



**Report of an Audit of Applications for and
Execution of Search Warrants
by the Independent Commission
Against Corruption**

June 2013

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

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

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 9 April 2013, 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 the operations of the Commission in relation to the application for and execution of search warrants between 1 January 2012 and 30 June 2012. The purpose of the audit is to monitor compliance with the law and assess the effectiveness and appropriateness of the relevant procedures of the Commission.

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*, 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 sought by the Commission during the period from 1 January 2012 to 30 June 2012, whether they were granted or refused by authorised officers; and
- (b) a copy of the Operational Orders issued in respect of each of the searches.

I have a copy of Procedure No. 9 approved 22 July 2009 and reviewed on 25 May 2010 and 2 December 2010. Are there any amendments? If so, please let me have a copy.

If you are concerned that disclosure of any of the above records to me 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 18 April 2013 advising that during the subject period it applied for seven search warrants, all of which were granted. It also enclosed a binder containing copies of the relevant documentation which 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.

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 Director of Public Prosecutions (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(1)(b) and Schedule 2).

Under section 40 of the ICAC Act a search warrant is issued by an “authorised officer”. Under section 60 of the LEPR Act a search warrant is issued by an “eligible issuing officer”.

Section 46(1) of the LEPR Act provides that “eligible issuing officer” means for a warrant other than a covert search warrant or a criminal organisation search warrant – an authorised officer. Section 3 of the ICAC Act states that *authorised officer* has the same meaning as it has in the LEPR Act.

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.

Sections 69 to 71A of the LEPR Act do not apply to warrants issued under the ICAC Act. However, that Act has comparable provisions.

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 1 January 2012 and 30 June 2012 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 the matter 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:

- 1) assess the number of personnel required to undertake the roles of searchers video operator and exhibits officer;

- 2) 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, and that sufficient consumables, such as batteries, are carried;

- 3) assess the need for equipment which will be required to accompany the search team;
- 4) establish the search team/s under his/her personal direction,
- 5) prepare Operational Orders,
- 6) conduct a formal briefing session with the search team and the Case Lawyer on the proposed execution of the warrant,
- 7) arrange for the search teams to physically study the address and precise premises to be searched and be aware of the address in detail.
- 8) 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.
- 9) The Executive Director, Investigation Division, shall be advised beforehand of the briefing sessions and attend if he/she considers it appropriate or necessary.
- 10) 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 Exhibits Officer is responsible for being aware of the property control procedure as set out in Procedure Number 28 (Registration, Control and Disposal of Property): 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 the aims of the search;
- the 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 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 verified 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 application. However, an examination of the material available to the respective deponents shows that knowledge and belief were reasonably 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 applications 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 7 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 was in or on any premises a document or other thing connected with any matter that was 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.
- 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.

Seven applications were made during the relevant period in respect of four different operations.

As at the date of writing the Commission has published a public report only in relation to the first 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 in respect of the operations not yet the subject of a public report. It is not desirable to publish anything which could interfere with the Commission's conduct of these operations.

FIRST OPERATION

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

The Commission was conducting an investigation into alleged corrupt conduct by a University of Technology Sydney (UTS) employee involving secret commissions. It was alleged that that employee corruptly received payments and other benefits from persons associated with companies to which he had allocated work at UTS and as a person who had an undisclosed financial interest in companies to which he had allocated work at UTS.

Approval for the application for two search warrants was signed by the Executive Director Investigation Division on 1 March 2012. Approval was granted for the issue of two search warrants, one to the employee's home address at Lugarno and, the second, for the employee's workspace within UTS.

The first search warrant

The verified application deposes that the employee was employed by UTS as an accommodation and refurbishment manager within the facilities management services (FMS) and part of his duties involved preparation, consideration and awarding of contracts for refurbishment projects to be supervised through the FMS. Enquiries with UTS revealed that he had made payments of large sums of money to businesses between 2006 and the date of the application in relation to work allocated through the facilities management services (FMS).

Financial analysis revealed that since August 2007 there had been a number of deposits into the employee's personal bank accounts and the bank account of his companies from businesses that had been contracted to perform work for UTS through the FMS. In addition enquiries revealed that the employee had travelled overseas whilst on approved annual leave on 11 occasions with directors of companies to which he had awarded work. Financial analysis of the employee's accounts and banking records failed to identify any payments to indicate that he had paid for any accommodation, meals or other expenses while he and/or his wife travelled with the directors of a company on these various overseas trips. Further information was obtained as a result of lawfully intercepted telephone conversations.

The search warrant was issued by an authorised officer on 2 April 2012 expiring at 4:00 pm on 5 April 2012. The occupiers notice is dated 2 April

2012. The authorised officer recorded on the application: "I am satisfied that documents and records to be searched are at the subject premises and will assist ICAC officers in their investigation into offences committed under section 249B of the Crimes Act".

The report to the authorised officer about the execution of the warrant dated 4 April 2012 reveals that it was executed on 3 April 2012 at 7:22 am. The items seized are listed in the property seizure record and they support the proposition that the subject employee had involvement with the contractors and/or companies of interest and also financial accounts held by the target. The occupier's notice was served on the occupant who was the employee personally.

The operational orders dated 2 April 2012 contain general information concerning the investigations and their results to date, the specific objectives of the search, the targets and location profiles, the description of three properties to be searched including photographs, the administration and logistics for the searched and a detailed analysis of risks and controls.

The second search warrant

The next search warrant authorised the entry and search of the employee's place of work at UTS facilities management office level 19, building 1, Broadway. This search warrant was issued on 2 April 2012 and expired at 4:00 pm on 5 April 2012.

The report to the authorised officer about the execution of the warrant is dated 4 April 2012 and states that execution occurred on 2 April 2012 at 6:27 pm. Items seized indicated that the employee had involvement with the contractors and/or companies of interest. The occupier's notice was served on the UTS Deputy Vice Chancellor - Corporate Services, Ms Anne Dwyer, personally.

That these search warrants assisted in the investigations appears in the Commission's Report on its Investigation into the Conduct of a Manager at the University of Technology, Sydney published March 2013, in which it acknowledged that it executed two search warrants issued under section 40 of the ICAC Act.

Chapter 2 of the report contains findings that four UTS contractors, namely Cady Pty Ltd, KB Electrics Pty Ltd, Rega Controls Pty Ltd and Wayne Hood, paid a total of \$119,325 to Mr Faysal's private company between April 2006 and May 2008, even though Mr Faysal did not do any of the work that purportedly led to these payments being made. The contractors made the payments at Mr Faysal's request because they thought that Mr Faysal would use his position to harm their business with UTS if they did not pay him. Three of the contractors were issued with false invoices by Mr Faysal to justify the payments made to his company.

Findings are made in chapter 2 that Mr Faysal engaged in corrupt conduct by soliciting and accepting money, travel and gifts.

Chapter 3 of the report contains findings that Mr Faysal accepted overseas travel worth \$61,568.19 from another company, Targetti Australia Pty Ltd ("Targetti"), between 2006 and 2011. During that period, Targetti was a supplier to UTS, and counted UTS as one of its more valuable clients. Findings are made that Mr Faysal did not disclose to UTS the receipt of travel paid for by Targetti, and that he accepted the paid travel knowing that it was a significant breach of applicable UTS policies to do so because of his influence and involvement in UTS procurement. A finding of corrupt conduct was made against Mr Faysal in respect of his receipt of this travel.

Chapter 4 of the report contains findings that Mr Faysal undertook private work for Webster Wagner Engineering Pty Ltd, despite knowing that it was a conflict of interest to do so as the company was a UTS contractor or interested in work at UTS, and that he deliberately failed to disclose this conflict of interest. The chapter also contains findings that Mr Faysal improperly disclosed confidential UTS information to assist particular contractors win work at UTS. Findings are made that these actions by Mr Faysal amounted to corrupt conduct.

Statements pursuant to section 74A of the Independent Commission Against Corruption Act 1988 (“the ICAC Act”) are made in the report that the Commission is of the opinion that consideration should be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of Mr Faysal for offences of soliciting and receiving corrupt benefits pursuant to section 249B of the Crimes Act 1900. Statements were also made that consideration should be given by UTS to taking disciplinary action against Mr Faysal with a view to his dismissal in the event that he succeeds in being reinstated to the service of UTS following the proceedings he has commenced in Fair Work Australia contesting his dismissal.

Chapter 5 contains a number of corruption prevention recommendations.

SECOND OPERATION

The search warrant

The ICAC was investigating a matter under its Act concerning an allegation or complaint that a company was providing benefits to New South Wales public officials in return for those public officials exercising their official functions in favour of that company.

Information had been obtained from a number of sources including searches of records, e-mail records and interviews which led to a belief on reasonable grounds that documents relevant to the investigation would be at the target premises.

The search warrant was issued on 11 January 2012 and expired at 12:30 am on 11 February 2012. It authorised search only by day that is between 6:00 am and 9:00 pm.

The Executive Director, Investigation Division, signed the authorisation check list stating that she had approved that an application for a search warrant was appropriate. In the same document the Executive Director, Legal, noted approval of the forms of application, warrant, occupiers notice and, if appropriate, clause 11 certificate.

The operational orders dated 13 January 2012 sets out the factual background to the investigation, the aim and specific objectives of the search, the person of interest involved, map and photographs of the location, method of executing the warrant, members of the team executing the warrant,, administrative and logistics including transport and equipment arrangements. Finally there is a detailed risk analysis.

The occupiers notice was served personally on the occupier of the premises.

The original report to the authorised officer about the execution of the warrant is dated 20 January 2012 and states that it was executed on 23 November 2011 between 9:25 am and 11:50 am and a number of items relevant to the Commission's investigation and described in property seizure of sheets were seized. There is a handwritten note on that report which says:

"Original report to authorised justice had incorrect date of execution. Error identified on 10/10/12. Authorised justice notified of error report. New report provided to authorised justice on 10/10/12 correcting the error."

The file includes this new report dated 10 October 2012 which states that the warrant was executed on Friday, 13 January 2012. Otherwise the report is the same as the original report.

THIRD OPERATION

This involves two search warrants.

The Commission was investigating allegations that a senior public official engaged in corrupt conduct by improperly exercising his public official functions so as to provide financial benefit to himself and others. Examination of a number of records, including public and bank records, led to a belief on reasonable grounds that documents relevant to the investigation would be located at the two target premises.

The Executive Director, Investigation Division, signed the authorisation check list stating that she had approved that an application for a search warrant was appropriate. In the same document the Executive Director, Legal, noted approval of the forms of application, warrant, occupiers notice and, if appropriate, clause 11 certificate.

The operational orders relating to both searches are dated 21 May 2012 and set out the factual background relating to the investigations the overall aims and specific objectives of the searches, the targets' profiles, the method of execution, coordination and timing, the respective search teams, identified risks, control and administration and logistics.

The first search warrant

The first warrant was issued on 21 May 2012 and expired at 11:30 am on 24 May 2012. The report to the authorised officer states that the warrant was executed on 22 May 2012 at 9:15 am. Business records and electronic devices were seized. The occupiers notice was served when the warrant was executed.

The second search warrant

The second warrant was issued on the 21 May 2012 and expired at 11:30 am on 24 May 2012.

The report to be authorised officer states that the warrant was executed on 22 May 2012 at 9:15 am. The results of the execution

included business records and electronic devices all described in a schedule. The occupiers notice was served when the warrant was executed.

FOURTH OPERATION

Two search warrants related to the investigation by the Commission into a matter referred to it under section 73 of the ICAC Act by both Houses of Parliament. Relevant to this investigation were communications by e-mail between certain people. On 16 May 2012 the Executive Director, Investigation Division, approved that an applications for a warrant was appropriate and, on 28 May 2012 the Executive Director, Legal, approved the form of the documentation.

The first search warrant

The verified application for the warrant set out in detail the information already on hand and the resulting belief that documents of the type required would be on the premises the target of the application. The warrant was issued on 29 May 2012 and expired at 12:40 pm on 29 June 2012. It authorised execution by day or night.

The report to the authorised officer is dated 31 May 2012 and states that the warrant was executed on 29 May 2012 at 4:35 pm. The execution yielded a computer server and laptop computer containing e-mail and electronic documents relevant to the Commission's investigation.

The operational orders dated 28 May 2012 set out the factual background, the overall aims and objectives of the search, the profile of the target, photographs of the premises, risk assessment, method of execution, coordinating and timings, groupings and taskings, identified risks and controls and administration and logistics.

The second search warrant

The verified application sets out the factual matters and information available which gave rise to a belief on reasonable grounds that there would be documents and other matters relevant to the investigation on the premises to be searched.

The warrant was issued on 29 May 2012 and expired at 1:05 pm on 29 June 2012. The warrant could be executed by day or night.

The report to the authorised officer states that the warrant was executed on 30 May 2012 and copies of electronic mail files and electronic documents relevant to the Commission's investigation were seized. The occupiers notice was served. The warrant holders check list set out details of the execution and shows that they departed the premises at 8:00 pm on 30 May 2012.

An e-mail on file from the Senior Investigator states, omitting names:

"the search warrant ... was undertaken in exigent circumstances due to the other operational team being engaged in other search warrants ... Operational orders were not drafted due to time constraints and having regard to the premises ... upon which the warrant was to be executed. -- "

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 orders in respect of the respective searches. 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.
- Search warrants were applied for in compliance with Procedure No. 9 of the ICAC Operational Manual.
- 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 flourish extending to the right.

His Honour Harvey Cooper, AM
Inspector of the Independent Commission Against Corruption
June 2013