The Yardstick

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The airbrushing of history

This *Yardstick*, inside front cover, features the government's response, palmed off by the minister Lord Drayson onto the National Measurement Office, as to how the European Communities Act 1972 can repeal the Weights and Measures Act 1985, in so far as the latter, as amended, renders supplementary indications unlawful after 1 January 2010.

The explanation is simple; the reply *omits any reference* to the Weights and Measures Act 1985, and refers instead to statutory instruments passed subsequently under the 1972 Act. Thus, the government continues to proceed as though the Weights and Measures Act 1985 does not exist. It ignores the Act when it preserves the use of the pound and the yard (lest this contravenes an EC Directive), and it ignores the Act where it outlaws the use of supplementary indications (for the EC says that would compromise EU trade). Michael Shrimpton, eminent barrister and specialist in constitutional law, with a particular interest in implied repeal, will doubtless be commenting on this at our forthcoming annual Conference (see below).

Enforcement Guidance

LACORS – the Local Authorities Coordinators of Regulatory Services – has published its long-awaited and updated guidance to trading standards offices on metric enforcement. Lacking any democratic or legal authority, and possessing only power, LACORS is going into overdrive in linking imperial traders to "deceptive conduct". Reproduced in full inside.

Annual General Meeting & Conference

Please note the place and date: Saturday 29 May 2009, to be held at the Victory Services Club, 63 Seymour Street, London W2 2HF, near Marble Arch. Guest speakers include Michael Shrimpton and Fiona McEvoy of the *Taxpayers' Alliance*; further details to follow in *Yardstick 41*.

John Gardner, Director

Conflict between European Communities Act 1972 and Weights and Measures Act 1985

BWMA letter to Rt Hon Lord Drayson, Minister for Science and Innovation, Department of Business, Innovation and Skills, Victoria Street, London, 12 January 2010

Dear Lord Drayson

While our Association welcomes the government's intention to implement recent changes to EC Directive 80/181, removing the end date for non-metric "supplementary indications", we are concerned about the *vires* of the government's chosen legal instruments. Here is an excerpt of statutory instrument 3046 (my emphasis):

The Secretary of State, being a Minister designated (a) for the purposes of ***section 2(2) of the European Communities Act 1972*** *(b) in relation to units of measurement to be used for economic, health, safety, or administrative purposes, in exercise of the powers conferred by that subsection, makes the following Regulations:*

… 3 — (1) ***In section 8(5A) of the Weights and Measures Act 1985*** *(d) (which allows the use for trade of supplementary indications up to and including 31 December 2009),* ***omit "up to and including 31 December 2009"****.*

The text indicates that the government is relying on an act from 1972 for powers to nullify the Weights and Measures Act 1985, in so far as the latter applies to supplementary indications. The government is aware, however, that repealing or negating an Act of Parliament with an older Act is not possible; under British constitutional law, the latter Act takes precedence. The Government has acknowledged this previously:

"If, and to the extent that, a modern statute clearly provides for such penalties, it is a necessary implication that any provision in any earlier enactment to contrary effect does not apply. ***Courts and tribunals are obliged to implement the modern statute****"* (letter, 22 November 2006).

It would appear that the government has enacted ineffective legislation, meaning local authorities remain under an obligation to bring enforcement action and prosecution against businesses for labelling and packaging references to non-metric units. Please could you explain urgently the government's position and intended course of action.

Yours sincerely, etc

Reply from National Measurement Office, Teddington, Middlesex, 4 February 2010

Thank you for your letter dated 12 January to Lord Drayson concerning the implementation of Directive 2009/3/EC. I have been asked to reply.

The Units of Measurement Regulations 2009 (SI 2009/3046) were made using powers under Section 2.2 of the European Communities Act 1972. These powers were used in this case because the Regulations implement European Law and the earlier Regulations which they amend, the Units of Measurement Regulations 1986 (SI 1986/1082) and the Units of Measurement Regulations 2001 (SI 2001/55) were both made using the same powers. This represents legal best practice and the Regulations were approved by the Joint Committee on Statutory Instruments.

I am not familiar with the letter to which you refer. However, I am confident that the Regulations have been made with the appropriate *vires* and therefore have no reason to believe that the legislation is ineffective in any way.

Lynnette Falk, Assistant Director

LACORS Guidance to Trading Standards Officers

Covering letter from Peter Mason, Chief Executive, National Measurement Office, Teddington, Middlesex, 31 December 2009, replying to BWMA Director and enclosing LACORS Guidance

When we met earlier this year, we discussed the work being undertaken to provide revised guidance to Trading Standards Officers on the enforcement of units of measurement legislation. This work has now been completed and LACORS has today published its revised guidance on its website to coincide with the coming into force of the Weights and Measures (Metrication Amendments) Regulations 2009 and the Units of Measurement Regulations 2009.

The guidance is, as you would expect, aimed specifically at those in local authorities with the responsibility for enforcing this legislation and access to the guidance on the LACORS website is restricted to members only. However, in the interests of transparency and with the agreement of LACORS, I am enclosing a copy of the guidance for your information.

The guidance has the support of the National Measurement Office and the Department for Business, Innovation and Skills and is in line with both Hampton Principles and the Regulators Compliance Code.

It remains the responsibility of Trading Standards Officers to decide whether to undertake prosecution in any particular case, but I believe that the revised guidance will help to ensure that future action taken in this area will be both proportionate and consistent.

Peter Mason, Chief Executive

Enclosure: *LACORS Guidance on the use of Metric Units of Measurement and the EC Units of Measurement Directive*

Preamble

Following discussions with the National Measurement Office (acting on behalf of the Secretary of State for Business, Innovation and Skills), and taking into account changes to European Law in Directive 2009/3/EC which amends Directive 80/181/EEC, this guidance updates and replaces previous LACORS Guidance, Concordats and Enforcement Packs on Metrication, and presents the current position, as of 31 December 2009.

Like its predecessor, this guidance takes into account the decision made in 2004 by the European Court of Human Rights in relation to the metrication appeals.

1. Summary

1.1 This guidance seeks to provide practical enforcement assistance for officers on the metrication provisions. When references are made to "enforcement" they relate to the whole range of activities including the provision of advice and guidance, issue of warnings etc and not simply to prosecutions.

1.2 This new guidance replaces and incorporates the earlier Concordat Advice into its provisions.

1.3 The enforcement pack contained within the appendices to this guidance are intended to ensure clarity and consistency of information supplied both to officers and business. The pack contains advice on:

- The history of metrication from 1994
- Metrication legal provisions
- Metrication offences in relation to imperial equipment
- Enforcement powers in relation to imperial equipment
- Price Marking Orders
- Notice of intent
- Draft specimen offences

2. Background

2.1 The last significant phase of metrication was completed on 1 January 2000 with the removal of the pound and ounce as lawful units of measurement for use for trade for the sale of goods sold loose from bulk. As a result of consultation with all stakeholders, LACORS Concordat Advice was first released in December 1999 and aimed to achieve consistent and proportionate enforcement action in accordance with good enforcement and compliance practices. The Advice suggested a sequence of enforcement actions, which are detailed below at paragraph 3.2.

2.2 Completion of the metrication programme was disrupted by actions taken by the UK Independence Party and others, who obtained a legal opinion to the effect that the legislation implementing the metrication provisions was ultra vires.

2.3 LACORS, on behalf of local authorities, obtained leading Counsel's Opinion, which fully rebutted all legal arguments put in the former Opinion. LACORS therefore reaffirmed its confidence in the vires of the legislation and the subsequent enforcement role and responsibility of Local Authorities.

2.4 Counsel's Opinion was subsequently proved to be valid when, on 18 February 2001, the High Court rejected the defendants' appeals (Thorburn [sic] *v.* Sunderland City Council etc. EWHC Admin 195 (2002) 166 JP 257) and the law was held to be good. A further application for leave to appeal to the House of Lords was rejected by their Lordships on 15 July 2002 (unreported, but see *The Guardian*, 16 July 2002).

2.5 The defendants lodged papers to commence proceedings before the European Court of Human Rights, alleging various breaches of the European Convention on Human Rights; these were understood to include right to a fair trial, right of freedom of expression, and right to peaceful possession of property. This process was completed in March 2004 when the ECHR refused to hear the appeal. This issue has now been considered by two levels of an independent judiciary (Four separate Magistrates' Courts and the Divisional Court) and has been refused any further consideration by the House of Lords and the European Court of Human Rights and therefore there is no legal impediment to the enforcement of the relevant provisions as part of the statutory duty under the Weights & Measures Act 1985.

3. Enforcement Action

3.1 Enforcement action is likely to be subject to continuing scrutiny by the media and others. Local Authorities should continue to demonstrate their commitment to consistent, proportionate action to ensure that those remaining traders who continue to trade in imperial units through ignorance of the law or misleading media coverage, do convert to selling in metric units. It may be necessary to consider different approaches with those small numbers of traders whose refusal is (a) part of a wider pattern of fraudulent or deceptive conduct or (b) a point of principle in support of a cultural objection to the move towards metric units.

3.2 To deal with issues of ignorance of the law or misleading media coverage, LACORS suggests the following enforcement approach and guidance:

- advice and explanation of the requirements, consider issuing a 28-day notice where applicable (but note that "28 day notices" are only appropriate in respect of the non-conformance of an imperial instrument with the relevant Regulations, rather than failing to comply with s.8);
- verbal warning (recorded), consider obliteration of stamp;
- letter of warning explaining the possible legal consequences if further non-compliances are detected.

In most cases this should be sufficient to ensure that traders are complying with the law.

3.3 Where breaches continue, attention should be paid to the trader's overall conduct, and in particular whether the use of imperial units is intended to confuse or mislead consumers, either as to the quantity they are receiving or the value it represents. In such cases it will usually be appropriate for there to be:

- consideration of a Simple Caution (formerly a Home Office caution), provided that the Attorney General's Guidelines are properly considered (although this procedure is not applicable in Scotland, the Procurator Fiscal may issue a warning). If this action is considered and the trader refuses to sign the caution then proceedings should normally be instituted for any offence. However, regard should be had to the provisions of paragraph 3.4 below in relation to the previous issue of a 28-day notice
- consideration of legal proceedings - Authorities in England and Wales may wish to consider what action (if any) to take if the trader undertakes to remedy matters immediately upon receipt of a summons. In Scotland, authorities may at a suitable time wish to consider the appropriateness of submitting a report to the Procurator Fiscal
- institution of proceedings, which should include s. 8 offences as well as any s.11 offences that may have arisen as a result of action under 3.2 above. This should avoid the inevitable adverse publicity that will attend suggestions that the authority, whilst seeking to enforce metrication, is not prepared to use the most appropriate offence to do so (See 4.2 below).

3.4 Where Authorities are continuing with existing enforcement action, and where non-compliance appears to have resulted from legal uncertainty, they may wish to issue a notice of intent prior to carrying out inspections. An example of such a notice can be found at Appendix F.

3.5 Where a 28-day notice has previously been issued and follow up action has not been undertaken by the Authority within a reasonable time due to legal uncertainty, a further 28-day notice should be issued and the subsequent statutory provisions followed (see Appendix B). In determining what would be a reasonable time, it is relevant to have regard to the fact that the original maximum allowed period of 'relaxation' is itself limited to 28 days.

3.6 Circumstances may dictate that some, or all, of the elements above are not applicable. This may occur where the trader concerned has a poor history relating to non-compliance, where a fraudulent practice exists or where it can be demonstrated that a significant unfair trading advantage is occurring or there is consumer detriment (e.g. price comparisons).

3.7 In a few cases a trader may continue to use imperial units solely as a matter of principle, but in circumstances where there appears to be no detriment either to consumers or competitors. In such circumstances authorities need to consider carefully whether the public interest will be served by enforcement action which may not have an impact on consumer welfare or competitors. Authorities need to have regard to the provisions of Counsel's Opinion in relation to the duty to enforce, the relevant points of which provide that Local Authorities may not decline to perform their statutory duties under the Act. Thus, whilst they enjoy discretion whether or not to prosecute in an individual case, that discretion may not be used to justify a general policy of non-prosecution and must be exercised reasonably. Where attention is paid on a case by case basis to whether prosecution is in the public interest it is appropriate to take into account the amount of detriment suffered by the trader's customers or competitors.

4. Offences and further actions

4.1 Offences for the use of imperial units for trade use are detailed in Appendix C.

4.2 Where possible, Authorities should not take action solely in respect of failing to use lawful units for weighing and/or unit pricing, nor solely in .respect of offences for the use of an unjust or unstamped machine after rejection. Coupling both s. 8 and s.11 offences will demonstrate that the trader has been given every opportunity to comply with the legislation. Moreover, there may be some danger in omitting offences relating to non-lawful units and proceeding solely with an offence of using unstamped equipment. A further scope for legal confusion could arise if a court is invited to consider proceedings in respect of equipment, where the summons requires the court to treat non-lawful units as though they were in fact lawful ones. At the same time, where there are other grounds for proceeding it may be worth considering carefully whether the inclusion of "metrication" offences will help or hinder the case as a whole. While the metrication offences will usually be easy to prove, there is a danger that the proceedings as a whole will be represented as a "metrication" case and so distract attention from the more serious issues of consumer detriment.

4.3 Where possible, Authorities should consider the use of test purchases to confirm the equipment's use and the use of imperial units, and to determine whether any short weight offences are committed. Quantities should be requested in metric, where possible, to avoid an accusation of 'agent provocateur'. Test purchases and equipment should be checked in, and any deficiencies/errors stated in, metric units (see Appendix B for advice on testing).

5. European Convention of Human Rights

5.1 Traders may attempt to develop the argument that the metrication provisions infringe their rights to freedom of expression under Article 10 of the ECHR. This has been dealt with by the recent decision in the European Court but the following information is provided as background.

5.2 The right to freedom of expression includes the freedom to impart and receive information without interference by public bodies. However, Art. 10(2) states that:-

"The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society,... for the prevention of... crime,..., (and) for the protection of... the rights of others"

It may be relevant to note that the requirement to sell in metric units does not restrict the right to impart or receive information *per se*; it only restricts the manner in which the information is imparted. The preamble to the Units of Measurement Directive (80/181/EEC) refers to the importance of units of measurement, to the need for clarity in their use, and to the need to protect consumers, all of which issues are arguably intended to prevent deliberate deception (prevention of crime) and to assist consumers (their right to the provision of consistent information). This was reinforced by the recent decision by the EHCR to refuse an appeal.

5.3 It should be noted that the metrication provisions do not in any event currently prohibit the use of imperial units. The provisions *require* traders to use metric units and *permit* traders to use imperial units as supplementary indications. The use of imperial units as supplementary indications had been authorised until 31 December 2009, but the amended UK legislation, following the implementation of Directive 2009/3/EC now allows supplementary indications to be used indefinitely alongside metric units. The 'imparting and receiving of information' is therefore preserved irrespective of any arguments as to the applicability of Art. 10(2).

5.4 It must be noted that the units to be used, both metric and imperial, must be the statutory names (gram/kilogram) and the statutory values given. There is no freedom to vary either the name or the value of the units.

6. Transactions regulated under the Weights and Measures Act

6.1 Many common consumer goods that are priced and sold by reference to units of measurement (weight, capacity measure, volume, area or length) are regulated by the Weights and Measures Act 1985 and its subordinate legislation. Regulated goods include most groceries (foods and non-foods), and many DIY goods and related products. These regulated products may be sold loose from bulk, packed or pre-packed.

6.2 There are a number of exceptions where metric quantities are not required including draught beer and cider, which must be sold in specified imperial quantities, and milk sold in returnable containers, which may continue to be sold by the pint.

6.3 Business may continue to use imperial units as supplementary indications and to display conversion charts if they consider that would be of value to their customers. Traders will also be free to serve (though in metric units) customers who ask for goods in imperial units.

6.4 Legislative changes to implement Directive 2009/3/EC are contained in the Units of Measurement Regulations 2009 (SI 2009/3046) and the Weights and Measures (Metrication Amendments) Regulations 2009 (SI 2009/3045) and allow UK business to be free to continue to display imperial units as supplementary indications for an indefinite period.

7 Transactions which are not regulated under the Weights and Measures Act

7.1 The majority of commercial transactions in goods, land and services are not regulated by the Weights and Measures Act 1985. These transactions are therefore not subject to any express sanction under provisions in UK legislation that regulate the use of units of measurement.

7.2 Business should, however, recognise that the scope of the EC Units of Measurement Directive is wider than transactions regulated under the Weights and Measures Act. The Directive provides for the use of metric units as the primary system of measurement from 1 January 1995 for "measuring instruments used, measurements made and indications of quantity expressed in units of measurement, for economic, public health, public safety or administrative purposes" (Article 2), unless one of the derogations (set out in appendix 1) which permit the longer use of imperial units applies.

7.3 The following are among the consequences that could follow for those non-regulated transactions that continue to use imperial units:

• Businesses which had hitherto used imperial units in transactions with other Member States could find that they are excluded from those markets until such time as they convert to metric units;

• The validity of a non-regulated transaction involving the use of imperial units could be liable to legal challenge by a party that argued that the transaction should not be upheld or enforced.

8. Derogations

8.1 Some imperial units remain available as the primary system of measurement for certain specific uses:

• The pint for sales of draught beer or cider and for milk sold in returnable containers
• The mile, yard, foot and inch for road traffic signs and for related distance and speed measurements
• The foot in aircraft heights and any other units used in the field of air and sea transport and rail traffic, which have been laid down in international conventions etc (see Article 2 of Directive 80/181)
• The nautical mile and knot for sea and air traffic
• The troy ounce for transactions in precious metals.

BWMA comments on the Guidance

Much of the text is carried over from the first version of the Guidance released in 2004 and is the subject of a previous BWMA report.[1] However, there are a number of new paragraphs, in particular:

[3.1] It may be necessary to consider different approaches with those small numbers of traders whose refusal is (a) part of a **wider pattern of fraudulent or deceptive conduct** or (b) a point of principle in support of a cultural objection to the move towards metric units … [3.3] … attention should be paid to … whether the use of imperial units is intended to **confuse or mislead consumers**, either as to the quantity they are receiving or the value it represents … [3.6] … where the trader concerned has a poor history relating to non-compliance, **where a fraudulent practice exists** or where it can be demonstrated that a significant **unfair trading advantage** is occurring or there is **consumer detriment** (e.g. price comparisons) [3.7] In **a few cases** a trader **may** continue to use imperial units solely as a matter of principle **but** in circumstances where there **appears** to be no detriment either to consumers or competitors … it is appropriate to take into account the amount of **detriment suffered** by the trader's customers or competitors [4.2] … there is a danger that the proceedings as a whole will be represented as a "metrication" case and so distract attention from **the more serious issues of consumer detriment** … [5.2] … the Units of Measurement Directive (80/181/EEC) … arguably intended to prevent **deliberate deception** …"

The notion that describing prices in lb/oz is "unfair", "misleading" and "fraudulent" is incorrect; if a retailer prices apples at 50p per pound, and then sells them at 50p per pound, no fraud has taken place; the consumer has not been misled and no deception exists. We draw attention to 5.4 of the Guidance that refers to both metric and imperial units; "*There is no freedom to vary either the name or the value of the units*". So, deception or misrepresentation is prevented under the law. We also point out that LACORS expresses no concern about deception in section 7, where the metric regulations do not apply.

LACORS does acknowledge that traders use imperial units on a point of principle (3.7). But the regulations themselves make no such distinction; how can trading standards officers assume a moral authority to decide that one trader is "good" and another "bad", when both use imperial units and there is no material difference between their actions?

The first sentence of 5.3 appears to be inserted for propaganda value; the metric regulations do prohibit use of imperial units.

Also note in 5.3 the use of the words relating to the display of conversions: "permit", "authorised", "allows", "preserved" and, in paragraph 6.4, "allow UK business to be free". LACORS does not understand that passing a law to permit private communication is not an indication of freedom, but of oppression.

Equally notable is what the LACORS Guidance leaves out:

The last piece of primary legislation on the matter, the Weights and Measures Act 1985, expresses legalises imperial units: *"The yard or the metre shall be the unit of measurement of length and the pound or the kilogram shall be the unit of measurement of mass by reference to which any measurement involving a measurement of length or mass shall be made in the United Kingdom".*

The main pillar on which the Divisional Court ruling of Lord Justice Laws was based – the hitherto unheard of ruling that later Acts can be overturned or negated by old Acts - has since been discredited, as documented in previous editions of *The Yardstick*.

Lord Justice Laws gave the traders leave to appeal on the question: "*Is the 1972 European Communities Act capable of being impliedly repealed by later legislation?*" This appeal never got to the House of Lords; it was blocked by the House of Lords Appeals Committee after only ten minutes' consideration. As illustrated elsewhere in this *Yardstick* (by the letter from the Information Commissioner's Office) public officials can and do obstruct appeals, act in the government's interest, and misrepresent procedures in the hope that problems will go away. There is no reason to assume that judges and law lords cannot act the same way; that is why Hackney Council were confident to proceed with a magistrates trial against trader Janet Devers, but not with a jury trial.

The LACORS Guidance is not concerned with preventing detriment to the consumer, but with preventing detriment to the government. Its purpose is to draw trading standards officers' attention away from the plain words of an Act of Parliament, and away from the discrediting of a Divisional Court ruling that was contrived to create an exception to British constitutional law. Having no legal authority for metric enforcement, LACORS seeks now to persuade trading standards officers of metric's *need*, by linking use of imperial units to fraud and deception. We do not expect trading standards officers to be taken in by this, but we do say this to TSOs: either declare a suspension of metric enforcement until a new Act of Parliament is passed; or do your duty, as declared by LACORS, and bring a trader before a jury for the single offence of pricing in pounds and ounces.

[1] Available on the internet at *http://www.bwmaonline.com/Business%20-%20Metrication%20Concordat.htm*

Metric downsizing: Cadbury Roses

BWMA sent the following question to Cadbury on 7 February 2010: "*Please explain why Cadbury recently reduced its 454 gram box (i.e. 1 lb) of Roses to 400 grams. Did Cadbury reduce the price to retailers?*"

The following reply was received on 11 February:

Thank you for your recent enquiry regarding our Tins of Roses. We have indeed reduced the weight of our boxes of Roses this year from 454g. We have kept the same footprint, however the new weight is clearly marked on the pack. Price and promotions are determined by the retailer and will vary.

Cadbury has long offered its chocolate in a range of sizes and shapes and these have regularly changed over the years. This particular change is driven by the need to keep our products competitively priced in the face of rising ingredient costs which have been well documented recently. Some of our competitors have chosen to increase the price of their products, but we wanted to maintain a great price point for consumers and customers, so have removed some weight to allow us to do that.

We do feel that we are offering good value in what is a particularly competitive market. Please be assured we will pass your comments onto our Marketing Department for their information. Thank you for taking the time and trouble to contact us, we do appreciate feedback from our consumers.

Cadbury Consumer Relations Department

***BWMA comment**: the new weight is indeed "marked on the pack" – but on the side, and in small print. When chocolates were sold in imperial units, weight was part of the popular 'identity'; pound boxes of chocolate were as common as 1lb packs of sausages and pint cartons of milk still are. Now, the consumer's link between quantity and price is lost, meaning a company can progressively reduce the weight while keeping the price and packaging size (the "footprint") the same. Perhaps someone should tell LACORS?*

Freedom of Information

Reply from Information Commissioner's Office, 15 December 2009, to BWMA letter of 28 November

Thank you for your letter of 28 November again reiterating your concerns with the outcome of your complaint made to the office of the Information Commissioner.

You have explained once more that you remain unhappy with the decision to close your case, following the release of all of the relevant information by the Department for Universities Innovation and Skills and you are unhappy that the case officer has not correctly interpreted our closure policy.

It may be useful once again to explain why the case has been closed and why there is no action that we will be taking in this case.

Our robust closure policy indicates that within the office we are prioritising our cases so that we do not fully take up individual cases, or issue Decision Notices, which are very unlikely to produce outcomes which will promote the effective use of the legislation. Our Freedom of Information strategy, available via our website, indicates that we are looking to move away from lengthy formal decision notices to ensure that we are not hampered in the exercise of our statutory functions by work which only serves to frustrate the legislation. In essence, our new approach is not to take up, or continue with, any FoI or EIR [Environmental Information Regulations] case where no useful purpose would be served if we were to proceed to an adverse Decision Notice.

In our opinion pursuing an application in this situation would mean that the application is frivolous or vexatious under s50 of the Act. Such cases will be closed, or dealt with in other ways if they appear to raise enforcement or similar issues.

In your case the decision was reached not to issue a formal decision notice, but the concerns raised were shared with our Good Practice and Enforcement team. In your case there was no constructive or remedial action which a Decision Notice could require the public authority to take. The information requested under the act had been released.

It may be helpful to elaborate once again on the reasoning for the approach. Our experience of complaint-handling has informed the need to reconsider the interpretation of section 50 and it is clear from our experience that there are cases which in that pursuing them would not achieve any benefit for the complainant, the public authority or the public generally.

We feel that this policy is in the public interest as it enables us to provide a better, more effective and efficient service to the public and it is consistent with our central function under section 50, which is to resolve as speedily as possible real and live disputes about disclosure rather than pore over the detail of what has (or has not) been done in the past. The approach helps us to free resources and channel them appropriately so as to deliver faster or fuller attention to substantive cases and to improve our ability to resolve cases informally without unnecessary legal process.

I appreciate that you disagree with the outcome reached but our intended aim is to achieve the promotion of the objects and policy of freedom of information legislation through the promotion of good practice as opposed to strict compliance with the letter of the law. Our Freedom of Information Strategy and our Robust Closure policy are available via our website and explain our approach to casework in more detail than I am able to here.

Once again I should inform you that you have the opportunity to raise your concerns with the Parliamentary and Health Service Ombudsman if you are dissatisfied with the outcome of your complaint. The Parliamentary and Health Service Ombudsman, Millbank Tower, Millbank, London SW1P 4QP. The helpline number is 0845 015 4033 should you wish to make further enquiries.

Andy Laing, Assistant Commissioner - Head of Casework
Information Commissioner's Office, Wilmslow, Cheshire

BWMA's reply to Information Commissioner's Office, 28 February 2010

Dear Mr Laing

Thank you for your letter of 15 December 2009.

According to the complaints handling policy criterion described by Christopher Logan in his letter of 8 June 2009, the ICO is obliged to provide a Decision Notice in our case. Although you describe this as our 'interpretation', you offer no interpretation of your own, nor do you dispute ours. We therefore take your second paragraph as a tacit acknowledgement that Mr Logan did not implement the procedure correctly.

In circumstances where you as Head of Casework can see that the procedure has not been followed, it is your duty, as it was Pam Clements, to correct that failure. Instead, you now offer a new account of how ICO closes FOI applications, which you say is based on the ICO's published Strategy. We have read the Strategy and it provides no alternative that replaces or contradicts the five-point test described by Mr Logan.

With regards to your reasons for not issuing a Decision Notice (that it serves no "useful purpose") *all* cases that pass ICO criterion are deemed to produce a useful Decision Notice. Such a procedure exists to disallow individuals such as yourself from deciding subjectively what is "useful" or in the complainant's "benefit". You are acting outside that procedure, and the three sentences of your fourth paragraph do no more than express in different words a practice of closing any case that causes difficulty.

It is not plausible that you do not understand the above, and we are of the view that you are dishonest in claiming the existence of a new closure process. In so doing, you contradict your letter of 28 August 2009, where you did not dispute the procedure, but misrepresented our complaint so it would not qualify.

With regards to "frustrating legislation" and raising "enforcement issues", neither of these concerns our application or the government's objection. The matter regards the government's refusal to release correspondence until after its sell-by date. Given that the ICO has given no undertaking to deal with complaints *when current*, the government knows it has a twelve-month period to refuse to requests, this being when information has practical value. For the ICO to turn a blind eye to this is to signal to the government that it may do so again.

You also say that our pursuing of our application is vexatious or frivolous (you do not say which). An application does not become vexatious or frivolous because it is pursued, only if it is baseless. The point at which the ICO needs to express such a view is when first responding to an application, i.e. Pam Clement's letter of 18 July 2009. Ms Clements made no such observation; nor did you in your letter of 28 August 2009. Only now do you say that our application is "vexatious or frivolous". We suggest that you know this is untrue, and that you are abusing s50 for the purpose of obstructing a complaint which you are aware is valid under ICO procedure. Indeed, you *admit* that you are not taking up individual cases. You also admit to not complying with the law.

In summary, you have used no fewer than five different devices for closing a case that you cannot deal with: to dismiss it as "retrospective" and no longer "real and live"; to describe it as "frivolous or vexatious"; to say that a Decision Notice would be "lengthy"; to suggest that pursuing it would not be to the complainant's own benefit; and that "strict compliance with the letter of the law" would interfere with the ICO's smooth operation. All five pretexts are irrelevant; you are obliged under your own procedure to issue a Decision Notice.

All this brings us back to the two questions in our previous letter which the Parliamentary Ombudsman cannot answer:

(a) what has caused you to act in the government's interests in our case; and

(b) how is the public to have confidence in the ICO?

Yours sincerely, etc

BWMA enquiry to Parliamentary & Health Service Ombudsman, 22 February 2010

Dear Sirs,

We are considering making a complaint against the Information Commissioner's Office, due to the manner in which they handled an application regarding freedom of information. However, we cannot find on your site the details of what the Parliamentary and Health Service Ombudsman offers in the way of a review or appeal. Please explain:

- Who or what undertakes the PHSO's review
- Does the PHSO have criteria for what constitutes a complaint
- What sanctions are applied to the Information Commissioner's Office, in the event of the complaint being successful?
- Does the PHSO provide a list of its previous reviews of the ICO?

Yours, sincerely, etc

Reply from Parliamentary and Health Service Ombudsman, 22 February 2010

Dear Mr Gardner,

Your email of today, 22 February 2010, has been passed to the Freedom of Information and Data Protection Team for response to your query … We aim to respond to this information request in April 2010.

Caroline Ward
BSO FOI/DP Team
Office of the Parliamentary & Health Service Ombudsman

Department for Transport acknowledges BWMA response to consultation on mandatory dual metric-imperial height signs, 24 December 2009

Thank you for your email. I can confirm that your letter was received in this office on the 7 December, please be assured that it will be considered with all other consultation responses in due course. For your information, once all responses have been analysed, we aim to publish our formal consultation response in February 2010.

Judith Tracey, Traffic Signs Mailbox

How BWMA was Reborn

By Vivian Linacre

Having won our first, minor but quite vital victory in this long war against compulsory metrication, by removal of an expiry date for the right to continue use of imperial measures as "supplementary indications", it is well to reflect on how long we have had to fight in order to reach this turning point, and what impelled us to go into battle all those years ago. Preserving our history is not only important for its own sake; it also provides a perspective without which we cannot project into the future.

I had originally founded the Imperial Measurements Preservation Society within my own profession as a surveyor in 1994, in response to a peremptory edict from the Councils of both the Royal Institution of Chartered Surveyors and the Incorporated Society of Valuers & Auctioneers requiring all members to adopt the exclusive use of metric units from 1st January 2000. This had been forced through at Branch Officer level, without consulting the membership as a whole. I simply published a letter in all our journals, announcing that this new body had been formed – although actually it did not yet exist – for the purpose of defying the directive, which attracted a huge response from practitioners as well as from clients in retailing, property development and real estate management. They were also amused, as intended, by the acronym "IMPS" – which neatly abbreviated the title and also implied impishness!

I quickly realized that we had to go national, moving our operation from Edinburgh to London where I was introduced through mutual friends (particularly Merrie Cave, managing editor of the splendid *Salisbury Review*) to Michael Plumbe and Robert Carnaghan, the latter of whom discovered the origins of the BWMA in the 1880s to oppose Parliamentary Bills that were first introduced (but made no progress) advocating adoption of the metric system, which had become fashionable following its enforcement in central Europe after the Franco-Prussian war in 1871. Remember that in 1897 the UK government went so far as to pass an Act legalizing the optional use of metric units for trade, so that for almost a century Britain effectively enjoyed a perfectly harmonious dual system. *(In the USA, Congress had passed a similar Act in 1866, after the Civil War. There the dual system continues. In both countries customary measures always thrive alongside the competition, whereas metric has to insist on a monopoly!)* But traditional measures had to be defended for protection of trade throughout the British Empire even more than for the benefit of the domestic economy. In any event, any remote threat from the Continent died with the outbreak of the Great War in 1914 and was not heard again until the first and second failed attempts (by Macmillan and Wilson) to join the Common Market in the 1960s.

Accordingly, by resurrecting the BWMA in 1995 we remained true to its origins, while acquiring an august title and proud record. I had already got in touch with many prominent Eurosceptics (though that term had not yet been invented), including Christopher Booker, whose article in *The Sunday Telegraph* on 3rd September was perfectly timed. He and I met for a wildly extravagant lunch at *Les Jardins des Gourmets* in Soho (he was going to spend the rest of the day writing jokes at *Private Eye*) ten days later. Then on Friday 29th September we held a press conference in the New Cavendish Club which was packed because the new regulations were coming into force two days later! Robert Carnaghan and I produced the No. 1 issue of *The Yardstick* in October and on 4th December we held our Inaugural Reception & Buffet at the Royal Overseas League's Overseas House in St. James's, at which Lord Monson and Sir Richard Body were principal speakers, along with our own Bruce Robertson. Our first AGM & Conference was held at the same venue on 25th May '96, when the speakers included Neil Hamilton MP (who was a Junior Trade Minister in this last year of John Major's government) and the renowned constitutional barrister Michael Shrimpton.

That No. 1 *Yardstick* contained this letter from Sir Teddy Taylor MP: "Thank you for your letter of 19th September and for letting me know of the splendid initiative being taken by the Imperial Measurements Preservation Society. Obviously I wish you every success in your battle at the Euro Court. It really is quite appalling that the issue was pushed through Parliament without a proper discussion. It went to a Standing Committee of 14 MPs who discussed the issue for only 14 minutes and were told that as the EU had passed the Directive there was little that could be done about it. The fact that they had "debated" the issue was reported to Parliament with no discussion allowed. Of course the legislation contains many anomalies and I can only wish you every possible success....."

The editorial contained this undertaking: "we are now committed to a four-year campaign to secure the repeal of these infamous regulations at the latest by 31st December 1999, since the remainder of our traditional measurements, apart from a few (allegedly permanent) exemptions, are due for prohibition on 1st January 2000. Well, we did not realize then that we were actually committed to a fifteen-year campaign and beyond, but customary measures have survived – if only because even the European Commission at last recognizes that the USA will never abandon "English" units – and the tide at last is turning.

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