



**Report of an audit of applications for
and execution of search warrants by the
Independent Commission
Against Corruption**

December 2010

**by
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**

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

December 2010

TABLE OF CONTENTS

BACKGROUND	1
1. THE INSPECTOR'S AUDIT FUNCTION	1
2. THE SUBJECT OF THE AUDIT.....	2
3. RELEVANT LEGISLATION.....	4
A. The Independent Commission Against Corruption Act 1988 (the ICAC Act)	4
B. The Law Enforcement (Powers and Responsibilities) Act 2002 (the LEPR Act)	6
C. The Law Enforcement (Powers and Responsibilities) Regulation 2005	10
4. ICAC PROCEDURES.....	11
A. Procedure Number 9	11
B. Operational Orders	15
5. PRELIMINARY ISSUES RELATING TO THE EFFECTIVENESS OF THE AUDIT	16
A. Documentation	16
B. Grounds to proceed	16
6. The Audit.....	17
A. Audit Methodology	17
7. PART ONE – COMPLIANCE WITH THE LAW.....	18
PART ONE - CONCLUSION	19
8. PART TWO – EFFECTIVE, APPROPRIATE AND PROPER USE.....	20
ICAC File Number E09/0279/7/1.....	20
ICAC File Number E09/0279/7/2.....	20
ICAC File Number E09/0279/7/3.....	21
ICAC File Number E09/1228/7/1.....	22
ICAC File Number E09/1228/7/2.....	23
ICAC File Number E09/1228/7/3.....	23
ICAC File Number E09/1228/7/4.....	24
ICAC File Number E09/1235/7/1.....	24
ICAC File Number E09/1235/7/2.....	25
ICAC File Number E09/1235/7/3.....	25
Results of E09/1235/7/1-3	26
ICAC File Number E09/1462/7/1.....	26
ICAC File Number E09/1462/7/2.....	27
Results of E09/1462/7/1-2	28
PART TWO - CONCLUSION.....	30

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 *Law Enforcement (Powers and Responsibilities) Act 2002* (the “LEPR 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 5 August 2010, 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 2009 and 31 March 2010.

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 2009 to 31 March 2010, 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 2009 to 31 March 2010 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 with documentation relating to twelve search warrants issued during the nominated period.

That documentation comprised:

- copies of the search warrants;
- Occupier's Notice;
- verified application for search warrant, Certificate 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;
- with one exception, 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 has approved that an application for a search warrant is appropriate and also signed by the Executive Director, Legal,

stating that the Application, Warrant, Occupier's Notice and clause 11 Certificate had been provided to and was approved by him;

- 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
- statement explaining the absence of the Report to Authorised Officer in respect of Search Warrant E09/1462/2.

3. RELEVANT LEGISLATION

A. 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.

B. 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 the warrant is required to search for a kind of thing – a description of the kind of thing,

- 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).

C. 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

A. Procedure Number 9

The relevant guidelines for the benefit of officers of the ICAC in force between July 2009 and March 2010 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.

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 senior investigator in charge will give consideration to whether any police officers or officers of other agencies should 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. 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, 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 Case Officer allocated the responsibility for the execution of a Search Warrant or Warrants (Search Team Leader) is accountable to the Commissioner for the entire operation. The Search Team Leader shall:

- 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) brief 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.

B. 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:
 - 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 ISSUES RELATING TO THE EFFECTIVENESS OF THE AUDIT

A. Documentation

The first issue to be determined is whether the ICAC has given documentation to the Office of the Inspector relating to all of the search warrants it has caused to be issued over the subject period, namely 1 July 2009 to 31 March 2010. Documentation for 12 search warrants in respect of 4 separate investigations have been supplied.

The courts have no index against which a search can be made of all search warrants the ICAC has caused to be issued. A “raid” on all files held by the ICAC may be permissible by law but is totally impracticable. Further, I have received no complaint relating to any search warrant issued or executed during the period under review. It should be emphasised that there are no grounds to believe that the ICAC has withheld any search warrants or associated documents.

B. Grounds to proceed

The second issue is whether the contents of the applications for search warrants are 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 listening 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

A. 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 solely 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 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, 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 12 search warrants in 4 investigations. 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 search warrant E09/1228/7/1, 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 which:
 - stated 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
 - stated whether or not an occupier’s notice had been served.

Search warrant E09/1228/7/1 was not executed. It expired on 31 August 2009 and the report to the eligible issuing officer is dated 30 September 2009.

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, many of the 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.

PART ONE - CONCLUSION

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.

ICAC File Number E09/0279/7/1

This warrant was issued on 14 December 2009 authorising search of premises at Schofields to seek information connected with the matter being investigated under the ICAC Act concerning an allegation that Tonette Kelly, a NSW Maritime employee, had engaged in corrupt conduct. The verified application set out information provided by persons employed at NSW Maritime who had observed the actions of Ms Kelly as well as other information which supported the application and justified it.

The authorisation checklist was duly signed by the Executive Director, Investigation Division, confirming that he had approved that an application for the search warrant was appropriate and also by the Executive Director, Legal that the application, warrant and occupiers notice were approved.

The report to the eligible issuing officer reveals that the warrant was executed between 8:44 am and 5:03 pm on 15 December 2009 and, a large number of relevant items were seized.

ICAC File Number E09/0279/7/2

This warrant was issued on 14 December 2009, authorising the search of further premises at Schofields. This relates to the same investigation as the previous search warrant. The reason for selecting these premises is that Ms Kelly's mother informed an investigator that Tonette Kelly resided with her at these premises plus the fact that Ms Kelly registered a new mobile telephone account to the

same address on 9 November 2009. The authorisation checklist was duly signed and approved by the Executive Director, Investigation Division and the Executive Director, Legal.

The report to the eligible issuing officer shows that the warrant was executed between 5:25 pm and 5:35 pm on 15 December 2009, but no document or other evidence was located or seized during that search.

ICAC File Number E09/0279/7/3

This warrant was issued on 14 December 2009, authorising the search of a motor vehicle owned by NSW Maritime but which was allocated to Ms Kelly for her business/personal use.

The report to the eligible issuing officer disclosed that the vehicle was located within the curtilage of the property at Schofields where a search warrant was executed on 15 December 2009 and was searched during the execution of that warrant. Consequently there was no reason to execute the warrant issued for the vehicle. There were no items seized from the vehicle.

The authorisation checklist was duly signed and approved by the Executive Director, Investigations Division and the Executive Director, Legal.

Results of Warrants E09/0279/7/ 1-3

In its *Report on the Investigation into the Misuse of Resources by a NSW Maritime Legal Services Branch Officer* published in September 2010 the Commission stated:

“Commission officers executed search warrants at residential premises associated with Ms Kelly. A large number of documents and files were seized and subsequently analysed.”

The execution of the search warrants contributed to the investigation and subsequent findings of corrupt conduct on her part.

Chapter 2 of the report contains the Commission's findings that Ms Kelly engaged in corrupt conduct in relation to the extent of her secondary employment and the use of NSW Maritime resources, including the facsimile machine. It also contains findings that Ms Kelly acted corruptly by making false and misleading representations to NSW Maritime officers about the extent of her secondary employment.

Chapter 3 sets out findings of corrupt conduct in relation to the personal use by Ms Kelly of an online search facility paid for by NSW Maritime, the authority she gave for the payment of invoices for the searches she made, and the preparation of two documents relating to that use.

The Commission was satisfied that Ms Kelly acted corruptly by engaging in secondary employment at a level well beyond that which had been approved, and in utilising the resources of NSW Maritime, including the facsimile machines, for her personal benefit. It was further satisfied that Ms Kelly knowingly misled the chief executives and Mr Clark on a number of occasions in relation to her secondary employment.

In discussing the evidence admissible against Ms Kelly in possible criminal proceedings the Commission said that much admissible documentary evidence is available, including the numerous conveyancing files seized from her residence and NSW Maritime records.

ICAC File Number E09/1228/7/1

This warrant was issued on 31 July 2009 authorising the search of residential premises. The purpose was to search for items connected with the matter then being investigated under the ICAC Act concerning an allegation that an officer of a public authority engaged in corrupt conduct by soliciting payments from contractors engaged by the authority in return for the officer acting in the favourable interests of those contractors.

The verified application set out in some detail information available to the applicant which provided reasonable grounds for believing that the issue of the

warrant was justified. The authorisation checklist was duly signed by the Executive Director, Investigation Division and the Executive Director, Legal.

The report to the eligible issuing officer dated 30 September 2009 reveals that the warrant was not executed because a fresh warrant was issued on 4 August 2009 in place of this one to accommodate further information that had come to light.

ICAC File Number E09/1228/7/2

This warrant was issued on 31 July 2009 authorising the search of premises being a motor vehicle and relates to the same matter as above. The vehicle was one used by the targeted officer.

The report to the eligible issuing officer states that the warrant was not executed because a fresh warrant was issued on 4 August 2009 in place of this one.

The authorisation checklist was duly signed by the Executive Director, Investigation Division and the Executive Director, Legal.

ICAC File Number E09/1228/7/3

This warrant was issued on 4 August 2009 for the search of residential premises and replaced warrant E09/1228/7/1.

The address was the home address of the officer and it was reasonably believed that he had records at his premises pertaining to his work with the public agency and which may identify how he was disbursing corruptly obtained funds. In addition it was suspected that he was likely to have correspondence, notes and diary entries pertaining to cash obtained from various contractors.

The report to the eligible issuing officer reveals that the warrant was not executed because operational activity did not develop as anticipated and the execution was delayed and then abandoned. Investigations were continuing.

The authorisation checklist was duly signed by the Executive Director, Investigation Division and the Executive Director, Legal.

ICAC File Number E09/1228/7/4

This warrant was issued on 4 August 2009 authorising the entry of premises being a motor vehicle. This warrant replaced warrant D091228/7/2.

The report to the eligible issuing officer reveals that the warrant was not executed because operational activity did not develop as anticipated and the execution was delayed and then abandoned. Investigations were continuing.

Results of Search Warrants E09/1228/7/ 1-4

A public hearing has taken place in this matter but a report has not yet been published at the time of writing.

ICAC File Number E09/1235/7/1

This warrant was issued on 22 January 2010 authorising the search of residential premises seeking items connected with the matter being investigated under the ICAC Act concerning allegations that a Senior Correctional Officer employed at a named Correctional Centre was engaged in corrupt conduct, namely the trafficking of contraband, including prohibited drugs and mobile telephones, into the Correctional Centre on behalf of inmates in return for corrupt payments and that he had stolen material from the Department of Corrective Services industry program for use in improvements to his premises.

The verified application for this search warrant sets out detailed facts supporting justification for the issue of the warrant. The report to the eligible issuing officer reveals that the warrant was executed at 9:35 am on 25 January 2010 and that a number of items were seized in connection with the investigation.

ICAC File Number E09/1235/7/2

This search warrant was issued on 22 January 2010 authorising the search of utility vehicle and allowed execution by day or by night, that is between 9 pm and 6 am.

The application for the warrant sets out that the vehicle containing the items intended to be seized could be on the premises before 6 am. The targeted person was to commence his shift at 6:30 am and in the light of past experience it was anticipated that he would be arriving at the Correctional Centre shortly before 6am. It was intended to execute the warrant when he entered the car park of the Centre and before he took anything from the premises.

The report to the eligible issuing officer reveals that the warrant was executed at 9:35 am on 25 January 2010 and items were seized.

ICAC File Number E09/1235/7/3

This warrant authorised the search of premises being nominated parts of a Correctional Centre. The verified application for the warrant provides reasonable grounds for the belief that the target had a personal locker situated within the gatehouse building of the Centre and that objects relevant to the investigation could be there.

The report to the eligible issuing officer reveals that NSW police searched the target in the car park of the premises and seized two plastic containers containing green vegetable matter, a tablet and a bottle believed to contain vodka. The target was placed under arrest and the items were entered into in NSW Police exhibits. After this, the search warrant was executed on the target's locker and a number of items relevant to the Commission's investigations were seized including diary entries and hand written notes containing telephone numbers and other details which may constitute evidence of associations with persons of interest to the investigation.

Results of E09/1235/7/1-3

In its report on the *Investigation Into The Smuggling Of Contraband Into The John Morony Correctional Centre* published in July 2010, the Commission stated:

“Commission officers then executed a search warrant on his vehicle in which \$510 cash was located. Search warrants were also executed at his residence and workspace within the JMCC.”

This investigation concerned the conduct of Sebastian Wade, a Senior Corrections Officer with Corrective Services NSW (CSNSW). The investigation was primarily concerned with Mr Wade supplying contraband, including drugs, to inmates at the John Morony Correctional Centre (JMCC) in return for payment. As a result of its investigation, the Commission established that on at least four occasions between mid-2009 and January 2010 Mr Wade obtained contraband from associates of two inmates and gave them to the inmates in return for payment. His attempt to smuggle contraband into JMCC on another occasion for a third inmate was aborted when he was apprehended and arrested by NSW Police.

The results of the execution of the search warrants contributed to findings that Mr Wade engaged in corrupt conduct in relation to supplying contraband to inmates and to the forming of the opinion that the advice of the Director of Public Prosecutions (DPP) should be obtained with respect to the prosecution of Mr Wade for offences of receiving corrupt payments from associates of three inmates contrary to section 249B of the *Crimes Act 1900* and offences of giving false or misleading evidence to the Commission contrary to section 87(1) of the ICAC Act.

The Commission was also of the opinion that CSNSW should give consideration to taking disciplinary action against Mr Wade with a view to his dismissal.

ICAC File Number E09/1462/7/1

This warrant was issued on 23 December 2009 and authorised the search of residential premises.

The aim was to seek audio recordings and hand written notes or transcripts of conversations connected with the matter being investigated under the ICAC Act concerning an allegation that the late Michael McGurk had knowledge of corrupt conduct and engaged in conversations with senior public officials and others in which corrupt conduct involving those officials and others was discussed.

The verified application for the search warrant revealed that a prison inmate attended before the ICAC to give evidence at a Compulsory Examination pursuant to section 35 of the ICAC Act in which he stated on oath that he had heard recordings made by Mr McGurk covertly indicating corrupt activity and that the transcripts and all tapes were stored in a filing cabinet in the study area of premises.

That person told the Commission that he kept copies of the transcripts (possibly the tapes) at the following locations:

1. The home of his “girlfriend”
2. The home of his “wife”

The report to the eligible issuing officer reveals that the warrant was executed on 23 December 2009 at 1:50 pm and that no property was seized.

ICAC File Number E09/1462/7/2

This warrant was issued on 23 December 2009 authorising the search of premises seeking the same class of documents as required in the above warrant.

The verified application for the search warrant states that the prison inmate informed officers that tapes and transcripts of the conversations were stored at his wife's residence.

The file contained an authorisation checklist but no copy of the report to the eligible issuing officer.

In response to my query, the Commission advised that it has not been able to obtain a copy of the report to the eligible issuing officer. Commission officers have inspected the relevant court file and spoken with the relevant eligible issuing officer (referred to under its former title of Authorised Officer) but could not locate the report. The Commission's electronic databases have also been searched but no draft copy could be found. The Commission has provided statements from two of its Investigators to the effect that the respective reports were lodged on 24 December 2009. One Investigator explains: "it appears that in my rush to attend to all necessary administration prior to commencing annual leave that day, I omitted to make a copy of the signed reports and submit them to the ICAC Property Section."

I accept this explanation. No relevant items were located or seized.

Results of E09/1462/7/1-2

In its report on its Investigation into Allegations of Corruption made by or attributed to Michael McGurk, published in March 2010, the Commission explained that widespread media reports following the murder of Mr McGurk on 3 September 2009 concerning the existence of audio recordings made by Mr McGurk, gave rise to a mass of rumour and speculation concerning corruption in the public administration of New South Wales. These reports tended to undermine confidence in government and the administration of the State. The Commission, therefore, determined it was in the public interest to hold a public inquiry so as to open to public scrutiny the nature of the Commission's investigation into the allegations.

The Commission's investigation included searches, authorised by search warrants, of premises suspected of containing recordings made by Mr McGurk of conversations he had with public officials. It also searched for transcripts of those conversations.

One of the allegations investigated by the Commission was that from October 2005 to April 2007 Mr McGurk secretly recorded a number of conversations during which senior NSW public officials and Members of Parliament (names

provided to the Commission) discussed engaging in corrupt dealings with Mr McGurk.

The source of this allegation is a correctional centre inmate referred to as "Z" who told the Commission that he and Mr McGurk, acting in concert, secretly recorded a number of conversations.

In view of concerns that the Commission had as to Z's credibility, it undertook extensive investigations to ascertain whether the allegation could be corroborated independently.

In a compulsory examination, Z said that Mr McGurk had secretly recorded a number of conversations he had made with several public officials and like persons and he, Z, had made handwritten transcriptions of seven such conversations. The transcriptions, according to Z, established corrupt conduct on the part of various public officials.

Z told the Commission that he had kept copies of the transcripts at a Correctional Centre where he was being held, at his family home and at another identified property. Searches were conducted at all these places by Commission Investigators acting under search warrants but they could not find any transcripts.

In addition, the persons to whom, according to Z, he had given the copies (with whom the Commission investigators were able to speak) denied that he had done so and said that they had not seen any copies of recordings or transcripts of the kind to which Z referred.

NSW Police removed from Mr McGurk's office anything that potentially could be of relevance to this case. The material secured included documents, electronic storage devices, mobile telephones and computers. Commission Investigators obtained access to this material and reviewed and interrogated them. No transcripts or recordings of the kind to which Z referred were found.

The fact that the recordings and transcripts were not where Z said they would be found, and the fact that persons to whom he said he gave the tapes denied that they had received the recordings or transcripts and denied any knowledge of their whereabouts, lead to the inference that Z's allegations cannot be relied on.

PART TWO - CONCLUSION

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 impinge upon 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 its Procedure No. 9 and Operational Instructions. This system renders it virtually 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 all but those cases where execution was not undertaken or where execution revealed no evidential material, the issue and execution of the search warrant were effective in locating material which contributed to the findings and recommendations made by the Commission in its published reports.
- 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.

His Honour Harvey Cooper, AM

**Inspector of the Independent Commission Against Corruption
December 2010**