



Office of the Inspector
of the Independent Commission
Against Corruption



**REPORT OF AN AUDIT OF APPLICATIONS FOR AND
EXECUTION OF SEARCH WARRANTS BY THE
INDEPENDENT COMMISSION AGAINST
CORRUPTION**

November 2012

**by the Inspector of the Independent Commission
Against Corruption**

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BACKGROUND

1. THE INSPECTOR'S AUDIT FUNCTION

Section 57B(1)(a) of the *Independent Commission Against Corruption Act 1988* (the "ICAC Act") authorises the Inspector of the Independent Commission Against Corruption (the "Inspector" and the "Commission" or the "ICAC") to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State.

The Inspector's audit role must be read in the context of the Inspector's other functions prescribed under section 57B, namely sections 57B(1)(c) and (d).

Section 57B(1)(c) of the ICAC Act authorises the Inspector to deal with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the Commission or officers of the Commission.

Section 57B(1)(d) of the ICAC Act authorises the Inspector to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality and propriety of its activities.

Section 57B(2) states that the functions of the Inspector may be exercised on the Inspector's own initiative.

2. THE SUBJECT OF THE AUDIT

From time to time, as part of its investigations into alleged serious and systemic corrupt conduct, the Commission obtains warrants, commonly known as search warrants, pursuant to the *Independent Commission Against Corruption Act 1988* (the ICAC Act) The warrants authorise officers of the Commission to search persons and premises for documents or things connected with any matter being investigated under the ICAC Act and to seize such documents or things and deliver them to the Commission (section 41 of the ICAC Act).

By letter dated 16 August 2012, as the Inspector of the ICAC, I wrote to the Commissioner of the ICAC as follows (omitting formal parts):

Pursuant to section 57B(1)(a) and (d) of the *Independent Commission Against Corruption Act 1988* (the Act), I propose to audit and assess the effectiveness and appropriateness of the procedures of the Commission in relation to the application for and execution of search warrants between 1 July 2011 and 31 December 2011.

The proposed audit and assessment will examine:

1. the Commission's compliance with the formal and procedural requirements under Part 4, Division 4 of the Act, Part 5, Division 4 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, the *Law Enforcement (Powers and Responsibilities) Regulation 2005*, the now repealed *Search Warrants Act 1985* and other relevant legislation;
2. the reasons behind the Commission's decisions to apply for search warrants;
3. the manner in which the Commission executed the search warrants; and
4. any other matters set out in section 57B of the Act.

For the purposes of this exercise, I would in the first instance like to review the Commission's files and records relating to:

- a) all applications for search warrants issued by the Commission during the period from 1 July 2011 to 31 December 2011, whether they were granted or refused by authorised officers; and
- b) all applications for search warrants proposed by the Commission's Investigation Division during the period from 1 July 2011 to 31 December 2011 but which were rejected by the Commission's Legal Unit and/or senior management.

If you are concerned that disclosure of any records to me under (a) or (b) may prejudice or compromise the Commission's ongoing investigations, I am happy for those records to be excluded from the scope of this request.

Upon reviewing the materials identified above, I may request further information from the Commission and/or its officers for the purpose of completing my audit and assessment.

I welcome any comments you may have on the proposed ambit of this audit and assessment.

The Commission replied by letter dated 28 August 2012 with documentation relating to sixteen applications for search warrants issued during the nominated period.

That documentation comprised:

- copies of the search warrants;
- copies of the Occupier's Notices;
- copies of the verified applications for search warrant,
- copies of Certificates pursuant to Clause 11(2) of the *Law Enforcement (Powers and Responsibilities) Regulations 2005* that the documents are not to be made available for inspection;
- copies of the report to the eligible issuing officer (also referred to as the Authorised Officer) about the Execution of the Warrant;
- authorised checklist signed by the Executive Director, Investigation Division, stating that he/she has approved that an application for a search warrant is appropriate and also signed by the Executive Director, Legal approving of the forms of the Application, Warrant, Occupier's Notice and s.11 Certificate),
- copies of the respective property seizure records.
- operational orders in relation to execution of the warrants;
- the most recent Procedure 9 (Procedures for Obtaining and Executing Search Warrants) approved on 22 July 2009 and reviewed and updated on 28 May 2010; and 2 December 2010.

The letter also advised that:

- there were no applications proposed by the Commission's Investigation Division which were rejected by the Commission's Legal Division lawyers or executive management.

- there were no applications which were refused by authorised officers.
- sixteen applications were made during the relevant period.
- two applications were withdrawn for operational reasons and were subsequently replaced with new applications.

3. RELEVANT LEGISLATION

3.1. THE INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988 (THE ICAC ACT)

In NSW, the relevant statutory provisions which govern the ICAC's application for and execution of search warrants are contained in Division 4 of Part 4 of the ICAC Act, Division 4 of Part 5 of the LEPR Act and the *Law Enforcement (Powers and Responsibilities) Regulation 2005* (the "Regulation"). The ICAC has adopted a policy that search warrants be sought from eligible issuing officers as defined under the LEPR Act and not from the ICAC Commissioner who, under the ICAC Act, is authorised to issue search warrants.

Within Division 4 of Part 4 of the ICAC Act, section 40(4) provides that to apply for a search warrant under section 40(4), an ICAC officer must have:

"... reasonable grounds for believing that there is in or on any premises a document or other thing connected with any matter that is being investigated under this Act or that such a document or other thing may, within the next following 72 hours, be brought into or onto the premises."

Section 41 authorises the person(s) named in the warrant to enter the premises and to search them for documents or other things connected with any matter that is being investigated under the ICAC Act and to seize any such documents or other things found in or on the premises and deliver them to the Commission.

Section 48(1) of the ICAC Act provides that Division 4 of Part 5 of the LEPR Act (other than sections 69-73A) applies to a search warrant issued under the ICAC Act.

If, in the course of such a search, the person executing the warrant finds a document or thing that the person believes on reasonable grounds to be evidence that would be admissible in the prosecution of a person for an indictable offence against the law of the Commonwealth, a State or a Territory; and if such person believes on reasonable grounds that it is necessary to seize the document or other thing in order to prevent its concealment, loss, mutilation or destruction, or its use in committing such an offence, then he/she may seize it (section 47(1)).

Section 42 imposes a duty on a person executing a search warrant to "produce the warrant for inspection by an occupier of the premises if requested to do so by that occupier."

Section 43(1) permits the use of “such force as is reasonably necessary” for the purpose of entering premises under a search warrant. A person authorised to enter the premises may also, “if it is reasonably necessary to do so, break open any receptacle in or on the premises for the purposes of the search” (section 43(2)).

Section 45 prohibits the execution of a search warrant by night (between 9pm and 6am) unless the authorised justice specifically authorises execution of the warrant between those hours.

Section 46(a) provides that a search warrant expires no later than one month after its issue.

Section 47(2) provides that the ICAC may retain any items seized under a search warrant “for so long as its retention by the ICAC is reasonably necessary for the purposes of an investigation to which it is relevant”; and if the retention of the item is not, or ceases to be, reasonably necessary for such purposes, the Commission must cause it to be delivered to the person who appears to be entitled possession of the item; or the Attorney General or the DPP, with a recommendation as to what action should be taken in relation to the item.

Section 48(1) provides that Division 4 of Part 5 of the LEPR Act (other than sections 69-73A) applies to a search warrant issued under the ICAC Act.

3.2. THE LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) ACT 2002 (THE LEPR ACT)

Division 4 of Part 5 of the LEPR Act sets out the provisions relating generally to warrants, including warrants obtained by the ICAC (section 59(b) and Schedule 2).

Section 60 provides that:

- an application for a warrant (other than a telephone warrant) must be in writing in the form prescribed by the regulations and must be made by the applicant in person.
- the information given by the applicant in or in connection with the application must be verified before the eligible issuing officer on oath or affirmation or by affidavit.

Under section 62(1) an application for a search warrant must include:

- the name of the applicant and details of the authority of the applicant to make the application for the warrant;
- particulars of the grounds on which the application is based, including (without limitation) the nature of the searchable offence or other offence involved;
- the address or other description of the subject premises;
- if the warrant is required to search for a particular thing – a full description of that thing and, if known, its location;
- if a previous application for the same warrant was refused—details of the refusal and any additional information required by section 64;
- any other information required by the regulations.

An eligible issuing officer, when determining whether there are reasonable grounds to issue a warrant, is to consider (but is not limited to considering) the following matters under section 62(3):

- (a) the reliability of the information on which the application is based, including the nature of the source of the information;
- (b) if the warrant is required to search for a thing in relation to an alleged offence – whether there is sufficient connection between the thing sought and the offence.

The applicant must provide (either orally or in writing) such further information as the eligible issuing officer requires concerning the grounds on which the warrant is being sought (section 62(5)).

The applicant for a warrant is not obliged to disclose the identity of a person from whom information was obtained if the applicant is satisfied that to do so might jeopardise the safety of any person (section 62(6)).

Section 63 makes it an offence, punishable by a fine of 100 penalty units and/or 2 years' imprisonment, for a person to give to an eligible issuing officer, in connection with an application for a search warrant, information that the person knows to be false or misleading in a material particular.

Section 64 provides that once an application for a search warrant has been refused by an eligible issuing officer, no further application for the same warrant

may be made to that or any other eligible issuing officer unless the further application provides additional information that justifies the making of the further application. However, in the case of a warrant other than a covert search warrant, a further application may be made to a Magistrate following a refusal to issue the warrant by an eligible issuing officer who is not a Magistrate whether or not additional information is provided in the further application. Only one such further application may be made in any particular case.

Section 66 provides that a search warrant must be in the form prescribed by the regulations.

Section 67 deals with the occupier's notice which is required under section 67(2) to be in the prescribed form and to specify:

- the name of the person who applied for the warrant;
- the date and the time when the warrant was issued;
- the address or other description of the premises to be searched; and
- contain a summary of the nature of the warrant and the powers it confers.

Section 67(4) requires that, on entry into or onto the premises or as soon as practicable thereafter, the occupier's notice be served on a person who appears to be an occupier of the premises and appears to be of or above the age of 18 years. If such person is not then present, service may be effected upon such person within 48 hours after executing the warrant. If an occupier's notice cannot practicably be served, the eligible issuing officer who issued the warrant may, by order, direct that, instead of service, such steps be taken as are specified in the order for the purpose of bringing the occupier's notice to the attention of the occupier.

Section 68 provides that unless satisfied on reasonable grounds that immediate entry is required to ensure the safety of any person or the effective execution of a search warrant, a person executing the warrant must, before entering the premises:

- announce that the warrant authorises his or her entry into the premises.
- give any person then in or on the premises an opportunity to allow entry.

A person executing a warrant must produce the warrant for inspection by an occupier of the premises if requested to do so by that occupier (section 69).

Section 70 provides that a person authorised to enter premises pursuant to a warrant may use such force as is reasonably necessary for the purpose of entering the premises.

Section 71 permits a person to execute a warrant with the aid of such assistants as the person considers necessary.

A warrant (other than a covert search warrant) may be executed by day (during the period between 6 am and 9 pm on any day), but must not be executed by night (during the period between 9 pm on any day and 6 am on the following day) unless the eligible issuing officer, by the warrant, authorises its execution by night (section 72).

Section 74 requires a report to be submitted to the eligible issuing officer who issued the warrant within 10 days after the execution or expiry (whichever is earlier) of the warrant. The report must:

- state whether or not the warrant was executed;
- if the warrant was executed – set out briefly the result of the execution of the warrant (including a brief description of anything seized);
- if the warrant was not executed – set out briefly the reasons why the warrant was not executed; and
- whether or not an occupier’s notice has been served.

If the eligible issuing officer who issued a warrant has died, has ceased to be an eligible issuing officer or is absent, the report must be provided to any other eligible issuing officer (section 75).

Section 76 provides that a warrant is not invalidated by any defect, other than a defect that affects the substance of the warrant in a material particular.

Section 75A empowers a person executing or assisting in the execution of a warrant to:

- (a) bring to the premises the subject of the warrant any electronic and other equipment reasonably necessary for the examination of a thing found at the premises, and

- (b) operate any such equipment (or equipment already at those premises) to examine a thing found at the premises in order to determine whether it is or contains a thing that may be seized under the warrant, and
- (c) move a thing found at the premises to another place (for up to 7 working days) for examination in order to determine whether it is or contains a thing that may be seized under the warrant if the occupier of the premises consents or if:
 - i. it is significantly more practicable to do so having regard to the timeliness and cost of examining the thing at another place and the availability of expert assistance, and
 - ii. there are reasonable grounds to suspect it is or contains a thing that may be seized under the warrant.

(2) If a thing is moved to another place for examination under this section, an eligible issuing officer may authorise the removal of the thing for an additional period (not exceeding 7 working days at any one time) if satisfied that the additional period is required to determine whether it is or contains a thing that may be seized under the warrant.

Section 75B provides for access to and downloading of data from computers (including access to computers outside premises the subject of a warrant).

3.3. THE LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) REGULATION 2005

Clause 8 requires a person who seizes a thing while executing a search warrant in any premises to provide the occupier with a receipt acknowledging seizure of the thing if the occupier is then present and it is reasonably practicable to do so. A copy of the receipt must be attached to the section 74 report to the eligible issuing officer.

Clause 11 enables an eligible issuing officer to issue a certificate to “seal” the Local Court’s records (or parts thereof) relating to an application for a search warrant if he or she is satisfied that disclosure of any such record:

- could disclose a person’s identity which in turn is likely to jeopardise that or any other person’s safety; or
- may seriously compromise the investigation of any matter.

Such a certificate may be revoked by any eligible issuing officer under clause 11(4) if satisfied that disclosure of the relevant matter is no longer likely to jeopardise any person's safety or seriously compromise the investigation of any matter.

4. ICAC PROCEDURES

4.1. PROCEDURE NUMBER 9

The relevant guidelines for the benefit of officers of the ICAC in force between July 2011 and December 2011 are contained in procedure number 9 “Procedures for Obtaining and Executing Search Warrants” (the “procedures”) approved on 22 July 2009 and reviewed 28 May 2010 and 2 December 2010.

After setting out the legal requirements for a valid warrant, the procedures go on to state the laws governing the application for a search warrant and place certain responsibilities, in paragraph 2.1, upon officers for the drafting and approval of the application.

The relevant parts are:

1. The Case Officer will discuss with the Case Lawyer whether there is a sufficient legal basis to make an application for a search warrant.
2. All applications must be approved by the Executive Director, Investigation Division. If approved the Case Officer will arrange for the Executive Director, Investigation Division to sign the Authorisation Checklist (Appendix A).
3. The Chief Investigator in charge will give consideration to whether any police officers or officers of other agencies should also be authorised under the warrant and if so advise the Executive Director, Investigation Division. In case of a search warrant to be executed on a parliamentary office, approval must be obtained from the Commissioner or Deputy Commissioner.
4. The Case Officer will be responsible for drafting the search warrant application using the legal macro. A separate application must be prepared for each warrant sought.

The guidelines then go on to state the issues which the application must address, namely:

- the authority of the applicant to make an application for a warrant;
- the grounds on which the warrant is sought;
- the address and description of the premises;
- a description of the thing being searched for and if known its location; and

- if a previous application was made and refused, the details of that application and its refusal and additional information that justifies the issue of a warrant.

The issuing officer is also required to consider:

- the reliability of the information;
- the nature and source of the information; and
- whether there is sufficient connection between the thing(s) sought and the matter under investigation.

The Case Officer is responsible for ensuring that all information contained in the application is true and correct and all relevant matters are disclosed.

The Case Officer will also draft the warrant, Occupier's Notice and, if needed, the Clause 11 Certificate using the legal macros.

The Case Officer will provide these documents, together with the "Authorisation Checklist" at Appendix A, through the Team Chief Investigator, to the Case Lawyer for review and settling. The Case Lawyer is to ensure that the documents comply with the relevant provisions of the ICAC Act, the LEPR Act and Regulations and is to identify any policy or other issues which the Case Lawyer believes should be brought to the attention of the Executive Director, Legal, that may affect approval. In the case of a search warrant to be executed on a parliamentary office the Case Lawyer should ensure as far as possible that the documents described in the warrant are not likely to be subject to parliamentary privilege.

The draft documentation and Authorisation Checklist will be referred to the Executive Director, Legal, for approval both as to the documentation and the making of the application.

If the Executive Director, Legal, does not approve the documentation it is to be returned to the Case Lawyer for appropriate amendment. If the Executive Director, Legal, does not approve the making of the application he or she will discuss with the Executive Director, Investigation Division (ID) and the Commissioner or Assistant Commissioner responsible for the investigation to resolve the issue.

If approved the documentation is to be returned to the Case Lawyer who will provide it and the Authorisation Checklist to the Case Officer for submission to the Senior Property Officer for numbering. The Senior Property Officer will return the original warrant to the Case Officer and retain a copy. The Authorisation Checklist will be retained with the other documents by the Senior Property Officer.

The Case Officer will then arrange for swearing and issue. A copy of the original signed application including the authorised officer's record of the application is to be obtained for Commission records.

Where the search warrant affects premises occupied by a public authority, as defined in the ICAC Act, consideration shall be given as to whether any prior liaison should take place with a public official. Prior liaison shall not occur without the express approval of the Executive Director, Investigation Division.

The officer allocated the responsibility for the execution of a Search Warrant or Warrants (Search Team Leader) shall be accountable to the Commission for the conduct of the search. Responsibility for the entire operation rests with the relevant Chief Investigator.

The Search Team Leader shall, in consultation with the Chief Investigator:

- a) assess personnel required and allocate tasks,
- b) ensure team members are skilled in the operation of the equipment to be used and that such equipment is in working order and ready for immediate use,
- c) assess the need for equipment which will be required to accompany the search team,
- d) establish the search team/s under his/her personal direction,
- e) prepare Operational Orders,
- f) conduct a formal briefing session with the search team and the Case Lawyer on the proposed execution of the warrant,
- g) ensure that each search team member reads and understands the authority of the warrant and is aware of his/her role and any potential risks. The Executive Director, Investigation Division shall be advised beforehand of the briefing sessions and attend if he/she considers it appropriate or necessary.
- h) The search team/s must be fully aware of the exact location and description of the premises to be searched, including entrances and other accesses to ensure that only the premises mentioned in the warrant are entered.

The Team Property Officer is responsible for being aware of the property control procedure as set out in Procedure Number 27: the composition, care and control of the search kits; maintaining the seizure records in the field including the

“Property Seizure Sheets” and the “General Receipts”; and controlling the seized or volunteered property until such time as it is registered with the Property Section of the ICAC. The Case Lawyer is responsible for providing advice on any legal issues relating to the proposed execution of the warrant.

The Procedures set out in some detail the powers and obligations of those executing the warrant as well as the rights of the occupier to see a copy of the warrant, to receive the Occupier’s Notice and to be given a receipt for and to request a copy of any documents seized.

There are also separate sections dealing with execution on a lawyer's office and on a parliamentary office.

The requirements and procedures for search of persons, damage to property, receipt of property at the Commission, return of seized documents, report to the issuing officer, debriefing and filing of documents are set out.

The form of the authorisation checklist which must accompany each stage of the application is Appendix “A” to the manual. Appendix “B” is the Case Officer’s Checklist and Appendix “C” is the form of receipt for property received and appendix “D” is the form of the Property Seizure Sheet.

4.2. OPERATIONAL ORDERS

It is also worthy of note that before any warrant is executed a document called “Operational Orders” is prepared and copies given to each of the participants in the execution of that warrant. Copies of operational orders were included with each search warrant.

The operational orders contain:

- general information about the subject matter of the investigation in respect of which the search warrant has been issued;
- the reasons for the use of the search warrant; and
- a description of the premises to be searched including a map of its location.
- in some cases, a photograph of the premises, and a description of the physical features such as fences are included;
- a risk assessment covering such matters as: o the likelihood of children being on the premises;

- the physical barriers to be overcome;
- cultural or religious sensitivities associated with the subject of the search warrant;
- threats of violence from the subject or from other sources;
- whether firearms are likely to be on the premises;
- the risk of physical injuries to an ICAC operative or to any other person;
- the presence of dogs or hazardous material on the subject premises.
- instructions as to the means of executing the warrant;
- details of pre-execution briefing, co-ordination and timings;
- allocation of personnel to specific tasks
- details of the nearest police station;
- whether or not a police officer is required to be present.

In many cases the operational orders include a profile of the subject of the search warrant including photographs of the person. In those cases where it is suspected that a child could be on the premises, instructions are given to delay the commencement of the execution until a time when the child will have left the premises for school.

5. PRELIMINARY ISSUE RELATING TO THE EFFECTIVENESS OF THE AUDIT

5.1. CONTENTS OF THE APPLICATIONS

Are the contents of the applications for search warrants true to the best of the applicant's knowledge and belief?

It is neither possible nor practicable to cross-examine every deponent upon every affidavit. However, an examination of the material available to the respective deponents shows that a belief was held by reason of information obtained from individuals, lawfully obtained telephone intercepts or surveillance (with or without the aid of devices) or from the results of previous search warrants. An examination of each application shows an internal consistency of information together with internal support for the conclusions derived and raises a high degree of probability that the contents of those affidavits were true and correct.

6. THE AUDIT

6.1. AUDIT METHODOLOGY

This audit is divided into two parts. The first part covers the ICAC's compliance with the law and involves an examination of the documentation used in support of an application for a search warrant, the documents issued by the court, the procedure of the actual searches and the furnishing of a report to the eligible issuing officer.

The second part goes further than mere compliance with the law and looks to see whether the conduct of the ICAC and its officers in following the letter of the law amounts to effective, appropriate and proper use of its accepted legal powers. The purpose of this audit is not only to determine compliance by the ICAC with the formal requirements for the issue and execution of search warrants, but also to determine whether the applications for and execution of those warrants constituted an abuse of power, impropriety or other form of misconduct including unreasonableness, unjustness, oppression or improper discrimination.

Furthermore, the audit attempted to assess the effectiveness and appropriateness of the procedures of the Commission as they relate to the legality or propriety of its activities. This involved examining documentation relating to each of the search warrants to determine the reasons for their issue, as well as the manner in which those warrants were executed and the manner of use of the material discovered as a result of those warrants.

It is not the function of the Inspector to examine the minutiae of the procedures followed by the ICAC. Rather, it is to look at whether those procedures amount to maladministration, defined in section 57B(4) of the ICAC Act as being contrary to law or unreasonable, unjust, oppressive or improperly discriminatory or based wholly or partly on improper motives and also, pursuant to section 57B(1)(d), to assess the effectiveness of the procedures of the Commission relating to the legality or propriety of its activities.

The documents reveal a total of 16 search warrants in 4 operations. Details relating to those search warrants are examined in the second part of the audit.

7. PART ONE – COMPLIANCE WITH THE LAW

It is not necessary to set out the steps taken in each individual application for and execution of the search warrants. Suffice it to say that, having examined each closely I am satisfied that:

- each applicant had reasonable grounds for believing that there is in or on any premises a document or other thing connected with any matter that is being investigated under the ICAC Act or that such a document or other thing may, within the next following 72 hours, be brought into or onto the premises”.
- the person executing the search warrant produced the warrant for inspection by an occupier of the premises when so requested.
- no unreasonable force was used for the purpose of entering premises under the search warrant.
- the warrants were executed within the hours of the day permitted by them and within the period of their validity.
- the items seized were documents or other things then connected with a matter that was being investigated under the ICAC Act.
- the applications were all in the prescribed form and duly verified.
- the occupier’s notices were all in the prescribed form and served in each case on a person who appeared to be an occupier of the premises and who was of or above the age of 18 years.

Except for the two search warrants which were withdrawn a report was submitted in each case to the eligible issuing officer within 10 days after the execution or expiry (whichever was earlier) of the warrant.

No attempt has been made to interview occupiers who were the subject of a search warrant. Nor has there been an examination of what items seized (if any) have been returned. As will be seen in the second part of this audit report, one set of items seized contributed to findings of corruption and recommendations for consideration of prosecution. In the cases where consideration of prosecution had been recommended, the documents seized would almost certainly form part of the brief for the DPP.

The Office of the Inspector has not to date received any complaint arising out of the application for, or execution of, any of the search warrants under review, or in respect of the seizure or retention of any item seized in the course of execution of any such search warrants.

CONCLUSION TO PART ONE

Having, pursuant to section 57B(1)(a) of the ICAC Act, audited the operations of the Commission for the purpose of monitoring its compliance with the law of the State, I have concluded that in relation to the search warrants audited, the ICAC has complied with the relevant law and the ICAC's own procedures concerning applications for and execution of search warrants.

8. PART TWO – EFFECTIVE, APPROPRIATE AND PROPER USE

In considering whether the conduct of the ICAC and its officers in following the letter of the law amounted to effective, appropriate and proper use of its accepted legal powers, the use of search warrants and the part they played in assisting the ICAC to perform its primary function of combating serious and systemic corruption was examined.

Sixteen applications were made during the relevant period. Of these, five applications related to one operation, four applications related to a second operation, three applications related to a third operation and four applications related to a fourth operation.

As at the date of writing the Commission has published a public report in relation to one operation.

Because of the sensitive nature of the information contained in the applications for the search warrants the description of the evidence and the material described is of necessity obscure. It is not desirable to publish anything which could interfere with the Commission's conduct of these operations.

FIRST OPERATION

The first five search warrants examined relate to the same operation and it is convenient to consider them together.

The first search warrant - The ICAC was investigating allegations that directors of a company engaged by government departments to manage the awarding of contracts to each of those departments was favouring a particular company in return for benefits corruptly provided by that company.

Evidence obtained at compulsory examinations indicated that the company had, at its business premises, documentation relevant to the matters being investigated. Evidence had also been obtained that the company had a system of issuing false invoices in a particular name which were used to support cash

cheques being drawn from its accounts in favour of officers of the company being investigated.

The subject search warrant was to authorize the search of the premises which were the principal place of business of that company.

The search warrant was issued on 22 September 2011.

The Report to the Authorised Officer about the execution of the warrant reveals that it was executed at 9:20am on 23 September 2011. Computer hard drives, a portable hard drive and business documents relevant to the investigation were seized.

The second search warrant - Examination of the material obtained on the execution of the first warrant indicated that the extent of the company's corrupt activities was greater than that initially believed. The material indicated that the company had provided cash payments, goods and financial rewards to a particular government employee evidence of which would be present at the home of that employee. This second search warrant was for the search of the home of this employee.

It was issued on 8 December, 2011 and executed on 13 December 2011 at 7:30am. The report to the authorised person is dated 14 December 2011 and reveals that a number of documents and items relevant to the investigation were seized.

The third search warrant related to the searching and seizure from the office premises of the employee referred to in the second search warrant. It was issued on 8 December 2011 and executed at 11:28am on 13 December 2011. Documents and other items were seized.

The fourth search warrant - During the course of the execution of the first warrant it was ascertained that a director of the company whose activities were under investigation had taken his laptop and personal effects from the business premises of that company a few days prior to the execution of the warrant. On the basis of information it was believed on reasonable grounds that those items would be relevant to the investigation and at his home. The fourth search warrant was to authorise the search and entry of this director's home.

The fourth search warrant was issued on 8 December 2011 and executed on 13 December 2011 at 9:35am. The report to the authorised person is dated 13 December 2011 and shows the seizure of items relevant to the investigation.

The fifth search warrant - Examination of the items seized in the execution of the first warrant revealed the identity of a further employee of a government agency who appeared to have received benefits from the subject company. Analysis of this person's financial accounts revealed unexplained cash deposits into his account. There was evidence that he did part of his work from his home. The fifth search warrant authorised the entry and search of the home of this employee.

That search warrant was issued on 8 December 2011 and executed at 7:15am on 13 December 2011. The report to the authorised officer is dated 14 December 2011 and indicates the location and seizure of items relevant to the investigation.

SECOND OPERATION

The next four warrants were all issued pursuant to the same further operation.

The ICAC was investigating an allegation that a former public officer had misused confidential New South Wales government information to bring about benefits to certain specified entities.

It was believed on reasonable grounds based upon evidence obtained from other sources that material relating to the activities being investigated would be located at each of the four premises referred to in the respective warrants.

The first search warrant was issued on 22 November 2011 and expired at 12:38pm on 22 December 2011. The report to the authorised officer dated 24 November 2011 reveals that it was executed on that day at 9:50am.

The second search warrant authorised the entry and search of the principal place of business of companies and persons involved in the investigation. It was issued on 22 November 2011 and expired at 12:45pm on 22 December 2011. The report to the authorised officer is dated 25 November 2011 and indicates that it was executed at 9:50am on 23 November 2011.

The third search warrant authorised the entry and search of the principal place of business of other persons and companies relevant to the investigation. This search warrant was issued on 22 November 2011 and expired on 22 December 2011. The report to the authorised officer is dated 24 November 2011 and reveals that the warrant was executed at 11:32am on 23 November 2011.

The fourth search warrant authorised the search and entry of premises being a motor vehicle used by a person whose activities were relevant to the investigation. The search warrant was issued on 22 November 2011 and expired at 1 pm on 22 December 2011. The report to the authorised officer is dated 25 November 2011

and reveals that the warrant was executed between 10:10am and 11:06am on 23 November 2011.

The Property Seizure Records relating to execution of each of the searches show that a number of items, showing the dealings between the subject public officer and other relevant persons, were seized.

THIRD OPERATION

The Commission was investigating a matter under the ICAC Act, concerning an allegation that a public official corruptly received benefits as a reward for showing favours to others in relation to his official position.

Evidence had been received from other sources including interviews by ICAC investigators of persons who had personal knowledge of events, together with examination of telephone call records and other records which supported the belief on reasonable grounds that certain relevant records were likely to be present in the premises the subject of the proposed warrant.

The first search warrant was sought to enable investigators to enter those premises and search for the subject documents. The authorised officer noted that "[it was] uncertain as to what barriers may be confronted to fully execute warrant which may result in times beyond the 9 pm day time execution being necessary to complete the execution of this warrant". The warrant was issued at 11:10am on 16 August 2011. It expired at the 11:10am on Thursday, 18 September 2011.

The report to the authorised officer about the execution of the warrant dated 24 August 2011 reveals that it was executed at 10:50am on 19 August 2011 and that records were obtained which provided a connection between the owner of the property and the information given to the ICAC by other witnesses and documents.

After the completion of the search authorised by the first search warrant, surveillance was conducted of the occupier of those premises during which he was seen to be carrying a shopping bag apparently containing documents. It appeared that he gave that bag with its contents to another person who then took it to further premises.

The second search warrant was for a search warrant for the further premises. It was then believed on reasonable grounds that the person named in the first warrant, having become aware of the activities of the ICAC, removed relevant documents to the premises referred to in the second warrant. The warrant was issued on 19 August 2011 and expired at 8:25pm on 18 September 2011. It authorised

execution by day (i.e. between 6 am and 9 pm) and night (i.e. between 9 pm and 6 am).

The report to the authorised officer about execution of warrant reveals that the warrant was executed at 11:22pm on 19 August 2011. Records and other items were seized. It is claimed that they showed a connection between the owner of the property and the information given to the ICAC by other witnesses and documents.

The third search warrant authorised the entry of premises being a nominated motor vehicle. It was sought on the basis that the targeted shopping bag containing documents was in a motor vehicle driven by the occupier of the premises referred to in the second search warrant. This warrant was issued on 19 August 2011 at 8:25pm and expired at 8:25pm on 18 September 2011. It authorised execution by day and night.

The report to the authorised officer about the execution of the warrant states that it was executed at 9:42pm on 19 August 2011. The motor vehicle was garaged within the premises named in the second warrant and was searched prior to the separate execution on those premises. Business cards were seized which showed a connection between the owner of the property and the information given to the ICAC by other witnesses and documents.

No operational orders were prepared in respect of the second and third search warrants. I am informed by the Commission that it was only during the execution of the first search warrant that investigators became aware that relevant documents were likely to be located at the premises nominated in the second and third search warrants. Applications for the second and third warrants were prepared immediately and the warrants were executed as soon as the applications were granted. There was urgency due to concern that delay might result in relevant documents being removed. Because of this urgency there was no time to prepare operational orders. The items being sought were described in the prior operational orders.

I have no difficulty in accepting this explanation.

FOURTH OPERATION

The ICAC was investigating an allegation that two named persons had made cash payments and provided other financial benefits to members of a government agency to ensure that those members would give favourable consideration to commercial proposals made by those named person.

A person had told the Commission of payments made to members of government agencies as inducements for those members to show favour to two persons who wished to undertake commercial activities with the agencies. The Commission also had possession of certain records supporting the allegations. In the light of all of the information received it was believed on reasonable grounds that relevant documents would be present on the nominated premises.

The first search warrant was issued on 4 October 2011 at 12:37pm but it was withdrawn because the warrant and the occupiers notice mentioned certain names. At that stage of the operation the disclosure of those names could have had a detrimental effect upon the progress of the operation.

The second search warrant authorised the entry and search of premises occupied by The Wagonga Local Aboriginal Land Council (LALC). The Commission had reasonable grounds for belief that members of this LALC had been provided with money by named persons, namely Fortunato “Lucky” Gattellari and Ron Medich to ensure that those members would give favourable consideration to proposals by Gattellari and Medich to develop land owned by the Wagonga LALC. This warrant was issued on 4 October 2011 at 12:37pm and expired at 12:37pm on 4 November 2011. It could be executed only by day (ie. between 6 am and 9 pm).

This warrant was also withdrawn because the warrant and the occupiers notice contained names the disclosure of which could have had a detrimental effect upon the progress of the operation.

The third search warrant replaced the first warrant which had been withdrawn. It was issued on 6 October 2011 at 3:10pm and expired at 3:10pm on 6 November 2011. It was executed at 9:20am on 13 October 2011. The report to the authorised officer about the execution of the warrant dated 13 October 2011 reveals that documents and records linking one of the named persons with the government agencies were amongst those seized.

The fourth search warrant replaced the second warrant which had been withdrawn. It was issued on 6 October 2011 and expired at 2:55pm on 6 November 2011. It authorised execution during the day. The report to the authorised officer about the execution of the warrant dated 14 October 2011 reveals that it was executed at 9:30am on 13 October 2011 and that records relevant to the investigation were seized.

In its “*Report into the Investigation Into The Conduct Of Officers Of The Wagonga Local Aboriginal Land Council And Others*” published in September 2012, the Commission revealed that its investigation focused on allegations of corrupt

conduct concerning key decision-makers at the Wagonga LALC, namely Mr Mason, Mr Foster and Vanessa Mason.

First, it was alleged that between March 2005 and the end of March 2006, Mr Mason and Mr Foster received financial benefits from Mr Gattellari in return for facilitating negotiations in relation to a joint venture agreement between the Wagonga LALC and Ron Medich Developments. Secondly, it was alleged that between January 2008 and April 2010, Vanessa Mason received financial benefits from Mr Gattellari in return for facilitating negotiations relating to proposed long-term leases between the Wagonga LALC and Water View Developments. The Commission also examined allegations that Mr Binge (an associate of Mr Gattellari) and Mr Medich facilitated the provision of financial benefits to Mr Mason, Mr Foster and Vanessa Mason in order to assist with negotiations in relation to the joint venture agreement and the proposed long-term leases.

The Report also reveals (page 9) that during the course of the investigation, the Commission:

- obtained documents from various sources by issuing 31 notices under section 22 of the ICAC Act (requiring the production of documents) and two notices under section 21 of the ICAC Act (requiring the production of statements of information)
- interviewed and/or obtained statements from a number of witnesses
- executed two search warrants to obtain information relevant to the investigation
- conducted 13 compulsory examinations.

The execution of the search warrants contributed to the investigations and findings that Mr Gattellari, Mr Mason, Mr Foster, Vanessa Mason and Mr Medich engaged in corrupt conduct.

Mr Gattellari engaged in corrupt conduct by making payments and providing other financial benefits to Mr Mason totalling approximately \$38,300 and to Mr Foster totalling approximately \$31,300 in order to facilitate negotiations in relation to a joint venture agreement between the Wagonga LALC and the Medich Group.

Mr Mason engaged in corrupt conduct by accepting payments and other financial benefits from Mr Gattellari totalling approximately \$38,300 as an inducement to use his position as chairperson of the Wagonga LALC to facilitate negotiations

with the Medich Group, and as a reward for having used his position as chairperson of the Wagonga LALC to assist the Medich Group by facilitating negotiations in relation to a proposed joint venture agreement. Chapter 2 also contains findings that Mr Foster engaged in corrupt conduct by accepting payments and other financial benefits from Mr Gattellari totalling approximately \$31,300 as an inducement for Mr Foster to use his position as coordinator of the Wagonga LALC to facilitate negotiations with the Medich Group in relation to the joint venture agreement.

Findings were also made that Mr Gattellari engaged in corrupt conduct by making payments totalling approximately \$127,746 to Vanessa Mason and her company, Emandem Enterprises Pty Ltd (“Emandem Enterprises”), in order to facilitate negotiations between the Wagonga LALC and Water View Developments in relation to the proposed long-term leases.

Chapter 3 of the Report contains findings that Vanessa Mason engaged in corrupt conduct by accepting payments totalling approximately \$127,746 made by Mr Gattellari to her and Emandem Enterprises as a reward for her having used her position as CEO of the Wagonga LALC to facilitate negotiations between the Wagonga LALC and Water View Developments in relation to proposed long-term leases to Water View Developments, and as an inducement for her to continue to use her position as CEO of the Wagonga LALC to assist Mr Gattellari and Water View Developments in the future.

The Commission also recommended:

- That any future amendments to the *Aboriginal Land Rights Act 1983* are sensitive to the resource implications of compliance with the amended legislation for the Aboriginal land rights network.
- That the Minister for Aboriginal Affairs consults with the NSW Aboriginal Land Council regarding the Aboriginal land rights network’s financial and resource capacity to provide support and capability development to LALCs across NSW.
- That the Minister for Aboriginal Affairs considers a review of the operation of Part 10 of the *Aboriginal Land Rights Act 1983* in meeting the expectations of the land rights network by excluding individuals who have been found to have engaged in corrupt conduct or in serious misconduct for a period of up to five years.

CONCLUSIONS TO PART TWO

To enable the ICAC to carry out the functions cast upon it under Division 1 of Part 4 of the ICAC Act, the ICAC Act makes available a number of tools which, if wrongly used, would violate the privacy and rights of Australian citizens and residents.

In conducting the second part of this audit, I have, pursuant to section 57B(2) of the ICAC Act, examined if there were grounds for reporting the existence of evidence of abuse of power, impropriety, or other forms of misconduct on the part of the Commission or officers of the Commission under section 57B(1)(b). I have also looked to see if there were grounds for reporting the existence of evidence of maladministration including unreasonable invasions of privacy and action or inaction of a serious nature that is contrary to law, unreasonable, unjust, oppressive or improperly discriminatory or based wholly or partly on improper motives under section 57B(1)(c).

In addition I have attempted to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities (section 57B(1)(d)).

The ICAC has instituted a system of applications for and execution of search warrants involving the participation of a number of officers each with duties laid down in Procedure No. 9 of its Operational Manual as well as in the Operational Instructions relating to the individual operations. This system renders it impossible for an individual officer to apply for and execute a search warrant that is not in furtherance of the purposes of the ICAC Act.

Examination of the application for and execution of search warrants in each of the above cases reveals the following:

- Search warrants were applied for and used as one of the tools authorised by the ICAC Act to enable the ICAC to carry out its functions.
- Each search warrant was applied for only in circumstances where a belief was reasonably formed in the light of information available from other sources that the application was soundly based.
- In all cases it was appropriate to apply for and execute the search warrant in the light of the information then available.
- In the one case where the Commission has published its report, it is apparent that the issue and execution of the search warrants were effective

in locating material which contributed to the findings and recommendations made by the Commission in its published report.

- There was no evidence of abuse of power, impropriety, or other forms of misconduct on the part of the Commission or officers of the Commission.
- There was no evidence of maladministration, including unreasonable invasions of privacy, or of any action or inaction of a serious nature that was contrary to law, unreasonable, unjust, oppressive or improperly discriminatory or based wholly or partly on improper motives.

A handwritten signature in blue ink, appearing to read 'H Cooper', with a long horizontal stroke extending to the right.

His Honour Harvey Cooper, AM
Inspector of the Independent Commission Against Corruption
November 2012



**Office of the Inspector of the
Independent Commission Against Corruption**

GPO Box 5341
SYDNEY NSW 2001

Tel: (02) 8374 5381
Fax: (02) 8374 5382
Email: InspectorICAC@oiicac.nsw.gov.au