of 1978 and was generally referred to as the "Ward Commission."

further states that those persons convicted to knowingly and willfully filing false statements are disqualified from submitting bids on other contracts for one year from the date of said conviction. By holding bidders accountable for the truth of their statements, this provision ensures that public monies are not needlessly expended on contractors who are not qualified or who misrepresent their capabilities.

The provisions of both statutes thus serve the same underlying purpose, to prevent the needless expenditure of public funds. To give effect to this shared legislative purpose, appropriate law enforcement agencies must have access to a prequalification statement if the veracity of its content is in question. If the confidentiality provisions of G.L. c. 29, § 8B, are interpreted to preclude disclosure of a prequalification statement to a law enforcement agency conducting an investigation of possible perjury, the sanctions for submitting false statements, also contained in § 8B, would be devoid of any practical significance. Further, to conclude that the MDC could withhold these statements from the Inspector General would frustrate the discharge of the very function for which the office of the Inspector General was created, "to prevent and detect fraud." G.L. c. 12A, § 7. An analogy may be drawn to the Supreme Judicial Court's conclusion that the Attorney General must have access to personal income tax returns in order to properly discharge his duty to prosecute tax cases, despite statutory provisions generally prohibiting the dissemination of information contained in such returns. *Opinion of the Justices*, 354 Mass. 804 (1968). Similarly, I think it is clear that the Inspector General must have access to prequalification statements in order to fulfill his legislative mandate.

By reaching this conclusion, I am not suggesting that the confidentiality provisions contained in § 8B should be construed as superfluous. Requiring that prequalification statements be kept confidential is intended to ensure open and competitive bidding on public contracts by denying competing contractors access to each other's trade secret, commercial, or financial information. See 1966/67 Op. Atty. Gen. No. 20, Rep. A.G., Pub. Doc. No. 12 at 70 (1967); *Final Report of the Chapter 579 Task Force* at 136-38 (February 1, 1983). This intent is not frustrated by disclosure of the statements to law enforcement officials conducting an investigation.

Nor would disclosure of such information to the Inspector General necessarily lead to the more general dissemination which § 8B was intended to avoid. Investigatory material compiled by the Inspector General, as by other investigatory officials and law enforcement agencies, is confidential and exempt from disclosure as a public record under the general exemption for such material provided in G.L. c. 4, § 7, clause 26(f). More specific, however, is the express exemption contained in G.L. c. 12A, § 13, which provides that all records of the office of the Inspector General are confidential and shall not be considered public records. These statutory exemptions are a product of the Legislature's recognition that the public disclosure of investigatory material could have a deleterious effect on law enforcement in derogation of the public interest. See *Bougas v. Chief of Police of Lexington*, 371 Mass. 59 (1976). A tangential result of these exemptions, relevant here, is that a bidder's expectation of confidentiality of trade secrets or other personal information contained in a prequalification statement is effectively met. Of course, if the Inspector General's investigation ultimately leads to the prosecution of the bidder for submitting fraudulent information, the information will be publicly disclosed. In that situation, however, a reasoned reading of both statutory provisions leads inescapably to the conclusion that, in the judgment of the Legislature, privacy concerns must yield to the greater societal interest in detecting and eradicating fraud and waste in the expenditure of

public funds. *In Re Hampers*, 651 F.2d 19 (1st Cir. 1981). Accordingly, I conclude that my interpretation of the two statutes as consistent furthers the legislative purpose behind both provisions.⁴

Even if I were not certain that the two statutes could be read harmoniously, I remain confident in the conclusion I reach. A fundamental rule of statutory interpretation provides that the Legislature is presumed to be aware of existing statutes when enacting legislation. *Town of Hadley v. Town of Amherst*, 372 Mass. 46, 51 (1976). I must presume, therefore, that in 1980 when the Legislature acted on the recommendation of the Ward Commission and created the office of Inspector General by inserting chapter 12A into the General Laws, it was aware of all statutory provisions, including G.L. c. 29, § 8B, that regulated the award and performance of public design and construction contracts. *Condon v. Haitsma*, 325 Mass. 371, 373 (1950). Indeed, a companion bill to the Inspector General measure, St. 1980, c. 579, extensively amended the provisions of chapter 29, including revisions affecting G.L. c. 29, § 8A. Chapter 579 was enacted upon the recommendation of the Ward Commission. Thus the principle that later acts of the Legislature may modify the application of an earlier statute without expressly or impliedly repealing that earlier statute is particularly relevant here. *Walsh v. Ogorzalek*, 372 Mass. 271 (1977). In accordance with that principle, to the extent that these two statutes may conflict, the more recently enacted Inspector General statute must control.

In sum, to construe chapter 29, § 8B, so as to preclude the MDC from disclosing prequalification statements to the Inspector General would frustrate the intent of the General Court and compromise the ability of the Inspector General to perform his statutory mandate to detect and prevent illegality or inefficiency in government. To avoid this unintended result, I conclude that G.L. c. 12A § 9, and G.L. c. 29, § 8B, construed together and light of legislative intent, authorize the Inspector General to have access to a prequalification statement submitted to the MDC, where the Inspector General has reason to believe that a contractor has committed perjury in connection with a bid on a public contract.⁵

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

⁴ My conclusion should not be read broadly. I do not read these statutory provisions as authorizing access to prequalification statements by any state agency or as a matter of routine to law enforcement agencies; instead, I view these provisions as extending no further than to require disclosure in connection with a specific investigation conducted by the Inspector General. *Cf. Torres v. Attorney General*, 391 Mass. 1 (1984) (personal data compiled by one state agency may be disclosed to the office of the Attorney General only when requested in connection with an affirmative investigation).

⁵ Of course, this construction need only be employed where, as in the situation presented by your request, seeking the contractor's consent to release of his prequalification statement would compromise the Inspector General's investigation. Otherwise, an attempt to obtain such a release, pursuant to G.L. c. 29, § 8B, should be made prior to disclosure.

September 4, 1984

Honorable Michael Joseph Connolly
Secretary of the Commonwealth
State House
Boston, Massachusetts

Dear Secretary Connolly:

By letter dated August 2, 1984, you transmitted a series of proposed ballot questions to me and requested my opinion whether they are "public policy" questions within the meaning of G.L. c. 53, § 19. You further requested an opinion of what simple, unequivocal, and adequate form is best suited for presentation of these questions on the ballot. This year your request forces me to consider, first, whether the matters presented are of purely local concern and hence excludable from the ballot, and second, whether they present appropriate matters for any type of legislative action at all. *See Thompson v. Secretary of the Commonwealth*, 265 Mass. 16 (1928).

As I have noted in past years, I am of the opinion that the term "public policy" as used in G.L. c. 53, § 19, should not be given an overly restrictive meaning. 1982/83 Op. Atty. Gen. No. 3, Rep. A.G., Pub. Doc. No. 12 at _____ (1982); 1980/81 Op. Atty. Gen. No. 6, Rep. A.G., Pub. Doc. No. 12 at 109 (1980). I have consistently opined, however, that each question must concern an important public matter in which every citizen of the Commonwealth would have an interest. *Id.* Still, even when a question appears to concern a small geographic area, if the problem it addresses is one of concern to the Commonwealth in general, then the question may be considered one of public policy. *See* 1982/83 Op. Atty. Gen. No. 3, Rep. A.G., Pub. Doc. No. 12 at 84 (1982).

For instance, one question was submitted from the 18th Suffolk Representative District concerning whether the representative districts from the Allston-Brighton areas of Boston should be redrawn so that one representative would be elected from Ward 21 of Boston and another representative would be elected from Ward 22 of Boston. If this is viewed as simply a question of whether these particular representative districts should follow municipal ward boundaries, it is difficult to characterize the question as one of concern to every citizen of the Commonwealth. The question may be viewed in a larger context, however, because it concerns the broader subject of how the representative districts of the General Court are drawn. This is a matter clearly within the purview of the state Legislature and equally clearly one in which every citizen of the Commonwealth has an interest. On the basis of an unbroken line of precedent,¹ I adopt the broader view and conclude that the question is one of public policy within the meaning of G.L. c. 53, § 19, and should appear on the ballot.

Another seemingly local question, filed from the 1st Hampshire Representative District, seeks to have Northampton declared a nuclear free zone. Although the petition is directed at a particular geographic area, it concerns the broader subject of the proliferation and deployment of nuclear weapons, which is of vital concern to all citizens of the Commonwealth. *See, e.g.,* 1974/75 Op. Atty. Gen. No. 13, Rep. A.G., Pub. Doc. No. 12 at 56 (approving a question calling for the closing and dismantling of nuclear power plants in Rowe, Massachusetts, and Vernon, Vermont). Accordingly, it is my opinion that the subject matter of this seemingly local question is also a public policy question within the meaning of G.L. c. 53, § 19.

¹ *See, e.g.,* 1980/81 Op. Atty. Gen. No. 6, Rep. A.G., Pub. Doc. No. 12 at 110 (1980); 1978/79 Op. Atty. Gen. Nos. 16, 17, and 18, Rep. A.G., Pub. Doc. No. 12 at 121-23 (1978); 1976/77 Op. Atty. Gen. No. 7, Rep. A.G., Pub. Doc. No. 12 at 89 (1976); 1974/75 Op. Atty. Gen. Nos. 11, 13, 22, Rep. A.G., Pub. Doc. No. 12 at 54, 56, 62-63 (1974).

A separate issue is raised, however, concerning whether declaring any area to be a nuclear free zone is an appropriate subject for legislative action. This issue arises because the instruction contained in each public policy question must be consistent with the powers of the Legislature, and the subject matter must be fit for legislative action. *Thompson v. Secretary of the Commonwealth*, 265 Mass. at 19; 1980/1981 Op. Atty. Gen. No. 6, Rep. A.G., Pub. Doc. No. 12 at 109 (1980). Unless the petition concerns a matter appropriately subject to some type of legislative action, it is not an appropriate public policy question. See 1978/79 Op. Atty. Gen. No. 8, Rep. A.G., Pub. Doc. No. 12 at 114 (1978) (disapproving a petition asking the Legislature to reject changes proposed by a local charter commission).

The United States Constitution, article I, section 8, clause 1, provides that Congress shall have the power to provide for the common defense. A state or a subdivision thereof cannot interfere with this power granted to the United States by adopting a legislative enactment establishing "nuclear free zones." *Pauling v. McElroy*, 278 F.2d 252, 254 (D.C. Cir.), cert. denied, 364 U.S. 835 (1960); *Holbridge v. United States of America*, 282 F.2d 302, 303 (8th Cir. 1960). Cf. *Stetson v. Kempton*, 13 Mass. 271 (1816) (local community may not appropriate money for the purpose of providing for the common defense). I find it crucial, however, that the petition as filed instructs the Representative to vote not in favor of legislation but in favor of a resolution. Because it is within the prerogative of the Legislature to memorialize Congress² to declare Northampton to be a nuclear free zone, I have concluded that the question, as rephrased, is one of public policy within the meaning of G.L. c. 53, § 19.

The requirement that the matter presented must be fit for legislative action is perhaps best illustrated by a discussion of the one question I have elected to reject. A petition was submitted from the 14th Suffolk Representative District in the following form: "Want licenses issued to Schaefer Paper Company and Suffolk Services for the storage and transportation of hazardous wastes to be rescinded by the (D.E.Q.E.) Department of Environmental and Quality Control of the Commonwealth of Mass." This petition does not call for any type of legislative action. The authority to issue and rescind licenses to store and transport hazardous waste rests with the Department of Environmental Quality Engineering, under G.L. c. 21C, § 7, not with the Legislature. Indeed, if the Legislature attempted to rescind particular licenses, grave constitutional issues would be raised under Article I, section 10, cl. 1, and the Fourteenth Amendment of the United States Constitution as well as under the Massachusetts Constitution, Pt. 1, Articles 10 and 30. See *Commissioner of Public Health v. The Bessie M. Burke Hospital*, 366 Mass. 734 (1975); *Boston Gas Co. v. Department of Public Utilities*, 387 Mass. 531 (1982). Cf. *Dickinson v. New England Power Co.*, 257 Mass. 108 (1926); *Paddock v. Brookline*, 347 Mass. 230 (1964). Accordingly, I have concluded that this petition does not present a question that may appropriately receive action by the General Court and therefore should not appear on the ballot.

The issue of fitness for legislative action is also squarely presented by a number of questions which concern changing internal procedures of the General Court. These questions require additional analysis in light of my decision last year that an initiative petition calling for reform of the rules of the General Court could not be placed on the ballot under Amendments, Article 48. That decision was upheld by the Supreme Judicial Court in *Paisner v. Attorney General*, 390 Mass. 593 (1983).

² See *Thompson v. Secretary of the Commonwealth*, 265 Mass. at 19.

As recognized by the court in *Paisner*, the power of the Legislature is broader than simply the power to make laws and includes the ability to establish rules of proceedings.

[I]n addition to those law making powers, the respective branches of the General Court possess many unicameral powers, most of which are bestowed on them by Part II, c. 1, §§ 2 and 3. . . . The power to “choose its own President, appoint its own officers, and determine its own rules of proceedings” is conferred exclusively on the Senate by Pt. II, c. 1, § 2, Art. 7. While the members of the House of Representatives possess the corollary power to “choose their own Speaker, appoint their own officers, and settle the rules and orders of proceeding in their own House . . .” by virtue of Pt. II, c. 1, § 3, Art. 10.

Paisner, 390 Mass. at 599. However, as further recognized by the Supreme Judicial Court, the power reserved to the people by the popular initiative is merely the power to enact laws or constitutional amendments and does not extend to the full panoply of legislative powers. “It is clear to us that the popular initiative is confined to laws and constitutional amendments.” *Id.* at 598. Accordingly, the court upheld my determination that a proposal modifying the rules of procedure of the Legislature was not proper under the provisions of Amendments, Article 48.

Public policy questions, unlike initiative petitions, are not restricted to providing instructions only on questions of law making; instead they extend to any question of important public concern that may appropriately receive attention or action by the General Court. *Thompson v. Secretary of the Commonwealth*, 265 Mass. at 19. Under the provisions of the Massachusetts Constitution, Pt. 1, article 19, the people of the Commonwealth have the right to provide instructions to legislators. This power is not expressly or implicitly restricted to any particular type of legislative action, nor does G.L. c. 53, § 19, contain any such restriction. Accordingly, public policy questions may concern subjects excluded from the popular initiative as long as they remain appropriate subjects for some type of action by the Legislature.

As noted above, the members of the Legislature have the power to establish the rules of procedure of their respective branches. Therefore, I have concluded that the questions concerning the reform of procedures followed in the Legislature are ones of public policy within the meaning of G.L. c. 53, § 19, and should appear on the ballot. *See 1978/79 Op. Atty. Gen. No. 14, Rep. A.G., Pub. Doc. No. 12 at 119 (1978).*

I end this general discussion of the merits of your request with the caveat that certain additional requirements must be satisfied before the questions may appear on the ballot. These requirements, contained in G.L. c. 53, §§ 19, 20, and 21, involve determinations of fact. For example, a question that is a fit subject for legislative action and presents an important public issue may not appear on the ballot if the question is substantially the same as one that has been submitted to the voters within less than three years. G.L. c. 53, § 21. As Secretary of the Commonwealth, you have in your possession past election ballots from each of the relevant districts, and therefore, you are in a better position than I to make such factual determinations. Consequently, and in accordance with prior practice,³ I have made no independent inquiry as to

³ 1982/83 Op. Atty. Gen. No. 3, Rep. A.G., Pub. Doc. No. 12 at 84 (1982); 1980/81 Op. Atty. Gen. No. 6, Rep. A.G., Pub. Doc. No. 12 at 109 n. 1 (1980); 1958/59 Op. Atty. Gen. No. 12, Rep. A.G., Pub. Doc. No. 12 at 44 (1958).

whether these questions are statutorily defective for any reason other than a failure to qualify as a public policy question in proper form for presentation on the ballot.

With the above considerations in mind, it is my opinion that the following questions should appear on the ballot in the following form:

**Representative Districts: 5th Essex and
six other Representative Districts⁴**

Shall the Representative from this district be instructed to vote in favor of legislation, resolutions, or constitutional amendments to balance the state and federal budgets and to retire the national debt, not by increased taxes, additional fees, expanded borrowing, or other revenue-enhancement measures, but by a reduction in spending?

Senatorial District: 4th Middlesex

Shall the Senator from this district be instructed to vote in favor of legislation repealing the seven and one-half percent surtax on the five percent Massachusetts income tax?

**Representative Districts: 1st Barnstable and
four other Representative Districts⁵**

Shall the Representative from this district be instructed to vote in favor of legislation repealing the seven and one-half percent surtax on the five percent Massachusetts income tax?

**Representative Districts: 2nd Barnstable and
thirty-eight other Representative Districts⁶**

Shall the Representative from this district be instructed to vote in favor of a resolution calling upon the United States Congress and the President of the United States to immediately withdraw any and all troops and military advisors from El Salvador and Honduras; to stop any and all military aid to El Salvador, Honduras, and Guatemala; to stop any and all aid to the forces fighting to overthrow the government of Nicaragua; and to direct funds now used for such purposes to the domestic economy to create jobs and improve services?

Representative District: 18th Suffolk

Shall the Representative from this district be instructed to vote in favor of legislation redrawing the representative districts for Allston-Brighton so that one representative shall be elected to serve all of Ward 21, and one representative shall be elected to serve all of Ward 22?

⁴ 15th and 17th Essex; 4th, 14th, 16th, and 17th Middlesex.

⁵ 1st, 21st, and 23rd Middlesex; 17th Essex.

⁶ Cape and Islands; 7th and 17th Essex; 1st and 2nd Franklin; 5th, 10th, 11th, 12th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, and 32nd Middlesex; 7th and 15th Norfolk; 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, and 19th Suffolk.

Representative District: 1st Hampshire

Shall the Representative from this district be instructed to vote in favor of a resolution calling upon Congress and the President of the United States to declare Northampton a nuclear free zone where no nuclear weapons may be produced, deployed, or stored within the city limits?

Representative Districts: 5th Norfolk and 7th Plymouth

Shall the Representative from this district be instructed to vote in favor of legislation or orders eliminating the extra pay for legislative committee chairmen, requiring legislative committees to act promptly on legislation, and permitting committee chairmen to be elected rather than appointed by the Speaker of the House?

Representative Districts: 7th and 13th Essex

Shall the Representative from this district be instructed to vote in favor of an order requiring the election of committee chairmen by the full membership of the House, substantially reducing the bonus pay given to committee chairmen and other members of the House leadership, and allowing the State Auditor and Inspector General to have access to the records of the Legislature?

Representative District: 8th Plymouth

Shall the Representative from this district be instructed to vote in favor of an order reforming the rules of the House of Representatives by requiring roll call votes on all legislative pay increases and by providing for election of the Speaker by secret ballot, election of committee chairmen by committee members, elimination of the additional \$7,500 in pay for committee chairmen, and allowance of television coverage of all House sessions?

**Representative Districts: 2nd Barnstable and
three other Representative Districts⁷**

Shall the Representative from this district be instructed to vote in favor of an order changing the rules of the Massachusetts House of Representatives to eliminate extra pay for legislative committee chairmen, to require legislative committees to act promptly on legislation, and to permit committee chairmen to be elected rather than appointed by the Speaker?

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

⁷ 21st and 22nd Middlesex; 11th Worcester.

October 2, 1984

Honorable Arthur M. Mason
Chief Administrative Justice of the Trial Court
New Court House
Pemberton Square
Boston, MA 02108

Dear Judge Mason:

You have requested my opinion as to whether G.L. c. 30, § 46(12), prohibits a county employee from receiving *per diem* compensation from the Commonwealth for service as a court officer if that employee also receives annual compensation from a county in excess of \$20,000.¹ For purposes of this opinion, I have divided your request into two subsidiary questions: (1) whether *per diem* court officers are state "employees" within the meaning of G.L. c. 30, § 46(12), and (2) whether the operation of the Trial Court is an "undertaking of the Commonwealth" under that statute. For the reasons set forth below, I answer both of those questions in the affirmative and therefore conclude that a county employee who currently² receives more than \$20,000 per year from a county may not also receive compensation from the Commonwealth for service as a court officer.

You have informed me that your opinion request arises in connection with your administration of the Trial Court of the Commonwealth, pursuant to G.L. c. 211B, § 9. You have also informed me that certain county correctional officers who are compensated by counties in amounts in excess of \$20,000 per year for their duties are also employed as court officers by the Superior Court Department of the Trial Court, pursuant to G.L. c. 213, § 13, and G.L. c. 211, §§ 69 *et seq.*, and are compensated for those duties by the Commonwealth on a *per diem* basis.

My analysis of G.L. c. 30, § 46(12), begins with the general rule that "a statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." *Registrar of Motor Vehicles v. Board of Appeal on Motor Vehicle Liability Policies and Bonds*, 382 Mass. 580, 585 (1981). The plain language of the statute serves as the initial and principal guide to legislative intent. *Bronstein v. Prudential Insurance Company of America*, 390 Mass. 701, 704 (1984.)

Section 46(12) of Chapter 30 was inserted by St. 1981, c. 293, § 5, and amended by St. 1984, c. 234, § 15. The subsection currently provides in full:

¹ You actually inquired about payment to those county employees whose annual county compensation is in excess of \$15,000. This is because at the time of your request G.L. c. 30, § 46(12), permitted those county employees whose annual compensation was \$15,000 or less to also receive compensation from the state. As of July 1, 1984, however, the "triggering" salary contained in that statute was raised to \$20,000. St. 1984, c. 234, §§ 15 and 108. The statutory change has led me to rephrase the question you posed, but it does not alter the thrust of your request nor the basic reasoning of this opinion.

² See note 1, *supra*.

Notwithstanding the provisions of any general or special law to the contrary, no employee shall receive compensation from any agency, department, commission, board or other undertaking of the commonwealth if said employee is also an employee of a county and would receive compensation from such county in excess of twenty thousand dollars. Any employee covered by the provisions of this paragraph shall have thirty days prior to separation from the payroll of the commonwealth within which to resign from the employ of such county.

Since the critical terms "employee," "compensation," and "agency, department, commission, board, or other undertaking of the Commonwealth" are not defined in G.L. c. 30, my construction of those terms must be based on the ordinary meaning of the terms and their usage in other analogous statutes.

In my opinion, county correctional officers who also serve as *per diem* court officers are "employees" of both the Commonwealth and their respective counties, since they are paid for services performed for both governmental bodies. The part-time nature of their service as court officers does not exempt them from "employee" status. Elsewhere in the general laws, the term "employee" is defined to include persons who hold employment "on a full, regular, part-time, intermittent, or consultant basis." See G.L. c. 268A, §§ 1(d), (g), and (q).³ See also G.L. c. 258, § 1, and 1983/84 Op. Atty. Gen. Nos. 1 and 2, Rep. A.G., Pub. Doc. No. 12 (1983) (construing the term "public employee" in G.L. c. 258, §§ *et seq.*, the Massachusetts Claims and Indemnity Act, to include part-time employees.⁴

The use of the term "compensation" in G.L. c. 30, § 46(12), in conjunction with the term "employee" fortifies my conclusion. "Compensation" is defined elsewhere in the General Laws as "any money, thing of value or economic benefit conferred on or received by a person in return for services rendered." G.L. c. 268A, § 1(a). The term "compensation" sweeps far more broadly than other phrases concerning payment, such as the term "salary."⁵ Read together with the term "employee," use of the term "compensation" demonstrates legislative intent to apply G.L. c. 30, § 46(12), to a person who receives money from the Commonwealth for part-time service. I therefore construe "compensation" to include the remuneration received by the *per diem* court officers.

³ The definitional guidance provided by G.L. c. 268A, which governs conflicts of interest and ethics in government, is particularly opposite here, since the "mischief to be remedied" and the "main object to be accomplished." *Registrar of Motor Vehicles*, 382 Mass. at 585, by G.L. c. 268A and G.L. c. 30, § 46(12), are related. Chapter 268A therefore provides an appropriate source of "ordinary and approved usage" of the language of § 46(12). *Id.* at 585.

⁴ Compare *Burnside v. Bristol County Board of Retirement*, 352 Mass. 481, 483-84 (1967) (where G.L. c. 32, § 1, defines "employee" as one "regularly employed," intermittent service as court officer does not qualify person as an "employee" eligible to join retirement system).

⁵ See G.L. c. 4, § 7, clause twenty-seventh (salary "shall mean annual salary"); see also G.L. c. 30, § 21 (prohibiting receipt of more than one "salary" from the treasury of the Commonwealth); 1981/82 Op. Atty. Gen. No. 7, Rep. A.G., Pub. Doc. No. 12 at 127 (1982) (distinguishing between "salary" and "wage").

I next consider whether the operation of the Trial Court constitutes an “undertaking of the commonwealth” within the meaning of G.L. c. 30, § 46(12). Most of the other provisions of G.L. c. 30 appear to apply solely to employees of the executive department of the state government. The title of G.L. c. 30 refers exclusively to “State Departments, Commissions, Officers, and Employees”; it does not refer to employees of the judiciary. Similarly, the salary schedule in G.L. c. 30, § 46, ¶¶ 1-11, does not apply to the salaries of employees of the judiciary; salaries for those employees appear in a separate schedule submitted annually to the Legislature for approval. *See* G.L. c. 211B, § 10. The terms immediately preceding the phrase “other undertaking of the commonwealth,” *viz.*, “agency,” “department,” “commission,” and “board” are used elsewhere in the General Laws to refer to subdivisions of the executive branch.⁶

These considerations suggest that if the terms of G.L. c. 30, § 46(12), limited its application to “any agency, department, commission, [or] board,” there might be some merit to a construction of the statute that excluded employees of the judicial branch. However, the additional phrase “or any other undertaking of the commonwealth” sweeps beyond the executive branch and evidences an intent to extend the statutory prohibition to employees of all enterprises of the Commonwealth. I must presume that the Legislature, at the time of the passage of St. 1981, c. 293, § 5, knew the statutory terminology which it had previously employed to limit application of the law to the executive branch. *See, e.g.*, St. 1962, c. 779, §§ 1(d) and 1(q) (members of judiciary exempt from original G.L. c. 268A).⁷ Moreover, in selecting the phrase “*any other* undertaking of the commonwealth” (emphasis added),⁸ it appears that the Legislature envisioned liberal application of the proscription,⁹ since it is hard to conceive of broader language. I therefore conclude that the operation of the Trial Court is an “undertaking of the commonwealth” within the meaning of § 46(12).

⁶ *See, e.g.*, G.L. c. 30A, § 1 (definition of “agency” in Administrative Procedure Act excludes legislative and judicial branches), and G.L. c. 7, §§ 3, 4 (terms “departments, commissions, offices and boards” used to describe subdivisions of executive branch).

⁷ *See Condon v. Haitsma*, 325 Mass. 371, 373 (1950); *Commonwealth v. Burke*, 390 Mass. 480, 485-86 (1983) (if Legislature intended certain construction, other language could have been used); *American Grain Products Processing Institute v. Department of Public Health*, 392 Mass. 309, 315 (1984).

⁸ The term “undertaking” rarely appears in the General Laws. *But see* G.L. c. 29, § 8A (requirements for public contracts apply to officers “having charge of any office, department, or undertaking”); G.L. c. 29, § 9B (allotments to “executive and administrative offices, departments and undertakings”).

⁹ *See Iannella v. Fire Commissioner of Boston*, 331 Mass. 250, 252 (1954) (fact that some sections of statute expressly exclude Sundays and holidays in appeal period is strongly indicative that Sundays and holidays are not excluded in those sections which are silent on that issue).

A similar provision in G.L. c. 30 supports my conclusion. Section 21 of that chapter provides: "A person shall not at the same time receive more than one salary from the treasury of the commonwealth." In a previous opinion I concluded that this proscription applies to employees of the judicial branch who, by operation of the Court Reform Act of 1978, G.L. c. 29A, § 1 *et seq.*, as added by St. 1978, c. 478, changed their status from county to Commonwealth employees and found themselves "on two Commonwealth payrolls." 1980/81 Op. Atty. Gen. No. 3, Rep. A.G., Pub. Doc. No. 12 at 101 (1980). While the language of G.L. c. 30, § 46(12), and G.L. c. 30, § 21, differ slightly, the similar breadth of their terminology supports my conclusion that § 46(12) also applies to employees of the judicial branch.¹⁰

Where "the words of a statute are clear and unambiguous and . . . given their ordinary meaning . . . yield a workable and logical result, there is no need to resort to extrinsic aids in interpreting the statute." *Hashimi v. Kalil*, 388 Mass. 607, 610 (1983). I therefore conclude, on the basis of the language of G.L. c. 30, § 46(12), that county employees who receive more than \$20,000 in annual compensation for their services may not receive *per diem* compensation from the Commonwealth for services as court officers.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

October 12, 1984

The Honorable Michael C. Creedon
Chairman
House Committee on Ways and Means
Legislative Office
State House, Room 250
Boston, Massachusetts 02133

Dear Representative Creedon:

In your capacity as Chairman of the House Committee on Ways and Means and pursuant to G.L. c. 12, § 9, you have requested that I advise the Committee as to the constitutionality of a proposed amendment to a bill presently pending before it. The bill (H. 2154) would provide state assistance for the removal, containment, or encapsulation of asbestos in the schools. The proposed amendment would expand the asbestos removal assistance program to encompass private as well as public

¹⁰I note that the second sentence of § 46(12) refers to "the payroll of the commonwealth," a phrase similar to one used in § 21, *viz.*, "the treasury of the commonwealth." Neither section employs any language suggesting an exemption for the judicial branch. My construction affords more consistent treatment of employees of the judiciary under sections 21 and 46(12) than the alternative interpretation. See *Killam v. March*, 316 Mass. 646, 649 (1944) (section of statute should "be interpreted so as to be harmonious").

schools, and accordingly raises concerns under the so-called Anti-aid Amendment to the Massachusetts Constitution, art. 18, § 2, *as amended through* art. 103.¹ I believe, however, that the proposed legislation is not facially unconstitutional.²

The Anti-aid Amendment prohibits the authorization of any grant of public money “for the purpose of founding, maintaining or aiding” any non-public primary or secondary school; and the proposed amendment would authorize grants of public monies to private schools for asbestos removal, containment, or encapsulation. Therefore, the validity of the proposed amendment depends upon whether the grants which it contemplates are for the purpose of maintaining or aiding such schools. This question in turn revolves primarily around the meaning attributed to the word “purpose” in article 18.

In addressing this constitutional term, I do not write upon a blank slate. On the contrary, the Supreme Judicial Court has recently considered the validity of other legislation authorizing public aid to private schools which was challenged under the Anti-aid Amendment. In *Commonwealth v. School Committee of Springfield*, 382 Mass. 665 (1981), the court held that the disbursement of public funds to private schools under the special education law, St. 1972, c. 766, did not violate the Anti-aid Amendment. In *Attorney General v. School Committee of Essex*, 387 Mass. 326 (1982), the court held that the statute requiring school committees to provide transportation to students attending private schools did not violate the Anti-aid Amendment. In each case, the Court inquired into the purpose of the legislation, its effect, and its avoidance of the political and economic abuses which prompted the passage of the constitutional prohibition. An analysis of those criteria in this case leads me to conclude that the inclusion of the proposed amendment in the pending bill would not contravene the Anti-aid Amendment.

I note first that the proposed assistance to private schools would be as part of a general measure, the purpose of which is to protect and benefit school children, and that the measure would be enacted in response to increasing evidence that low-level asbestos exposure is a serious health hazard. See Policy Report #13: “Asbestos in the Commonwealth’s Public Buildings,” 1985 Budget of the Senate; 1982 Annual Report of the Special Commission Relative to Evaluating the Extent of the Use of Asbestos in the Schools and Public Buildings of the Commonwealth. The purpose of promoting the general health, safety, and welfare through insulating the children of the Commonwealth from asbestos inhalation is unquestionably a valid state interest, which legitimately extends beyond the public school system to all children. It is my perception that the proposed amendment is predicated upon such legitimate legislative concerns; there appears to be no reason to suspect a hidden, contrary purpose to maintain or aid private schools.

¹ In my opinion, no serious claim of unconstitutionality under the Establishment Clause of the First Amendment to the United States Constitution could be made. See *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984); *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

² Any analysis of whether the proposed legislation would be unconstitutional as applied in particular circumstances, which are not foreseeable, is necessarily beyond the scope of this opinion.

The Constitution proscribes "a use of public property for the purpose of aiding [private] schools in carrying out their essential functions." *Bloom v. School Committee of Springfield*, 376 Mass. 35 (1978). In *Bloom*, a statute requiring local school committees to loan textbooks to private school students was held invalid; the court emphasized the central role of textbooks to the schools' educational function. By contrast, the removal or encapsulation of asbestos is quite remote from the essential teaching function of private schools. The removal of asbestos is much more closely analogous to the provision of school transportation at public expense, which was upheld in *Essex*. It is "a community safety measure like police and fire protection." *Essex*, 387 Mass. at 332 (quoting *Bloom*, 376 Mass. at 47).

Nevertheless, the proposed amendment may still be invalid if it has the effect of providing "substantial assistance" to private schools. *Essex*, 387 Mass. at 332 (quoting *Commonwealth v. School Committee of Springfield*, 382 Mass. at 679). But in this case, as in *Essex*, the proposed aid would be "quite remote" from the educational function of the schools. *Id.* at 334 (quoting *Bloom*, 376 Mass. at 47). From a public health and safety viewpoint, the pupils and other occupants of the schools would "consume" the benefits of an asbestos-free environment directly; the schools themselves would benefit only indirectly.

Admittedly, these grants of funds would not benefit the students exclusively. The removal or containment of asbestos may increase a school's ability to attract or retain students and also could be viewed as an improvement to the school buildings, of possible tangible benefit to the private institution as such. However, the thrust of the legislation is to advance the health and safety of all school-age children in the Commonwealth, in response to the relatively recent public awareness of the serious health hazards from asbestos inhalation. It is therefore my opinion that any benefits to non-public schools resulting from the removal or containment of asbestos should be viewed as incidental to the public health benefits of the program. See *Essex*, 387 Mass. at 333.

The purposes underlying the principal amendment to the Anti-aid Amendment, art. 46, § 2, were to stem the politically divisive and financially wasteful practice of directing aid to private schools and sectarian institutions. See *Commonwealth v. School Committee of Springfield*, 382 Mass. at 683. I conclude that the inclusion of private schools in the asbestos removal assistance program, as a law of general application directed to a serious public health issue, would not be legislation of the character which the Anti-aid Amendment was designed to prevent.

The purpose and effect of the proposed amendment being to promote the general health and safety of children rather than the maintenance of private schools. I conclude that, if enacted, the bill (with the proposed amendment) would be defensible against a challenge under the Anti-aid Amendment.

Very truly yours,
FRANCIS X. BELOTTI
Attorney General

November 20, 1984

Ira A. Jackson, Commissioner
Department of Revenue
100 Cambridge Street
Boston, MA 02204

Dear Commissioner Jackson:

You have requested my opinion regarding your authority to remove locally elected or appointed tax assessors from office. Specifically, you ask whether: (1) you have the statutory authority to remove such assessors if you determine that they have failed to perform their duties; (2) if so, whether you may initiate administrative proceedings pursuant to G.L. c. 30A and the Standard Rules of Adjudicatory Procedure to accomplish that result; and (3) if not, how you may seek removal of such assessors. For the reasons set forth below, it is my opinion that you lack the statutory authority to remove locally elected or appointed assessors from office, since that removal power, where it exists, is vested in local officials. As a result of this determination, I need not address your question concerning the means by which you might accomplish such removal. The extent of your power in this regard is to advise the municipal authorities of any problems which come to your attention, for appropriate local action.

Resolution of the questions you pose requires that I examine the extent to which assessors are subject to the supervision and control of the Commissioner of Revenue. While assessors are "public officers," *Assessors of Haverhill v. New England Telephone & Telegraph Co.*, 332 Mass. 357, 360 (1955), they "are not State officers in the ordinary sense of the term, and are not subordinates of the commissioner." *Sudbury v. Commissioner of Corporations and Taxation*, 366 Mass. 558, 563 (1974). Instead, they have been regarded as municipal officers, since they are locally elected or appointed and act on behalf of, and are paid by, the municipality. *Williams v. City Manager of Haverhill*, 330 Mass. 14, 15 (1953); *Dowling v. Assessors of Boston*, 268 Mass. 480, 484-85 (1929); *Hobart v. Commissioner of Corporations & Taxation*, 311 Mass. 341, 344 (1942); *Commonwealth v. Dowe*, 315 Mass. 217, 223 (1943). The court in *Sudbury* thus observed that "in the performance of their statutory duties the assessors act under the direction of the commissioner only so far as the power of direction is conferred upon him by statute." 366 Mass. at 563 (quoting *Hobart v. Commissioner of Corporations and Taxation*, 311 Mass. at 344).

The applicable statute, G.L. c. 58, § 1A¹ empowers the Commissioner, among other things, to enforce all laws relating to the valuation, classification, and assessment of property, and to supervise the administration of such laws by local assessors. G.L. c. 58, § 1A, ¶ 1. The Commissioner may also inspect the work of assessors and require necessary information from them, as well as require them to take such action as will tend to produce uniformity in the valuation, classification, and assessment of property for local taxation. G.L. c. 58, §§ 1A, 6, 10. He may cause assessors to be prosecuted for any violation of law relative to assessment of taxes or classification of property. G.L. c. 58, § 1A.

The Legislature has also provided in G.L. c. 58, § 4, a means by which the Commissioner may attempt to correct improper methods used by local assessors where it appears that a city or town has failed to comply with the law in meeting standards

¹ Added by St. 1979, c. 797, § 3. The powers and duties of the Commissioner were found previously at G.L. c. 58, § 1.

established by him. Pursuant to that statute, the Commissioner may examine the pertinent records and then “direct . . . assessors to meet the minimum standards required . . .” Particularly relevant here is the mandate that:

On failure by the assessors . . . to comply with such directions of the commissioner, for any reason, he shall forthwith notify the mayor or the selectmen, in writing, of said failure and of any requirements which he deems necessary or expedient to insure proper performance, valuation and classification of property for taxation according to law . . . G.L. c. 58, § 4.

If a city or town continues to fail to comply with proper assessing practices after the notice provided for in G.L. c. 58, § 4, is given, the Commissioner may either contract on behalf of that city or town to provide such services as will bring the municipality into compliance or petition a Single Justice of the Supreme Judicial Court either to order the mayor or selectmen to so comply or to order the assessors to value property as required by law. G.L. c. 58, § 4A. Thus it is clear that the Legislature has provided a statutory mechanism by which the Commissioner may seek proper compliance by local assessors.²

Noticeably absent from the sanctions available to the Commissioner, however, is any express authority to remove assessors who fail to perform their duties. The answer to your question therefore turns on whether the power to remove local assessors can be inferred from the Commissioner’s limited authority to appoint them under G.L. c. 41, § 27,³ as you suggest. I conclude that it cannot.

The “[p]ower to remove a public official is not a necessary and inherent incident of the authority to appoint. Frequently they are disjoined.” *Opinion of the Justices*, 216 Mass. 605, 606 (1914). See also *Attorney General v. Stratton*, 194 Mass. 51, 53 (1907) (“In the cities and towns of Massachusetts, there is no power to remove public officers except that which is given by statutes.”). Indeed, the general rule is that “the right of removal is not implicit in an appointing power in the absence of some constitutional or statutory provision, where the term of the official is fixed by law for a given period.” *Adie v. Mayor of Holyoke*, 303 Mass. 295, 301 (1939). The actual power of removal is sometimes incident to the of power appointment, but only “in the absence of some constitutional or statutory provision to the contrary.” *Id.* at 300 (citations omitted). Here, the tax assessors’ terms are in fact fixed, G.L. c. 41, §§ 1, 24 and 25; and, as demonstrated below, the only statutory provision for their removal vests that power in the local governments.

² Consistently, a prior Opinion of the Attorney General stated: “When the [Revenue] Commissioner determines that . . . local assessors are not assessing property at its full and fair cash value . . . he shall notify them . . . [as well as] the mayor and/or the selectmen of the given community of such failure.” 1963/64 Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 211 (1964).

³ That statute reads:

If assessors, or selectmen acting as such, shall fail to perform their duties, the commissioner of revenue may appoint three or more persons to be assessors for such town, who shall be sworn, shall hold office until the offices of assessors are filled by the town, and shall receive from the town compensation as assessors.

Chapter 41, § 27, simply provides a means by which assessors who have left office or have been removed in accordance with G.L. c. 41, §§ 22 and 25; c. 39, § 8A; or c. 43, § 105, may be replaced, on a temporary basis, until new original appointments to those positions are made by the city or town. See 1963/64 Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 210-11 (1964). Nor does G.L. c. 59, § 27, providing that “[i]f assessors neglect to assess a . . . tax required by law, the commissioner shall forthwith appoint other persons in accordance with [G.L. c. 41, § 27],” give the Commissioner any express removal power.

Inferring a removal power from the Commissioner's limited appointment power would also be contrary to the statutory scheme as a whole, which clearly delegates removal powers to municipal officials rather than to the Commissioner. It is an elementary rule of statutory construction that statutes relating to the same subject matter should be construed together so as to constitute a harmonious whole consistent with the legislative purpose. See *Registrar of Motor Vehicles v. Board of Appeal on Motor Vehicle Liability Policies and Bonds*, 382 Mass. 580, 585 (1981); *Board of Education v. Assessor of Worcester*, 368 Mass. 511, 513-14 (1975).

Just as local governments have the power to appoint assessors pursuant to G.L. c. 41, §§ 1, 4, 21, 22, 24, 25, and 26, it is clear that those municipal authorities also have the express power to remove them. For example, G.L. c. 41, § 21, authorizes selectmen of a town to act as or appoint certain local officers, including assessors, and section 22 grants express authority to the selectmen to remove those appointed officers.⁴ Even more explicitly, section 25 of that same chapter provides that town selectmen shall appoint assessors, and then "may remove them at any time for cause after a hearing."

Similarly, assessors appointed by a city may be removed by that municipality. "Assessors, like other public officers not provided for in our Constitution, are subject to the right of the Legislature to create or abolish the office . . . and provide for the election, appointment and removal of the incumbent" (emphasis added). *Williams v. City Manager of Haverhill*, 330 Mass. at 15 (citing *Taft v. Adams*, 69 Mass. (3 Gray) 126, 130 (1854)); *Attorney General v. Stratton*, 194 Mass. at 54; *Johnson v. Mayor of Quincy*, 198 Mass. 411 (1908).⁵ Indeed, the Legislature has provided for both the local appointment and the local removal of city officials in two situations. First, to the extent that a city council has determined that assessors shall be appointed and supervised by the city manager, the latter is authorized by G.L. c. 43, § 105,⁶ both to appoint and to remove those assessors. To the extent that assessors are not among the city officers supervised by a city manager, G.L. c. 39, § 8A,⁷ authorizes a city council to remove any officer or official appointed or elected by that city council. Courts have also construed G.L. c. 39, § 8A, to apply where a city charter or ordinance does not cover the process of removing local officers:

⁴ G.L. c. 41, § 22, reads: "Officers appointed by authority of a vote under the preceding section shall hold office until removed by the selectmen, and shall receive such salary as the selectmen may determine, subject to the appropriations of the town therefor; and any vacancies existing in any of said offices under the supervision and control of the selectmen shall be filled in the manner of an original appointment" (emphasis added).

⁵ The court in *Williams* observed further that [the] "power and responsibility for the proper and faithful conduct of municipal officers and departments" is vested in the local city government. 330 Mass. at 16.

It is noteworthy that the current version of the statute at issue here, G.L. c. 41, § 27, was effective when *Williams* was decided, with the exception of the word "revenue" which was subsequently substituted for "corporations and taxation." St. 1978, c. 514, § 21.

⁶ That statute reads, in pertinent part: "Such officers and employees as the city council, with the advice of the city manager, shall determine are necessary for the proper administration of the departments, commissions, boards and offices of the city, for whose administration the city manager is responsible shall be appointed, and may be removed, by the city manager . . ." (emphasis added).

⁷ That statute provides: "Unless otherwise provided in any general law or in any special law relating to a city, any officer or official appointed or elected by the city council may be removed by said council . . ." (emphasis added).

[W]here the power to remove is not expressly given or implied from the power to appoint, *Murphy v. Webster*, 131 Mass. 482, 488 (1881); *Attorney General v. Varnum*, 167 Mass. 477, 480 (1897), the city council, the appointing or electing body, shall be the removing body. See *Adie v. Mayor of Holyoke*, *supra* at 301-302.

Williams v. City Manager of Haverhill, 330 Mass. at 17 (emphasis added).

In sum, the specific inclusion of express removal powers in conjunction with appointments found in G.L. c. 41, §§ 22 and 25; c. 39, § 8A; and c. 43, § 105, discussed above, implies an intentional omission of those powers in G.L. c. 41, § 27. See *First National Bank of Boston v. Judge Baker Guidance Center*, 13 Mass. App. Ct. 144, 153 (1982) (where specific language appears in one part of statute, but not in others that treat the same topic, language cannot be implied where not present). Those clear grants of authority thus obviate any suggestion that the power to remove town assessors is vested at the state, rather than local, level.

Your questions also relate to popularly elected assessors. Unlike the above-described situation, pertaining to assessors elected or appointed by a city council or its equivalent, there do not appear to be any statutes expressly authorizing the removal of popularly elected assessors by anyone. Therefore, any suggestion that the Commissioner, or some other state or local body, should be empowered to remove elected assessors is best addressed to the Legislature.⁸ An attempt to supply such authority omitted from the statute would be "tantamount to adding a meaning not clearly intended by the Legislature." *Boylston Water District v. Tahanto Regional School District*, 353 Mass. 81, 84 (1967) (if statutory omission intentional, no court can supply it; if due to inadvertance, attempt to supply it adds meaning not intended by Legislature).

It is therefore my opinion that, although the Commissioner of Revenue has broad authority to oversee local tax assessment practices, that authority does not include the power to remove locally elected or appointed assessors from office.

Very truly yours,
FRANCIS X. BELOTTI
Attorney General

February 4, 1985

George McCarthy, Chairman
Alcoholic Beverages Control Commission
100 Cambridge Street
Boston, Massachusetts 02202

Dear Mr. McCarthy:

You have requested my opinion whether the Alcoholic Beverages Control Commission is authorized to adopt regulations concerning the posting of prices by wholesalers of alcoholic beverages, and, if so, whether those regulations would violate the federal antitrust laws. It is my opinion that the Commission is authorized to

⁸ Cf. G.L. c. 211, § 4, which grants express authority to a majority of the justices of the Supreme Judicial Court to remove certain popularly elected officials upon sufficient cause for the "public good."

promulgate the regulations in question. Although I must decline to render a formal opinion as to whether the proposed regulations would violate federal antitrust laws, I believe the regulations would be defensible against an antitrust challenge.

In substance,¹ the Commission proposes to adopt regulations requiring alcoholic beverage wholesalers to file a list of prices and discounts on the fifth day of the month preceding the month during which the prices will be in effect. The lists thus filed would be made available for public inspection, and between the fifth and fifteenth day of the month, any wholesaler would be permitted to amend downward any price or discount to meet, but not go below, competing prices or discounts for the same product.

I am informed that this plan represents little change in substance from current practice. Under existing regulations, wholesalers must distribute price and discount lists to their customers, and must file an affidavit with the Commission affirming that they have done so, before they sell to any retailer or wholesaler. 204 C.M.R. § 2.14. By statute, these lists must remain in effect for at least thirty days. G.L. c. 138, § 25A. By long-standing policy of the Commission, price and discount schedules must be filed with the Commission, and wholesalers are permitted to amend prices downward to meet competition in the same product.² Thus, the proposed regulations are apparently intended to formalize the existing system.

Your first question is whether the Commission is authorized to adopt the proposed regulations. A response to that question requires an examination of the Commission's statutory powers. The Commission is vested with the power of "general supervision of the conduct of the business of manufacturing, importing, exporting, storing, transporting and selling alcoholic beverages . . . and also of the quality, purity and alcoholic content thereof." G.L. c. 6, § 44. The Commission is authorized by G.L. c. 138, § 24, to

make regulations not inconsistent with the provisions of this chapter for clarifying, carrying out, enforcing and preventing violation of, all and any of its provisions for inspection of the premises and method of carrying on the business of any licensee, . . . for the proper and orderly conduct of the licensed business, for establishing maximum prices chargeable by licensees under this chapter, and regulating all advertising of alcoholic beverages . . .

¹ You have outlined two alternative plans, which differ in that one would rely on the Massachusetts Beverage Journal to publicize the price lists while the other would simply make proposed lists available for public inspection at the Commission's offices. Since the difference is not material to the questions posed, I treat the two alternatives as substantially the same for the purposes of this opinion.

² In essence, this same system was prescribed by § 25B between 1946 and 1970. See St. 1946, c. 304. In 1970, § 25B was redrafted to delete the statutory scheme, as it applied to sales to retailers. See St. 1970, c. 140, § 2. Before this amendment could take effect, however, the Commission promulgated Rules 55.1-55.4 on an emergency basis. Those rules, now codified at 204 C.M.R. § 2.14, required wholesalers to distribute their price and discount schedules to all retailers with whom they did business. In 1971, the Legislature amended § 25A to add the second paragraph, requiring price lists and quotations to any licensee to remain in effect for thirty days. St. 1971, c. 494. Because § 25B already so provided with respect to sales to wholesalers, this amendment of § 25A clearly signifies legislative knowledge and approval of the Commission's regulations, and forecloses any inference that the 1970 amendment of § 25B was intended to restrict the Commission's regulatory authority. See *Board of Assessors of Melrose v. Driscoll*, 370 Mass. 443 (1976) (Legislature is presumed to act with knowledge of existing regulations).

On August 23, 1973, the Commission issued a written policy that price and discount schedules should once again be filed with the Commission, and that wholesalers would be permitted to amend their schedules before their effective date to meet the prices and discounts offered by competitors for the same product.

In sum, “[t]he commission has comprehensive powers of supervision over licensees.” *Boston Licensing Board v. Alcoholic Beverages Control Commission*, 367 Mass. 788, 795 (1975). See also *J. & J. Enterprises, Inc. v. Martignetti*, 369 Mass. 535, 538 (1976); *Connolly v. Alcoholic Beverages Control Commission*, 334 Mass. 613, 616-17 & n. 1 (1956). In view of the Commission’s broad charter, authority to act in a particular instance or on a particular issue within the Commission’s subject area need not be specifically delegated in a statute. See *Levy v. Board of Registration & Discipline in Medicine*, 378 Mass. 519, 524, 525 (1979).³ Of course, the Commission may not act inconsistently with its enabling statutes and “must diligently respect the policy limits set by the Legislature in enacting a particular statute.” *M.H. Gordon & Son, Inc. v. Alcoholic Beverages Control Commission*, 371 Mass. 584, 589 (1976).

You propose to adopt the above-described regulations to implement G.L. c. 138, § 25A, which provides as follows:

No licensee authorized under this chapter to sell alcoholic beverages to wholesalers or retailers shall discriminate, directly or indirectly, in price, in discounts for time of payment or in discounts on quantity of merchandise sold, between one wholesaler and another wholesaler, or between one retailer and another retailer purchasing alcoholic beverages bearing the same brand or trade name and of like age and quality.

All price lists or price quotations made to a licensee by a wholesaler shall remain in effect for at least thirty days after the establishment of such price list or quotation. Any sale by a wholesaler of any alcoholic beverages at prices lower than the price reflected in such price list or quotation within such thirty day period shall constitute price discrimination under this section.

Were I to confine my attention to this section, § 24, and G.L. c. 6, § 44, I would not hesitate to conclude that the proposed regulation is within the Commission’s authority to promulgate. In effect, § 25A provides that a wholesaler must sell alcoholic beverages at the same price or discount to all retailers with whom he does business, and that once listed or quoted, prices and discounts must remain in effect for thirty days; and, similarly, a seller may not discriminate among wholesalers by price or discount. The Commission’s plan to require each wholesaler to file monthly a schedule of prices and discounts, to remain in effect for thirty days, appears well within the Commission’s authority to “make regulations . . . for clarifying, carrying out, enforcing and preventing violation of” § 25A. See G.L. c. 138, § 24. In the absence of a requirement that price schedules, available for public inspection, be filed regularly, it might be very difficult to police the requirements that prices remain in effect for thirty days, and that no discrimination occur between retailers or between wholesalers.

³ The court there said that

Where an administrative agency is vested with broad authority to effectuate the purposes of an act “the validity of a regulation promulgated thereunder will be sustained so long as it is ‘reasonably related to the purposes of the enabling legislation.’ ”

The Commission's proposal would allow ten days during which wholesalers could amend their price and discount schedules downward to meet (but not go below) lower prices or greater discounts offered by their competitors for the same product. Although § 25A does not expressly provide for amendments of schedules to meet competition, I conclude that this provision, too, is consistent with the Commission's powers under that section. First, since in the Commission's scheme all amendments would be made before the effective date of the schedule, this provision would not be inconsistent with the requirement of § 25A that a price list or quotation remain in effect for thirty days.

Second, the proposed provision would steer a middle course between extremes, both of which appear inconsistent with legislative policy. On the one hand, if no amendments were permitted, the requirement that a price schedule remain in effect for thirty days could lead to the destruction of wholesalers who fail to anticipate the prices or discounts of their competitors. It is fair to say, however, that one overall purpose of legislation regulating the industry is to preserve competition in the long run by protecting the existence of many wholesalers. *See, e.g., James J. Sullivan, Inc. v. Cann's Cabins, Inc.*, 309 Mass. 519 (1941) (Legislature intended to discourage vertical integration of industry by enacting § 25); St. 1946, c. 304 (Sections 25A and 25B were enacted to combat "[t]he practice of manufacturers and wholesalers in granting discounts, rebates, allowances, free goods, and other inducements to favored licensees.'). On the other hand, if amendments were freely permitted, a situation could arise in which there were unsupervised price-fixing, with the Commission acting as a clearinghouse through which the wholesalers could settle upon a mutually agreed price. Such a situation is not consistent with the legislative policy as described in *M.H. Gordon & Son, Inc. v. Alcoholic Beverages Control Commission*, 386 Mass. 64, 71-73 (1982) (Legislature intends Commission to exercise control over prices).

In sum, the proposal to permit amendments of price schedules only to meet the lower prices or more favorable discounts of competitors is consistent with the legislative policy embodied in § 25A.⁴ My answer is somewhat complicated, however, by § 25B. By that section, the Legislature has mandated a system to govern sales to wholesalers which is similar to that proposed by the Commission to govern sales to retailers. This section, therefore, raises the question whether the Legislature's detailed action governing sales to wholesalers implies that the Commission may not promulgate a similar scheme to govern sales to retailers.

It is my judgment that the legislative specification of a detailed scheme to govern sales to wholesalers does not imply a lack of authority on the Commission's part to implement a similar scheme to govern sales to retailers. As I have already noted, the Commission has broad authority to regulate the liquor industry, and it has specific authority to promulgate regulations to clarify and implement the provisions of G.L. c. 138. G.L. c. 138, § 24. That authority is not specifically limited with respect to § 25A, and the mere fact that the Legislature itself chose to elaborate a system for insuring nondiscrimination in sales to wholesalers does not imply a limitation on the Commission's authority. *Cf. Levy v. Board of Registration & Discipline in*

⁴ I assume that the Commission would permit amendments of schedules in certain other circumstances to avoid hardship arising from the requirement that prices remain in effect for thirty days. *See* G.L. c. 138, §§ 25B(d), 25C(f), (g). *See also* G.L. c. 93, § 14G.

Medicine, 378 Mass. at 523-25 (statute listing grounds for license revocation does not preclude Board from establishing additional grounds). The difference in legislative treatments permits the conclusion that the Legislature found that conditions required the detailed statutory specification of a scheme to prevent discrimination in sales to wholesalers. It does not permit the conclusion that the Legislature intended that sales to retailers should be free from similar regulation, but only that a legislatively prescribed scheme to regulate such sales was deemed unnecessary. It is entirely consistent with this determination by the Legislature that the Commission retained authority and discretion to implement § 25A by adopting a scheme, similar to that established in § 25B, to govern sales to retailers if it should find such course to be necessary or desirable. *See, e.g., Grocery Manufacturers of America, Inc. v. Department of Public Health*, 379 Mass. 70, 76-77 (1979) (detailed grant of authority to require disclosure in certain cases does not negative power under more general grant to require disclosure in other cases); *Cambridge Electric Light Co. v. Department of Public Utilities*, 363 Mass. 474, 494-96 (1973) (statute dealing generally with termination of utility service and providing hearing when service is refused or shut off does not preclude regulation allowing hearing at earlier point in dispute); *see also* n. 2, *supra*. Furthermore, it is extremely unlikely that the Legislature could have intended to delegate power to enforce § 25A to the Commission, and at the same time to forbid a sensible, otherwise lawful, enforcement scheme. Accordingly, I conclude that the specific scheme prescribed by § 25B to govern sales to wholesalers does not preclude the Commission from adopting a similar scheme to govern sales to retailers.

For these reasons, my answer to your first question is that the proposed regulations are within the Commission's authority to promulgate and are consistent with the law.

Your second question is whether the proposed regulations would violate the federal antitrust laws. It has been the practice of the Attorney General to refrain from giving his opinion as to the proper interpretation of federal statutes. *See, e.g.,* 1982/83 Op. Atty. Gen. No. 12 Rep. A.G., Pub. Doc. No. 12 at 118 n. 3 (1983); 1978/79 Op. Atty. Gen. No. 6, Rep. A.G., Pub. Doc. No. 12 at 109, 111 (1979). Accordingly, I decline to render a formal opinion whether the proposed regulations would violate federal antitrust laws and leave that question to judicial resolution in an appropriate case. However, based on existing caselaw, I believe that the proposed regulatory scheme would be defensible.⁵

In *M.H. Gordon & Son, Inc. v. Alcoholic Beverages Control Commission*, 386 Mass. at 71-73, the Supreme Judicial Court held that the scheme established by G.L. c. 138, §§ 25B, 25D, is immune from antitrust scrutiny. That decision would appear to control here as well, since both § 25B and the proposed regulations implement § 25A, and since the proposed regulations would establish a system for regulating sales to retailers which is substantially similar to that applicable to sales to wholesalers under § 25B.

⁵ It is not the function of the Attorney General to express an opinion concerning the wisdom or desirability of the Commission's proposals, 1961/62 Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 199, 200 (1962); accordingly, I have restricted myself to the question whether the proposed regulations would be legally defensible.

Moreover, if one were to ignore the fact that the proposed regulations would be an integral part of the regulatory system sustained in *M. H. Gordon*, and were instead to view the regulations in isolation, it seems clear that they could still be defended against an antitrust challenge. The regulations would not authorize or institute price maintenance. Each wholesaler would be free to determine his own prices, provided that, once determined, they would remain in effect for thirty days, and provided also that he does not discriminate among his customers.⁶ Since the scheme would not constitute price maintenance, it would not be invalid under *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980), in which the Supreme Court held that a statutory price maintenance system under which the state permitted wholesalers to fix prices without active state supervision was invalid.

It is true that the proposal would not permit completely unrestrained competition, but that is the effect of the statute even without the proposed regulations. The statutory requirements, that prices must remain in effect for thirty days and that there may be no discrimination in prices or discounts between retailers, themselves may operate to restrain competition in some measure.⁷ But these are policies clearly expressed by the Legislature and vigorously supervised by the Commonwealth through the Commission. Accordingly, the statute itself, and with it any regulations which, like those proposed, simply interpret and implement it, would seem to be immune from antitrust scrutiny under the state action doctrine.⁸

I note, finally, that regulatory schemes like that proposed by the Commission have recently been upheld in *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166, 170-75 (2d Cir. 1984); *Intercontinental Packaging Co. v. Novak*, 348 N.W.2d 330 (Minn. 1984); and *Wine and Spirits Specialty, Inc. v. Daniel*, 666 S.W.2d 416 (Mo. 1984), *appeal dismissed*, 105 S.Ct. 56 (1984). If the question had not already been decided by the Supreme Judicial Court, I would find the careful and scholarly reasoning of these cases persuasive.

Accordingly, I conclude that the regulations proposed by the Commission are within its authority and would be defensible under federal antitrust laws.

Yours truly,
FRANCIS X. BELLOTTI
Attorney General

⁶ Of course, the seller also must comply with the Unfair Sales Act, G.L. c. 93, §§ 14E-14K. I of course consider only whether the proposed regulations are defensible on their face, since no facts concerning their effect on competition in practice are before me.

⁷ Because those provisions preserve retailers from destructive competition and because they tend to discourage vertical integration in the liquor industry, see *Opinion of the Justices*, 368 Mass. 857, 865 (1975), they may well promote competition in the long run.

⁸ Because the statute does not set up a system which would constitute a *per se* violation of the antitrust laws, it would also appear to be sustainable under the preemption analysis of *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982).

March 1, 1985

Robert A. Crane
Chairman
State Retirement Board
One Ashburton Place, Room 1219
Boston, MA 02108

John J. McGlynn
Commissioner
Public Employee Retirement Administration
100 Cambridge Street, Room 1101
Boston, MA 02108

Dear Chairman Crane and Commissioner McGlynn:

You have each requested my opinion, on behalf of the State Retirement Board and the Public Employee Retirement Administration (PERA), respectively, concerning the proper application of the presumption contained in section 94 of chapter 32 of the General Laws, commonly known as the "heart law."¹ Your inquiry specifically concerns the proper roles of the Rating Board,² the State Retirement Board, and PERA in determining whether "competent evidence" exists to overcome the presumption that a heart ailment is service-related.

For the reasons discussed below, I have concluded that, in the case of State Police officers,³ the Rating Board is responsible for determining, as a factual matter, whether competent evidence exists that a heart ailment is not service-related and, if so, whether that evidence is sufficient to overcome the presumption that heart ailments are service-related. If the Rating Board determines, after weighing the "presumption" against any contrary evidence, that the ailment is service-related, the State Retirement Board is required to grant a pension to the State Police officer involved. Upon review of a pension granted to a State Police officer by the State Retirement Board, PERA may not re-weigh the evidence before the Rating Board. Rather, PERA's scope of review is limited to determining whether the State Retirement Board's decision to grant a pension is unsupported by substantial evidence, made upon unlawful procedure, arbitrary or capricious, or based on fraud or misrepresentation.

¹ General Laws, c. 32, § 94, provides, in pertinent part:

[A]ny condition of impairment of health caused by hypertension or heart disease resulting in total or partial disability or death of a . . . permanent . . . member . . . of the state police . . . shall, if he successfully passed a physical examination . . . , which examination failed to reveal any evidence of such condition, be presumed to have been suffered in line of duty, unless the contrary be shown by competent evidence.

² The Rating Board is comprised of the state surgeon, the commissioner of public health, and the commissioner of public safety. G.L. c. 32, § 26(1).

³ Since the original opinion request arose from a case involving a State Police officer, this opinion relates primarily to that situation. However, except as otherwise noted below, the conclusions reached are generally applicable to all public employees covered by the heart law.

Your respective opinion requests arose from an application by a State Police officer for an accidental disability retirement pension based on a heart ailment. In accordance with G.L. c. 32, § 26(2)(a),⁴ the officer was examined by a physician appointed by the Rating Board, who found the officer was permanently incapacitated from performing his duties as a police officer due to coronary atherosclerosis. Contained in the physician's report were the following relevant comments: "Although he [the officer] has some risk factors for coronary disease (a 20-pack year smoking habit prior to December 1983, hypertension for four years, mild hypercholesterolemia and a suggestive family history), his coronary disease seems more advanced than one might predict from the above epidemiologic data." Based on that report and a report from the officer's treating physician, the Rating Board reported to the State Retirement Board that it found the officer permanently incapacitated from performing his duties, through no fault of his own, due to coronary artery disease.

The State Retirement Board accordingly granted the officer's application for accidental disability retirement benefits, pursuant to G.L. c. 32, § 26. On review of this matter, pursuant to G.L. c. 32, § 21(1)(d),⁵ PERA ruled that the presence of one or more cardiac risk factors in the officer's medical history, as noted in the appointed physician's report, constituted "competent evidence" sufficient to overcome the presumption that his heart ailment was service-related. PERA therefore remanded the matter to the State Retirement Board with instructions that the Rating Board weigh the inference that the heart disease was job-related against what PERA considered the competent contrary evidence on causation. The Rating Board and the State Retirement Board took exception to PERA's remand. The present opinion was jointly sought by the State Retirement Board and PERA in order to resolve this immediate dispute as well as to provide guidance in future cases.

Based primarily on the language of G.L. c. 32, § 26, I conclude that it is the Rating Board which is responsible for determining whether a heart ailment suffered by a State Police officer is service-related. That section expressly delegates to the Rating Board the responsibility for determining, "after an examination of such officer by a registered physician appointed by it," whether an illness suffered by a State Police officer was "incurred through no fault of his own in the actual performance of duty." G.L. c. 32, § 26(2)(a)(i). See 1941/42 Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 43 (1941). Also pertinent to this conclusion is the fact that at least one of the members of the Rating Board is a physician, i.e., the State Surgeon, and the Rating Board's findings must be based on the results of an examination of a physician appointed by it. G.L. c. 32, § 26(1) and (2). Because of the Board's medical expertise, the General Court logically concluded that the Rating Board is the best suited of the three agencies involved to make the medical determination of the cause of an illness.

⁴ That status provides, in pertinent part:

Any . . . officer of the . . . state police . . . shall be retired by the state board of retirement in case the rating board, after an examination of such officer by a registered physician appointed by it, shall report in writing to the state board of retirement that such officer is physically or mentally incapacitated for the performance of duty by reason of . . . illness incurred through no fault of his own in the actual performance of duty . . . and that such incapacity is likely to be permanent.

⁵ That statute authorizes the Commissioner of PERA "to review all accidental and ordinary disability pensions granted by the retirement boards."

Where, as here, the illness involved is caused by hypertension or heart disease, the Rating Board must apply the presumption contained in section 94 in determining whether the illness is service-related. Application of section 94 is a two-step process. First, the Rating Board must determine "whether there was evidence that the disease was not service connected." *McLean v. Medford*, 340 Mass. 613, 617 (1960). If the Rating Board⁶ finds no evidence that the disease was not service-connected, then, by operation of the presumption contained in section 94, it must conclude that the disease was service-connected, and the analysis stops at this threshold.⁷ *McLean v. Medford*, 349 Mass. at 120. If, however, the Rating Board finds evidence that the disease was not service-connected, it must then proceed to the second step of the analysis and determine whether the evidence is sufficient to overcome the presumption that heart ailments are service-related. *McLean v. Medford*, 340 Mass. at 618. The mere existence of evidence that a heart ailment is not service-related does not cause the statutory presumption to disappear entirely. Rather, a presumption continues to constitute evidence of service-relatedness that may or may not be outweighed by the contrary evidence. P. Liacos, *Handbook of Massachusetts Evidence* 55 (5th ed. 1981) (citing *McLean v. Medford*, 340 Mass. 613).

In the case that gave rise to the present request, the physician appointed by the Rating Board reported that the State Police officer involved "has some risk factors for coronary disease (a 20-pack year smoking habit . . . , hypertension . . . , mild hypercholesterolemia and a suggestive family history)," but nevertheless concluded that "his coronary disease seems more advanced than one might predict from the above epidemiologic data." Based on that physician's report and other medical evidence, the Rating Board found the officer "incapacitated . . . by reason of coronary artery disease through no fault of his own in the actual performance of duty." In its report to the State Retirement Board, the Rating Board made no mention either of the presumption or of contrary evidence. While it may have been preferable for the Rating Board to have made an express finding that the contrary evidence was not sufficient to overcome the presumption, such a finding can be inferred from the Rating Board's conclusion that the disease was service-related in the face of the physician's report citing the contrary evidence.

Upon receipt of the Rating Board's report that the officer's disease was service-related, the State Retirement Board had no choice but to grant the disability benefits in question. G.L. c. 32, § 26(2) (if the Rating Board submits such a report, a State

⁶ In the case of employees under the jurisdiction of county or municipal retirement boards, this analysis is conducted by the retirement board, rather than by the Medical Panel (which corresponds, in some respects, to the Rating Board here). See *McLean v. Medford*, 340 Mass. at 617; *McLean v. Medford*, 349 Mass. 116, 120 (1965); *Mathewson v. CRAB*, 335 Mass. 610, 615 (1957). Unlike the State Retirement Board, the county and municipal retirement boards are not required to grant a pension upon a report by the Medical Panel that an illness is service-related. Compare G.L. c. 32, § 26(2) (a) with G.L. c. 32, § 7(1). While the county and municipal retirement boards are authorized to conduct their own review of the evidence including but not limited to the report of the Medical Panel, G.L. c. 32, § 7(1); *Mathewson v. CRAB*, 335 Mass. at 614, the State Retirement Board is required to grant a pension in cases where the Rating Board reports that the illness is service-related. G.L. c. 32, § 26.

⁷ The same result would follow if the Rating Board made no findings on the issue of causality, in which case the presumption alone would suffice to establish that the ailment is service-related. See *Mathewson v. CRAB*, 335 Mass. at 616; *McLean v. Medford*, 340 Mass. at 617-18; 1956/57 Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 38 (1957).

Police officer “shall be retired” by the State Retirement Board). As concluded by one of my predecessors, the State Retirement Board “has no authority to disapprove such an application accompanied by such a report in writing.” 1941/42 Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 43 (1941).⁸

Pursuant to G.L. c. 32, § 21(d), PERA “is authorized to review all . . . disability pensions granted by the retirement boards.” Its scope of review, however, is strictly limited. It may remand a matter to the retirement board for further proceedings only if it finds that the retirement board’s decision is “(1) made upon unlawful procedure, (2) unsupported by substantial evidence, (3) arbitrary and capricious, or (4) a result of fraud or misrepresentation.” G.L. c. 32, § 21(d). This limited standard of review, which parallels that contained in G.L. c. 30A, §14, for judicial review of administrative agency decisions, does not permit PERA to “displace [a retirement] board’s choice between two fairly conflicting views, even though [it] would justifiably have made a different choice had the matter been before it de novo.” *Zoning Board of Appeals v. Housing Appeals Committee*, 385 Mass. 651, 657 (1982). Rather, the retirement board “is the sole judge of the . . . weight of the evidence before it.” *Number Three Lounge, Inc. v. ABCC*, 7 Mass. App. Ct. 301, 309 (1979); see also *Board of Assessors of Lynnfield v. New England Oyster House, Inc.* 362 Mass. 696, 702 (1972) (weight to be given to evidence is for the trier of facts). PERA, therefore, may not “substitute [its] views as to the facts” for those of a retirement board. *Arthers v. Board of Registration in Medicine*, 383 Mass. 299, 304 (1981).

More particularly, it is my opinion that upon review of the State Retirement Board’s granting of disability benefits to a State Police officer suffering from a heart ailment, PERA may not re-weigh any evidence in the record that the illness is not service-related against the presumption that it is. This opinion is based on my view that the Rating Board’s determination of whether there is sufficient evidence to overcome the presumption that a heart ailment is service-related is a factual determination, rather than a legal one. In accordance with the principles discussed above, that determination may not be second-guessed by PERA. See *Coomey v. Board of Assessors*, 367 Mass. 836, 837-39 (1975) (question of whether presumption required granting of abatement is essentially one of weighing the evidence). Under normal circumstances, the presumption alone constitutes “substantial evidence” in support of the State Retirement Board’s decision. It is therefore my opinion that PERA’s remand of the present matter to the State Retirement Board for further consideration of whether the officer’s heart ailment was job-related or attributable to pre-existing cardiac risk factors was unwarranted.

Of course this particular opinion is based, in part, on the inference that the Rating Board identified and weighed contrary evidence and concluded that the continuing effect of the section 94 presumption was controlling. When it appears to PERA that the two-part analysis outlined above has not been followed, then it may remand the matter to the relevant retirement board on the grounds that the retirement board’s decision was “made upon unlawful procedure.” G.L. c. 32, § 21(d)(1).

⁸ As noted above, municipal and county retirement boards are not so bound by reports of their respective Medical Panels. See n. 6, *supra*.

In sum, it is my opinion that it is up to the Rating Board to determine, by weighing the heart law presumption against any evidence to the contrary, whether a State Police officer's heart ailment is service-related. If the Rating Board reports to the State Retirement Board that such an ailment is service-related, the State Retirement Board is required to retire the officer with disability benefits. PERA's review of the allowance of such benefits does permit it to determine whether the decision was based on unlawful procedure, but not to re-weigh the evidence before the Rating Board as to whether a heart ailment is, in fact, service-related.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

May 7, 1985

Michael J. Connolly
Secretary of State
Office of the Secretary of State
State House
Boston, MA 02133

James S. Hoyte, Secretary
Executive Office of Environmental Affairs
100 Cambridge Street
Boston, MA 02202

Dear Secretaries Connolly and Hoyte:

You have requested my opinion concerning the interpretation of the Massachusetts Historical Commission Act ("MHCA"), G.L. c. 9, §§ 26-27D. While you have phrased your questions differently, essentially each of you has asked whether in the case of a private development that requires a state permit, the state permit-granting body is required to review the effect on historic places of the entire development or only the part of the development covered by the permit in question. My conclusion on this question is that a state body is required to determine the effect only of activity covered by its own permit.

You have also both asked whether the state body must withhold a requested permit and consult with the Massachusetts Historical Commission ("Commission"), if the Commission disagrees with the state body's determination that the issuance of a permit would have no effect on historic places. My conclusion with respect to this question is that the state body is not required by the MHCA or the regulations promulgated thereunder to withhold the permit and consult with the Commission in this circumstance.

While my opinion is intended to be general in scope and application, my analysis is informed by the the particulars of a development called "International Place," a complex of structures to be built on land adjacent to the Custom House Historic District, an area in downtown Boston that is listed in the State Register of Historic Places. This privately funded development sought a sewer connection permit from the Division of Water Pollution Control of the Department of Environmental Quality Engineering ("DEQE"), see G.L. c. 21, § 43; 314 C.M.R. §§ 7.00 *et seq.*, and an industrial user discharge permit from the Metropolitan District Commission ("MDC"), see G.L. c. 92, §§ 6A, 8A; 350 C.M.R. § 11.04(2). DEQE and MDC determined that the issuance of the requested permits would have no effect on the

Custom House District. In making this determination, those agencies considered only the effect of the activities covered by their respective permits, not the effect of the development as a whole. The Commission has objected to the DEQE and MDC determinations on the grounds that, in its view, the agencies were required to determine the effect of the entire development, not just of the state-permitted activity, and that, in its view, other aspects of the development would have an adverse effect on the Custom House District.¹

The questions raised as a result of these events have required me to examine the MHCA and other related statutes. The MHCA creates the Massachusetts Historical Commission and includes provisions designed to protect the cultural, archaeological, and historical resources of the Commonwealth. Among these provisions is G.L. c. 9, § 27C, which requires, *inter alia*, that

[a]s early as possible in the planning process of any project undertaken by [a state body] and prior to such state body funding, licensing or approving any private project, such state body shall determine if the project will affect any property listed on the state register of historic places ["listed property"].

If the state body so determines, it is to notify the Commission, which is then to determine whether the project will "adversely affect a listed property." If the Commission makes the latter determination,

the commission and the state body shall meet to discuss alternatives to the project and means of mitigating any adverse effect. The state body, in implementing its final plans, shall adopt all prudent and feasible measures that eliminate or mitigate the adverse effect.

The questions that you have raised lead me to focus on the word "project" as it appears in the above-quoted provisions. State agencies often issue permits for particular aspects of a proposed development — here, for instance, sewer connection and sewer discharge permits. The question therefore arises whether the "project" in such instances is merely the specific activity permitted — the sewer connection and discharge — or is, instead, the entire development. If the former, "narrow," reading is correct, the state body is required to review only the specific state-permitted activity to determine whether that activity will affect a listed property. If the latter, "broad," reading is correct, the state body must determine the effect of the overall undertaking, irrespective of the subject matter of the state permit. For the reasons that follow, I have concluded that the narrow reading is the correct one, at least as to private developments such as International Place, where the state body's participation consists only of the issuance of permits.²

¹ The Commission is in the Department of the State Secretary, who is the chairman of the Commission; DEQE and MDC are within the Executive Office of Environmental Affairs. Hence each of you is entitled to my opinion in this matter.

² Because developments undertaken or funded by a state body are not at issue here, they will not be discussed further except as it is necessary to contrast them with the type of development that is at issue here.

In attempting to ascertain the meaning of the word “project,” I must first examine the language and provisions of the MHCA. If the MHCA yields a plain and unambiguous meaning, no other source is necessary. See *James J. Welch & Co. v. Deputy Commissioner of Division of Capital Planning and Operations*, 387 Mass. 662, 666 (1982). The MHCA does not define the term “project.” The general mandate to interpret statutory terms “according to the common and approved usage of the language,” G.L. c. 4, § 6, is also of no particular help here because the dictionary definitions of “project” are so various. See Webster’s Seventh New Collegiate Dictionary 681 (1965) (“a specific plan or design”; “a planned undertaking”); Webster’s New World Dictionary 1136 (2d ed. 1974) (“a proposal of something to be done”; “a special unit of work”).

The context in which the term “project” is used provides some, albeit inconclusive, guidance as to its intended meaning. Cf. *International Brotherhood of Electrical Workers v. Western Massachusetts Massachusetts Electric Co.*, 15 Mass. App. Ct. 25, 27 (1982) (“A general term in a statute or ordinance takes meaning from the setting in which it is employed.”) The term is used in § 27C to refer to developments that differ in the amount of state participation involved, i.e., developments that are state-undertaken, state-funded, state-licensed, or state-approved. That the Legislature intended to differentiate among various types of developments, at least to some degree, is shown by the different procedural requirements that apply to them. Section 27C establishes different notification and mitigation requirements for projects undertaken by the state than it does for projects merely licensed by the state. State-undertaken projects require notice of an effect on a listed property early in the state body’s planning process, while state-licensed projects require notice prior to the issuance of the license. At the end of the review process, the state body is to adopt certain mitigation measures “in implementing its final plan.” By its terms, this mitigation requirement can apply only to projects for which state bodies have “plans,” namely state-undertaken projects subject to the “planning process” referred to in the opening phrase of § 27C. State permit-granting bodies do not have a “planning process” or “final plans” for the issuance of permits.³

Thus the Legislature used the term “project” loosely to describe various types of developments that differ in their level of state involvement and, as a consequence of the amount of involvement, in their procedural and mitigation requirements.⁴ Whether the Legislature intended different review requirements as well is not clear.

³ There is a mitigation requirement that applies to the issuance of state permits. It is found in § 61 of the Massachusetts Environmental Policy Act, G.L. c. 30, §§ 61–62H. That section requires state agencies, *inter alia*, to use “all practicable means and measures to minimize damage to the environment,” including historic districts and sites. These measures may result from consultation under MHCA between the state permit-granting body and the Commission.

⁴ This “looseness” is apparent elsewhere in the statute and makes its interpretation difficult. For example, the last two sentences of the first paragraph of § 27C read as follows:

Within thirty days of receiving notification, the commission shall determine if the project will adversely affect a listed property, and shall send an advisory report to the state body describing and documenting its findings. If the commission does not notify the state body within thirty days, the state body may proceed with the project.

When thirty days have passed without commission notification on a privately financed project, what does the phrase “the state body may proceed with the project,” authorize the permitting agency to do? In my opinion, the agency is authorized to issue the permit, making the terms “project” and “permit” synonymous in this context at least. As it is first used in § 27C, however, the word “project” appears to be a synonym for “development.”

Indeed, rather than being “clear and unambiguous,” the statute is so vague that further legislative action is imperative. My task, nevertheless, is to opine on the statute as it is written, and I turn to other pertinent sources in seeking a workable definition of the term “project.” The relevant sources here are the legislative history of § 27C; the Commission’s regulations implementing MHCA, “Procedures to Protect the Historic and Archaeological Properties of the Commonwealth,” 950 C.M.R. §§ 71.00, *et seq.*; and the provisions of other related statutes. *Murphy v. Bohn*, 377 Mass. 544, 548 (1979) (statutes should be interpreted in connection with their development and progression through the legislature and with prior legislation).

The legislative history shows that the primary purpose of the Commission in sponsoring the 1982 amendments to the MHCA, which included the amendment of § 27C to add the provisions at issue here, was two-fold: to consolidate the various listings of historical resources into a State Register of Historic Places and to provide a structure to ensure that inadvertent harm to historic properties would not be caused by “state actions.” Patricia L. Weslowski, Executive Director, Massachusetts Historical Commission, *Testimony before the Committee on State Administration H. 3550: An Act to Amend Preservation [L]egislation*. The legislative history does not reveal, however, whether the Legislature viewed the “state action” subject to MHCA as the licensed activity alone or the entirety of a development that receives a state license for limited aspects of the development.

The Commission’s regulations provide some assistance in resolving this question. The relevant regulation defines “project” as follows:

Project means any action, activity or program undertaken by a State Body, or any private action, activity or program which is funded, licensed or approved by a State Body. Projects include actions which are:

- (a) directly undertaken by a State Body;
- (b) supported in whole or in part through state contracts, grants, subsidies, loans, loan guarantees, or other forms of direct and indirect funding assistance; or
- (c) carried out pursuant to a state lease, permit, license, certificate, approval, or other form of entitlement or permission.

950 C.M.R. § 71.03. This regulatory interpretation of the statute is entitled to deference.⁵ See *Consolidated Cigar Corp. v. Department of Public Health*, 372 Mass. 844, 855 (1977); *American Family Life Assurance Co. v. Commissioner of Insurance*, 388 Mass. 468, 474–75 (1983). Where only a state permit is involved, the regulations define the “project” whose effect the state body must determine as the “action [or] activity . . . which is . . . licensed . . . by a State Body.” The clause “which is . . . licensed . . . by a State Body” suggests that the terms “action” and “activity” are narrow ones, encompassing only the specific work done in conformance with a state permit. This conclusion is buttressed by the second sentence of the Commission’s definition, which resolves any possible ambiguity and clarifies

⁵ It should be noted that the Commission sponsored the amendment to § 27C, provided the testimony in support of the legislation, and drafted the regulations. Given the Commission’s participation in the legislative process, the assumption that the agency charged with enforcement of the statute drafted regulations in harmony with the statute and with legislative intent is of special force here. Cf. *Board of Education v. Assessor of Worcester*, 368 Mass. 511, 516 (1975) (greater weight given to agency’s interpretation of statute where agency participated in drafting the legislation).

the distinction between the different meanings of "project": a project is all of a state-undertaken or supported action, even if it is supported only in part; but in the case of private developments, a project is only the action "carried out pursuant to" the state license or permit. "Pursuant to" is a restrictive term that means "in conformance to or agreement with." Black's Law Dictionary 1112 (rev. 5th ed. 1979). Only the activities covered by a particular state permit are carried out "pursuant to" that permit; other aspects of the development are not.

The Commission's relatively narrow definition of the action that the state body must review is consistent with the limited authority of permit-granting agencies as established by their respective enabling acts. Although the limited scope of an agency's authority may not preclude its making a determination about the effect of an entire development on a historic property, its authority to mitigate such wide-ranging effects is limited to the particular activity that the agency is authorized to regulate. Even if an agency reviewed the entire development, it would be powerless to mitigate an extra-permit effect.⁶ It cannot be assumed that the Legislature intended agencies with specific expertise to review matters outside that expertise, especially where, as here, the agency is not empowered to take action based on that review. Such review would be a fruitless waste of agency and Commission resources. A sounder conclusion is that in enacting MHCA, the Massachusetts Environmental Policy Act ("MEPA"),⁷ and other statutes that regulate development in historic districts, all of them dealing with the same general subject, the Legislature intended to confer the authority to review the potential effect of actions within their jurisdiction upon those entities with the power to regulate those actions. *See Registrar of Motor Vehicles v. Board of Appeal*, 382 Mass. 580, 585 (1981) (two or more statutes relating to the same subject matter should be construed together so as to be harmonious with legislative purpose).

MEPA and MHCA, both of which provide for state review of state action, overlap to some extent. MEPA calls for state environmental review of projects involving state action that may cause significant damage to the environment and empowers, indeed requires, state licensing agencies to act on the basis of that review. G.L. c. 30, § 61. A collateral review takes place under MHCA, under which all effects of state action on historic properties are examined, including intangible impacts on historical resources not necessarily protected by MEPA,⁸ and under which the specialized expertise of the Commission is utilized in the area of historic preservation if the state

⁶ In the case of International Place, the permits are sewer connection and industrial user discharge permits. The state agencies' enabling legislation does not give them authority to impose permit conditions that are unrelated to the subject matter of the permits. *See* G.L. c. 21, § 43; 314 C.M.R. §§ 7.00, *et seq.* (DEQE); G.L. c. 92, §§ 6A, 8A; 350 C.M.R. § 11.04(2) (MDC). There is no indication in § 27C or in the legislative history of the MHCA of a legislative intent to authorize state permit-granting agencies to regulate private developments in their entirety, and I will not infer such a radical change in state law. *International Organization of Masters, Mates & Pilots, Atlantic & Gulf Maritime Region v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority*, 392 Mass. 811, 817 (1984) ("We will not interpret a statute, unclear on its face, to require a drastic alteration in existing law unless we can discern that the Legislature intended to achieve this result.") This is not to say, however, that state permit-granting agencies may not impose a broad range of conditions that are related to the subject matter of their permits.

⁷ General Laws, chapter 30, §§ 61-62H.

⁸ Section 61 of MEPA refers only to historic districts or sites; section 26C of MHCA covers a broader range of historically significant properties. Section 26B of MHCA defines the "effect" the agency is to determine, which is broader in some respects than the "damage to the environment" defined in § 61 of MEPA.

body determines that there will be an effect on a historic property. Some projects involving state action are excluded from MEPA review, generally on the basis of size; but if they will affect a listed property, they do not escape scrutiny under MHCA, as is appropriate to the sensitive nature of historic resources.

A “narrow” reading of the term “project” as it is used in MHCA leads to a harmonious construction of MEPA and MHCA, two complementary statutes enacted to prevent state-caused harm to the natural and historical environment. See *Board of Education v. Assessor of Worcester*, 368 Mass. at 513–14. In both statutes, state action triggers the review process, and the degree of state involvement determines the amount of state control that may be imposed on the development. In both statutes, state-undertaken projects are subject to full review, and the state is required to exercise its full control over the project to prevent environmental harm, by adopting either “prudent and feasible measures” (MHCA) or “practicable means and measures” (MEPA), or both. This process is entirely appropriate, for where a state agency itself is the developer, it must of necessity evaluate the impact of the entire development. Additionally, where the agency has overall charge of the development, it has not only the responsibility to effect broad changes by virtue of the language of MHCA and MEPA but also the authority to do so. Where the state controls only licensing or permits, on the other hand, it lacks the expertise and resources to evaluate the entire development; and it is without authority to act on such an evaluation.

This narrow construction is consistent with the overall statutory scheme for historic preservation. In addition to the state review provided by MEPA and MHCA, the statutory scheme provides for review of other aspects of development that may affect historic properties. This review is undertaken by entities with both the expertise necessary for such an evaluation and the authority to require changes. This Historic Districts Act, G.L. c. 40C, §§ 1–17, empowers municipalities to establish local historic districts and historic district commissions whose members include those knowledgeable in this field. G.L. c. 40C, §§ 3, 4. The commissions are authorized to regulate virtually every exterior architectural feature of buildings and other work in the historic districts, and no alterations or construction may take place, nor may a building permit for construction or exterior alteration issue, without a certificate from the local commission. G.L. c. 40C, §§ 5, 6.

In addition, the Legislature has enacted a number of special acts that protect certain historically important properties by establishing specific historic districts and site-specific historic district commissions.⁹ As is the case under the Historic Districts Act, these commissions regulate every visible aspect of development in a historic district.¹⁰

⁹ See, e.g., St. 1956, c. 447 (Lexington); St. 1958, cc. 314, 315 (Beacon Hill); St. 1960, c. 345 (Concord); St. 1963, c. 697 (authorizing establishment of municipal historical commissions); St. 1964, c. 118 (Bedford); St. 1965, cc. 694 (Yarmouthport), 101 (Marblehead), 48 (Chatham); St. 1966, cc. 211 (Petersham), 502 (Hingham); St. 1970, c. 395 (Nantucket); St. 1972, c. 708 (Nantucket); St. 1975, c. 772 (Boston); St. 1978, c. 268 (Battle Green, Lexington); St. 1979, c. 631 (King’s Highway).

¹⁰ The Boston Landmark Commission Act (“BLCA”) St. 1975, c. 772, like the Commission’s regulations, 950 C.M.R. § 71.03, authorizes regulation of development in the vicinity of the designated properties that it protects. The BLCA authorizes the establishment of “protection areas” for regulation of a 1200-foot radius around landmarks, landmark districts, and architectural conservation districts, but does not permit protection areas in the downtown area, the location of the development at issue here. It is of some significance that the Legislature thus chose to exclude from BLCA review developments that are not in historic districts or are not designated properties. A broader reading of the MHCA than I have found appropriate here could lead to overall review of such developments by state bodies, notwithstanding the absence of such review by local or site-specific commissions, who have more expertise on the subject. It seems unlikely that the Legislature intended such a paradoxical result.

Thus the overall statutory scheme authorizes detailed review of development in a historic district by expert site-specific bodies, additional review under the MHCA of the effect of state permits by the state permit-granting agency, agency consultation with the Commission if granting the permit will affect a listed property, and MEPA review on the same and other impacts if the project is of a certain magnitude. The Legislature has placed the responsibility for review in each instance on those who have the expertise to perform it and the authority to enforce the findings that result from the review.

Your second question is whether the permit-granting agency is required to withhold the permit and consult with the Commission if the Commission disagrees with the agency's determination that issuance of the permit will not affect a listed property. The question stems from the Commission's disagreement with DEQE's and MDC's conclusion about the effect of granting the permits.¹¹ This question is answered by reference to the plain language of § 27C itself. See *James J. Welch & Co. v. Deputy Commissioner of Division of Capital Planning and Operations*, 387 Mass. § 666. Under that section, the state body is to determine whether the project will affect any listed property and, if so, to notify the Commission before issuing a license. The Commission's role is limited to determining whether the effect anticipated by the agency will be adverse and advising the state body of its findings. Section 27C does not empower the Commission to require consultation if the state body determines that the project will not affect a listed property, and therefore the state body need not withhold the requested license or approval.¹²

¹¹ The Executive Director did not disagree with these DEQE and MDC determinations, but instead disagreed with those agencies' interpretation of the scope of what they were to review, asserting that they should review the effect of the entire development.

¹² I note, however, that the Commission's regulations require a ten-day period after a "Determination of No Effect" before the state body proceeds, in order to provide the Executive Director of the Commission time to review the determination and any objections to it and to advise the state body and objecting party of the Executive Director's findings. 950 C.M.R. § 71.07(1)(b)1. This procedure is consistent with the directive to the Commission in § 26 of the MHCA that the Commission encourage governmental bodies to consult with it to avoid adverse effects to historical assets. State bodies may find it helpful, given the Executive Director's expertise, to avail themselves of such comments before making a final decision to issue the permit.

I note in conclusion that providing answers to your questions was made substantially more difficult by the ambiguity of § 27C. Especially in the absence of clear indications of legislative intent, such an ambiguous provision is difficult to interpret. In the course of answering your specific questions, I noted other equally troublesome problems with both the MHCA and the regulations promulgated thereunder, all of which are beyond the scope of this opinion.¹³ I strongly recommend that, to avoid further confusion and disagreement over the scope and application of the MHCA, the statute receive legislative attention. I would be pleased to assist in any endeavor that is undertaken in this regard.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

¹³ I cannot help noting one drafting problem of marginal interest with respect to the International Place development. Section 27C requires a state body and the Commission to determine, respectively, whether a project will “affect” and whether it will “adversely affect” a listed property. These terms are not defined. “Effect” and “adverse effect” are, however. Both definitions refer to “sites.” G.L. c. 9, § 26B. The word “site” is in turn defined as “any building, structure, district or area . . . that is one hundred and fifty years old or more and [historically] significant . . .” The Custom House was completed in 1847, and its tower added 68 years later, arguably making the structure 138 years old. In any event, while the definitions section suggests that MHCA review may be triggered only by a determination that a project will change characteristics of a building, structure, district, or area that is at least 150 years old, under G.L. c. 9, § 27C, MHCA review may be triggered by a determination that a project will affect any property listed on the state register of historic places. I presume that such properties include buildings, structures, districts, or areas that are not 150 years old. The statutory provisions are thus inconsistent.

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