NSW GOVERNMENT

Office of the Inspector of the
Independent Commission Against Corruption

Report concerning circumstances surrounding the Independent Commission Against Corruption's use of certain telephone intercept material during Operation Keppel

Special Report 2021/03

Introduction

1. This is a Special Report pursuant to s 77A of the *Independent Commission Against Corruption Act 1988* (the ICAC Act). That provision enables the Inspector to make a special report to the Presiding Officer of each House of Parliament on:

> *(a) any matters affecting the Commission, including, for example, its operational effectiveness or needs, and*
> *(b) any administrative or general policy matter relating to the functions of the Inspector, and*
> *(c) any other matter relating to the exercise of a function to audit, deal with or assess any matter under section 57B that the Inspector considers warrants the making, in the public interest, of a special report.*

2. The purpose of this report is to determine a matter that was first raised with me on 24 November 2020 by the then Manager of the Committee on the Independent Commission Against Corruption (**ICAC Committee**) who emailed the Office of the Inspector of the Independent Commission Against Corruption (**OIICAC**) drawing attention to an article published in the Daily Telegraph on 23 November 2020.

3. The article titled, "MP says ICAC taps an insult to Japan", outlined concerns expressed by the Member for Wentworth, Mr Dave Sharma MP, that the interception and publication of a phone call ("the intercepted call") by ICAC as part of Operation Keppel may amount to "a violation of Australia's obligations under international law and has the potential to jeopardise Australia's diplomatic relations with a close trading and security partner". A copy of that article is enclosed as Attachment A.

4. I considered that the matter raised important questions of public interest, including among others, whether the act of interception and use of the intercepted material was lawful. Accordingly, I decided to commence an investigation of my own initiative into the matter pursuant to ss 57B(2) and 57C of the ICAC Act.

5. The Inspector's principal functions are provided for by s 57B of the ICAC Act:

> *(1) The principal functions of the Inspector are—*
>
> *(a) to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State, and*

(b) *to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission, and*

(c) *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, and*

(d) *to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.*

6. Relevant to the particular matters considered in this Report, "maladministration" is defined by s 57B(4) as follows:

> *(4) For the purposes of this section, conduct is of a kind that amounts to maladministration if it involves action or inaction of a serious nature that is—*
>
> *(a) contrary to law, or*
>
> *(b) unreasonable, unjust, oppressive or improperly discriminatory, or*
>
> *(c) based wholly or partly on improper motives.*

Background to the intercepted call

7. Counsel assisting the Commission in Operation Keppel announced the General Scope and Purpose of the Public Inquiry in the opening statement of 21 September 2020, as follows:

> 1. *This is a public inquiry conducted for the purposes of an investigation (Investigation) into whether between 2012 and 2018 Daryl Maguire MP engaged in conduct that involved a breach of public trust by using his public office, involving his duties as a member of the NSW Parliament and the use of parliamentary resources, to improperly gain a benefit for himself and/or entities close to him, including G8wayInternational/G8wayInternational Pty Ltd and associated persons (Public Inquiry).*
>
> 2. *In short, this Public Inquiry will investigate whether Mr Maguire sought to monetise his position as a Member of Parliament, Parliamentary Secretary and Chair of the NSW Parliament Asia Pacific Friendship Group.*

8. The intercepted call occurred on 14 September 2017 between Mr Daryl Maguire, former MP for Wagga Wagga, and Mr Keizo Takewaka the then Japanese Consul-

General in Sydney. The call was played during a public hearing on 16 October 2020. A transcript of it was also tendered as Exhibit 367.

OIICAC's inquiries

9. On 25 November 2020, I wrote to Mr Sharma noting that I was considering carrying out an inquiry into the matters he was reported to have raised by the Daily Telegraph and requesting an explanation of the basis of his statement that ICAC's conduct may amount to a violation of Australia's obligations under international law. On the same date, I also wrote to the Chief Commissioner of the Independent Commission Against Corruption (**ICAC**) seeking a response to Mr Sharma's allegations, as raised in the Daily Telegraph article. Those letters are respectively Attachment B and Attachment C.

10. On 26 November 2020, Mr Sharma provided a copy of a letter that he sent on 11 November 2020 to the Hon Christian Porter MP, who was the then Attorney-General (Attachment D). In the letter, Mr Sharma made reference to the intercepted call and its publication noting that the ICAC is not investigating Mr Takewaka and, "neither [he] nor the Government of Japan were aware of the fact that Mr Takewaka's telephone conversations were being intercepted and recorded. Nor were they made aware of the fact that the detail of such conversations would be publicly released by ICAC". The letter outlined concerns about the Commission's conduct, in summary:

- interception of the call appears to be "a violation of Australia's obligations under the Vienna Convention", particularly Articles 22, 27 and 29 of the *Vienna Convention on Diplomatic Relations of 1961*, and

- publication of the contents of the call, without advance warning to Japan, is "a highly insulting and offensive diplomatic act".

11. Mr Sharma requested that the Attorney-General convey his concerns to the NSW Attorney-General, suggested the NSW Government apologise to the Japanese Government on behalf of ICAC and provided reflections on the implications of ICAC's conduct for Australia's national interests and establishment of a Commonwealth Integrity Commission.

12. On 2 December 2020 the Chief Commissioner responded to the allegations in the Daily Telegraph article, clarifying that during the Operation Keppel investigation the Commission had obtained a warrant under the *Telecommunications (Interception and Access) Act 1979* (Cth) (**TIA Act**) to intercept communications

made to and from a telecommunications service operated by Mr Maguire (Attachment E).

13. The Chief Commissioner noted that the news article did not identify the international rules or law alleged as breached and identified the *Vienna Convention on Consular Relations of* 1963 (**VCCR**) as applicable in the circumstances, pinpointing Article 35 (paragraphs 1 and 2). Article 35 states that the receiving State (being Australia) shall permit and protect free communication on the part of the consular post for all official purposes. It also provides that the official correspondence of the consular post shall be inviolable. The Chief Commissioner suggested that the Commission's position was that it had not infringed Article 35 by intercepting the call.

14. After receiving and considering the material provided by Mr Sharma and ICAC, I decided that the matter warranted formal investigation and therefore expanded my inquiries.

15. On 18 February 2021 I informed Mr Sharma of that decision. After which, he provided a copy of the Attorney-General's response to his letter of November 2020. On 15 December 2020, the then Attorney-General wrote to Mr Sharma (Attachment F):

> *Thank you for your letter of 11 November 2020 regarding your concerns about the recent conduct of the NSW Independent Commission against Corruption (ICAC). I share your concerns and agree that the important issues you have raised warrant the attention of the Australian Government.*
>
> *The government takes seriously its obligations under the Vienna Convention on Consular Relations. The fact that ICAC disclosed the transcript of an intercepted phone call between Mr Daryl Maguire and former Japanese Consul-General Takewaka in the course of a public hearing, and did not provide any advance notice to the Consulate of its intention to do so was, in my view, poor handling of a sensitive issue that should have been treated with care.*
>
> *My department has informed me that the Department of Foreign Affairs and Trade (DFAT) has briefed Japanese diplomatic representatives in Australia in relation to these issues. As raised in your letter, I agree it is important to register these concerns with the NSW Government and the ICAC to remind them of the Australia's legal obligations under both the Vienna Convention on Consular Relations and the Vienna Convention on Diplomatic Relations. I am*

advised that DFAT will raise this incident directly with the NSW Department of Premier and Cabinet and with ICAC.

...[1]

16. On 24 February 2021 I wrote to Mr Kiya Masahiko, the current Consul-General of Japan in Sydney and sought the Consulate's views on ICAC's use of the intercepted material and the matters raised by Mr Sharma in his letter to the Attorney-General of 11 November 2020. On 9 April 2021, the Consul-General responded and advised, among other things, that "the Consulate-General of Japan in Sydney considers that such matters should be more closely coordinated by relevant government authorities in future".

17. On 30 April 2021 I had a teleconference with DFAT officers to discuss the Department's view of ICAC's conduct. During the teleconference, I was informed that DFAT had contacted ICAC (and the Department of Premier and Cabinet) about the matter. The correspondence exchanged between DFAT and ICAC was subsequently provided to my Office.

18. That correspondence makes it clear that, upon learning of ICAC's use of the intercepted call, DFAT raised concerns with the Chief Commissioner in writing and attempted to establish a relationship with the Commission so that the two agencies could "[work] closely together in relation to any interaction with the diplomatic and consular corps in Australia" and requested that it be "[alerted]...of any evidentiary material that is likely to affect Australian's international relations prior to publication". In closing, the DFAT official noted that "[w]hile my office has previously attempted to arrange a meeting with you and ICAC CEO Philip Reed, I continue to be available to discuss a means for ICAC to carry forward investigations in a way that enables us to satisfy the obligations in relation to the diplomatic and consular corps".

19. ICAC's response to DFAT, in essence, sought to explain its view of the matter, defended its conduct and concluded "[t]here is no other material to be tendered in evidence that is likely to affect Australia's international obligations or relations".

20. On 21 April 2021 I sought advice from the Crown Solicitor's Office (CSO) about the lawfulness of ICAC's conduct insofar as the VCCR was concerned. The CSO

[1] I note that the Attorney-General's Department gave approval for reference to be made to the letter and a copy of it to be attached to this Report.

provided its advice on 18 May 2021 (Attachment G). A more detailed discussion of it appears in the sections of this report that follow.

21. After having considered the material referred to above, I prepared a draft report about the matter containing findings about the ICAC's conduct and recommendations. The draft report was provided to Mr Dave Sharma MP, the DFAT, the Consulate-General of Japan in Sydney, the ICAC and to Mr Scott Robertson (counsel assisting the Commission in Operation Keppel) so that each party could provide any comments about it before its submission to Parliament. The comments received informed this final version of the report. Where relevant, I have sought to note any comments that have directly resulted in a modification to the draft report.

22. I also received representations from other interested parties who requested that their representations be kept confidential. I have decided to honour those requests and accordingly I simply note that I have taken the representations into account in forming the views set out in this report.

Consideration

23. In the circumstances of this matter, I see two issues that require close consideration, those being:

    1. whether ICAC's interception of the call and use of the intercepted material was lawful, and
    2. even if lawful, whether it was appropriate for ICAC to play the intercepted call during a public inquiry and tender a transcript of it as a public exhibit.

24. I address each of these issues in turn below before detailing recommendations to ICAC to prevent a recurrence of the conduct dealt with in this Report.

Issue 1: whether ICAC's interception of the call and use of the intercepted material was lawful

25. There are two conventions that Mr Sharma referred to in his letter of concern about ICAC's conduct: the Vienna Convention on Diplomatic Relations 1961 (**VCDR**) and the VCCR. Australia has ratified both conventions.

26. The VCDR provides a framework for the performance of the functions of diplomatic missions representing States. It has the force of law in Australia

pursuant to s 7 of the *Diplomatic Privileges and Immunities Act 1967* (Cth) (**DPI Act**). The VCCR provides a framework for the performance of functions of consular posts on behalf of their respective States. The VCCR has the force of law in Australia pursuant to s 5 of the *Consular Privileges and Immunities Act 1972* (Cth) (**CPI Act**).

27. At the time of the intercepted call, Mr Takewaka was the then Consul-General for Japan in Sydney. Only the VCCR and CPI Act are applicable in those circumstances.

28. Section 3 of the CPI Act is an interpretation provision. Relevantly, its key definitions are as follows:

> *3 Interpretation*
> *(1) In this Act, unless the contrary intention appears:*
>
> ...
>
> ***Convention*** *means the Vienna Convention on Consular Relations, a copy of the English text of which is set out in the Schedule.*
> ...
>
> *(2) In this Act, expressions defined by the Convention have the same respective meanings as they have in the Convention.*

29. As noted, the CPI Act gives certain provisions of the VCCR the force of law in Australia. Section 5 of the CPI Act relevantly provides:

> *5 Vienna Convention on Consular Relations to have force of law*
>
> *(1) Subject to this section, the provisions of Articles 1, 5, 15 and 17, paragraphs 1, 2 and 4 of Article 31, Articles 32, 33, 35 and 39, paragraphs 1 and 2 of Article 41, Articles 43 to 45 (inclusive) and 48 to 54 (inclusive), paragraphs 2 and 3 of Article 55, paragraph 2 of Article 57, paragraphs 1, 2 and 3 of Article 58, Articles 60 to 62 (inclusive), 66 and 67, paragraphs 1, 2 and 4 of Article 70 and Article 71 of the Convention have the force of law in Australia and in every external Territory.*
>
> *(2) For the purposes of those provisions as so having the force of law:*

(a) a reference in those provisions to the receiving State shall be read as a reference to Australia and, where the context so permits, as including a reference to every State of the Commonwealth and every Territory;

(b) a reference in those provisions to a national of the receiving State shall be read as a reference to an Australian citizen;

(c) a reference in those provisions to authorities of the receiving State shall be read as including a reference to members and special members of the Australian Federal Police, members of the police force of a State of the Commonwealth or of a Territory and persons exercising a power of entry to premises;

...

(5) For the purposes of section 38 of the Judiciary Act 1903, a matter arising under the Convention as having the force of law by virtue of this section shall be deemed not to be a matter arising directly under a treaty.

30. The English text of the VCCR is set out in the Schedule to the CPI Act. The Commission identified only Article 35 as being relevant to Mr Sharma's allegations. However, each other interested party that I made inquiries of either raised other articles of the VCCR or spoke in general terms without identifying the Articles relevant to ICAC's conduct. Consequently, I sought legal advice on the construction of the CPI Act and of the VCCR. That advice was provided by the CSO and identified that Articles 31, 35 and 40 were relevant to ICAC's handling of the intercepted call. Those articles are set out below.

31. Article 31 provides for inviolability of the consular premises:

1. Consular premises shall be inviolable to the extent provided in this Article.

2. The authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending State. The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.

3. Subject to the provisions of paragraph 2 of this Article, the receiving State is under a special duty to take all appropriate steps to protect the consular

premises against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity.

4. *The consular premises, their furnishings, the property of the consular post and its means of transport shall be immune from any form of requisition for purposes of national defence or public utility. If expropriation is necessary for such purposes, all possible steps shall be taken to avoid impeding the performance of consular functions, and prompt, adequate and effective compensation shall be paid to the sending State.*[2]

Only paragraphs 1, 2 and 4 of Article 31 have the force of law in Australia pursuant to s 5 of the CPI Act.

32. Article 35 provides for freedom of communication:

1. *The receiving State shall permit and protect freedom of communication on the part of the consular post for all official purposes. In communicating with the Government, the diplomatic missions and other consular posts, wherever situated, of the sending State, the consular post may employ all appropriate means, including diplomatic or consular couriers, diplomatic or consular bags and messages in code or cipher. However, the consular post may install and use a wireless transmitter only with the consent of the receiving State.*

2. *The official correspondence of the consular post shall be inviolable. Official correspondence means all correspondence relating to the consular post and its functions.*

...

33. Article 40 deals with the protection of consular officers, in the following terms:

The receiving State shall treat consular officers with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity.

That Article does <u>not</u> have the force of law in Australia under s 5 of the CPI Act. Nevertheless, as DFAT pointed out in its response to a draft of this report, the Commonwealth of Australia is still bound by this Article as an obligation that is set out in an international treaty.

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[2] Paragraph 3 of Article 31 has not been given the force of law by s 5 of the CPI Act and is therefore omitted.

34. The executive summary of the advice that I received from the CSO dated 18 May 2021, states:

> *In circumstances where the ICAC's interception of the relevant telephone call occurred as a result of a warrant issued under the Telecommunications (Interception and Access) Act 1979 (Cth) ("the TIA Act"), difficult and significant questions arise concerning both the proper construction of Article 35 and the interaction of the TIA Act with the CPI Act, each of those questions being relevant to the lawfulness of the ICAC's conduct. Because the effect of Article 35 is subject to doubt, I cannot presently reach a definitive conclusion, either with respect to the proper construction of Article 35, or with respect to whether the warrant issued to the ICAC under the TIA Act validly authorised the interception of the relevant telephone call.*

35. The CSO observes that:

> *...Ascertaining the effect of the VCCR on the lawfulness of the ICAC's conduct with respect to the [Takewaka] call therefore requires consideration of the interaction of the TIA Act and the CPI Act, the question being whether the s. 46 warrant, on which the ICAC relied to intercept the [Takewaka] call, lawfully authorised the interception of a call to which the head of a consular post in Australia was a party.*
>
> *If the TIA Act (in particular, s. 46) were properly to be read as subject to the requirements of the CPI Act, and if the interception of the [Takewaka] call were inconsistent with a provision of the VCCR given the force of law by the CPI Act, that may mean that the ICAC could not have relied on the s. 46 warrant as providing lawful authority for intercepting the [Takewaka] call. That, in turn, would raise a question as to whether the ICAC, in intercepting the [Takewaka] call, had acted in contravention, not merely of the CPI Act, but also of ss. 7(1) and 105(1) of the TIA Act, which together have the effect that it is an offence for a person to intercept a communication passing over a telecommunications system, unless s. 7(2) applies. (By contrast, the CPI Act contains no provision imposing criminal liability for conduct that is inconsistent with the provisions of the VCCR to which the CPI Act gives the force of law.)*

36. The CSO did not have sufficient information before it to undertake an analysis of the operation of s 7(1) and 105(1) of the TIA Act, but expressed the view that it did not "think it is presently necessary to express a concluded view concerning the interaction of the TIA Act and the CPI Act" because "the relevant provisions of the

VCCR are uncertain in their meaning, such that, even if the TIA Act were to be read as not permitting the issuing of a warrant for the interception of a telephone call in circumstances that would contravene the CPI Act, uncertainty would remain as to precisely in what circumstances such interception would in fact contravene the CPI Act."

37. Of the Articles identified as relevant and having the force of law in Australia, only Article 35 (concerning the freedom of communication) was considered by the CSO to be in issue and so the consideration below is confined to that Article.

38. ICAC's interpretation of Article 35, taken from its letter of 2 December 2020, is as follows:

> *It is reasonably clear that the intercepted communication between Mr Maguire and Mr [Takewaka] was not "official correspondence" in the sense that the term is used in Article 35 of the VCCR. That article is directed to ensuring that diplomatic and consular officials of a sending State have "freedom of communication" (see the heading to Article 35 of the VCCR) with, in particular, other nationals of the sending State including the sending State's "Government", "diplomatic missions" and "other consular posts" wherever situated (see para 1 of Article 35). It is reasonably clear that it is not directed to communications between consular officials and nationals of the receiving State such as Mr Maguire.*
>
> *Consistent with this, the report of the International Law Commission to the General Assembly covering the work of its thirteenth session commented that the phrase "for all official purposes" in what became paragraph 1 of Article 35 of the VCCR "relates to communication with the government of the sending State; with the authorities of that State, and, more particularly, with its diplomatic missions and other consulates, wherever situated; with the diplomatic missions and consulates of <u>other</u> States; and lastly, with international organisations": see Yearbook of the International Law Commission, 1961 vol II at 111 (emphasis added).*
>
> *In light of the above, that freedom of communication protected by Article 35 of the VCCR was not infringed by the telephone intercept in relation to Mr Maguire's telephone. That intercept did not in any way violate Mr Takewaka's freedom of communication with his Government or any other communication protected by the VCCR.*

39. ICAC relies on commentary extracted from the Yearbook of the International Law Commission (**ILC**), 1961 vol II at 111 to support its view. It does not address the definition of 'official correspondence' found in Article 35, paragraph 2.

40. That interpretation was considered by the CSO in its advice, which suggested that the ILC report alone would not be sufficient to address the intended meaning of Article 35, paragraph 1 because:

> *[i]f limited in the manner described in that report, the scope of the "official purposes" that determine the extent of protection afforded by para. 1 of Article 35 might arguably be in tension with the extent of protection afforded by para. 2 of Article 35 to "official correspondence", a term that encompasses "all correspondence relating to the consular post and its functions" (my emphasis). Article 5 of the VCCR (which is given the force of law by s. 5(1) of the CPI Act) prescribes what "[c]onsular functions consist in". By paras (b) and (c) of Article 5, "consular functions" consist in, relevantly:*
>
> > *"(b) furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention;*
> >
> > *(c) ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting thereon to the Government of the sending State and giving information to persons interested".*
>
> *The transcript of the questioning of Mr Maguire by counsel assisting the ICAC, and the transcript of the [Takewaka] call, suggest to me that part of Mr Maguire's purpose in approaching Mr [Takewaka] may have been to elicit investments by Japanese companies in connection with developing land around the new airport at Badgerys Creek. This at least raises for consideration whether the purpose of the [Takewaka] call, including on the part of Mr [Takewaka], related to Mr [Takewaka's] performance of one of the "consular functions" referred to in para. (b) or para. (c) of Article 5 of the VCCR. If that were so, it would arguably be a surprising result if "correspondence" for that purpose were "official correspondence" protected by para. 2 of Article 35, while a telephone call for that same purpose were not*

for an "official purpose" that would engage the protection afforded by the immediately preceding paragraph of the same Article.[3]

41. In giving its advice, the CSO had regard to secondary commentary concerning paragraph 1 of Article 27 of the VCDR (which is equivalent to paragraph 1 of Article 35 of the VCCR) that "suggests that the interception generally of diplomatic telephone conversations would violate the freedom of communication afforded by Article 27." The secondary material cited by the CSO, indicates that the obligation provided by Article 27 of the VCDR requires States party to the convention to not engage in the surveillance of diplomatic communication.

42. The CSO advice concluded at paragraphs 22 and 23 that:

> *While the matter is attended by considerable doubt, there may, I think, be some tension between the more confined description, in the International Law Commission's report, of the scope of communications to which the protection in para. 1 of Article 35 of the VCCR applies, and the somewhat broader description, in the secondary commentary referred to above, of the scope of communications to which the protection in the equivalent provision of the VCDR applies. There does not appear to be a textual basis for distinguishing between the operation of the two provisions, and, to the extent that the freedom of communication afforded by the VCDR is properly understood to apply broadly to all communications by members of a diplomatic mission (or, at least, to all communications related to the functions of the mission), there is no obvious basis for reading para. 1 of Article 35 of the VCCR as affording a lesser degree of protection.*
>
> *In the absence, however, of a clear and authoritative statement concerning the intended effect of para. 1 of Article 35 of the VCCR, I am unable to reach a definitive conclusion as to whether the ICAC's interception of the [Takewaka] call was in contravention of that paragraph, so as to be in contravention of the CPI Act. In those circumstances, I am further unable to reach a definitive conclusion as to whether the warrant issued to the ICAC under s. 46 of the TIA Act validly authorised the interception of the [Takewaka] call.*

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[3] The text in this footnote is quoted from the CSO advice: 'As to the meaning of the term "correspondence" in the VCCR, I note that para. 3 of Article 54 of the VCCR draws a distinction between "official correspondence and other official communications in transit", while other references to "official correspondence" tend to suggest that such correspondence would take documentary form. Paragraph 3 of Article 35 suggests that "correspondence" may be contained in the consular bag, while para. 3 of Article 44 suggests that "official correspondence" is something that can be "produce[d]", and in neither case could such correspondence sensibly include a telephone call.'

43. When I circulated my draft report to the previously identified parties for comment, a copy of the CSO's advice was also provided. Comments received from two of the parties had a bearing on my consideration of the lawfulness of ICAC's conduct and are therefore set out below.

44. In a letter dated 24 June 2021, Mr Dave Sharma MP suggested that further consideration of the lawfulness of ICAC's conduct may be warranted on the following basis:

> *In my view the legal advice from the Crown Solicitor's Office should also have considered the applicability of Article 43(1) of the Vienna Convention on Consular Relations, as given effect by the Consular Privileges and Immunities Act 1972, in addition to its consideration of Article 35.*
>
> *Article 43(1) provides that "Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in response of acts performed in the exercise of consular functions."*
>
> *Prima facie, Article 43(1) would appear to indicate that the warrant issued to ICAC under the Telecommunications (Interception and Access) Act 1979 could not have validly authorised the interception of the relevant telephone call involving the Japanese Consul-General, as the Consul-General is not amenable to such jurisdiction under the terms of Article 43(1).*
>
> *In my view this element should also be considered when assessing whether ICAC had lawful authority to intercept the telephone call.*
>
> *Whilst Article 35 may be uncertain in its meaning, such that the CSO was unable to present a concluded view, an additional consideration of Article 43 when assessing ICAC's conduct may assist the CSO to reach a more definitive position regarding the lawfulness of ICAC's conduct. This would in turn inform your consideration of whether ICAC has engaged in maladministration, for which I believe there is an arguable case.*

45. In a letter dated 14 July 2021 which provided comments in response to the draft report, DFAT wrote:

> *DFAT's view is that any investigatory conduct by ICAC in which foreign officials are involved has the potential to involve both Australia's international*

legal obligations and Australia's foreign relations, such that consultation with DFAT is necessary.

In this regard, we note that the Commonwealth exercises responsibility over Australia's international legal obligations, as these are legal obligations of the Commonwealth.

Under the Australian Government's Legal Services Directions 2017, advice on the Commonwealth's international legal obligations may only be provided by a limited group of Commonwealth agencies, including the Department of Foreign Affairs and Trade.

We have reviewed the legal advice prepared by the Crown Solicitor's Office and, without offering comment on its legal analysis, we agree with the conclusion that, ordinarily, guidance on questions of law related to the operation of the Vienna Convention of Consular Relations should be sought from my department.

46. The key question in relation to the ICAC's conduct, for me as the Inspector, is whether it amounted to maladministration within the meaning of s 57B of the ICAC Act. Overall, as is demonstrated by the advice that I received from the CSO, the position concerning the lawfulness of ICAC's conduct is not clear or settled. Mr Sharma's comments quoted above raise a valid avenue of inquiry concerning Article 43(1) of the VCCR and DFAT's comments highlight the role of the Commonwealth in providing advice on its international legal obligations.

47. Towards the end of this report, I make recommendations as to steps that are to be taken by ICAC in consultation with DFAT concerning its handling of the intercepted call and to establish a process for dealing with such material in future. I do not consider that further consideration of the legal issues by me through a request for additional advice from either the CSO or a specified provider of legal services under the *Legal Services Directions 2017* would greatly assist the work necessary to follow the recommendations in this report. The resources and time that would be required from my Office to do so are not justified when balanced with the fact that the recommendations ultimately made do not depend on a settled view about the legalities.

48. In those circumstances and on the information before me, I do not make any finding that the Commission has engaged in maladministration. In order to do so, I would need to be satisfied that it had acted "contrary to law" (per the terms of s 57B(4)(a) of the ICAC Act). For the reasons expressed, I am not so satisfied.

49. I do not see that any of the other criteria which constitute maladministration as defined by s 57B (being delay in the conduct of investigations, unreasonable invasions of privacy, action or inaction of a serious nature that is unreasonable, unjust, oppressive or improperly discriminatory, or based wholly or partly on improper motives) or the matters referred to in s 57B(1)(b) are enlivened by ICAC's conduct in this matter.

Issue 2: whether it was appropriate for ICAC to play the intercepted call during a public inquiry and tender a transcript of it as a public exhibit

50. ICAC's introduction of the intercepted call into evidence during the public inquiry held on 16 October 2020 gives rise to other questions distinct from the lawfulness of its conduct, including the propriety of it considering broader policy considerations, including, obviously in this case, the effect on a friendly foreign nation.

51. Of relevance to this issue, the Chief Commissioner explained in his letter of 2 December 2020:

> *I am advised that Scott Robertson, Counsel Assisting the Commission, gave consideration to whether the Commission should not expose Mr Maguire's communication with Mr [Takewaka] in public with a view to not embarrassing the Consul-General personally or Japan more generally. Mr Robertson took the view that the call could not reasonably be regarded as embarrassing to the Consul-General or Japan and that, in all the circumstances, the public interest in exposing Mr Maguire's conduct supported the playing of the recorded telephone call in public. I agree with that assessment.*
>
> *I also note the following points:*
>
> ...
>
> 3. *The intercepted call was relevant to the Commission's investigation. One of the matters being investigated by the Commission was whether Mr Maguire had misused his parliamentary position as chair of the NSW Asia Pacific Friendship Group (APFG) to seek potential investors or purchasers of the SmartWest site near the new Sydney Airport in anticipation that if successful he would receive a financial benefit.*

4. *The intercepted call was relevant to establishing that Mr Maguire had sought, on this particular occasion, to use the consular network to which he had access as chair of the APFG with a view to benefitting himself. During the call Mr Maguire told Mr [Takewaka] that "a friend" had asked him to do some "matchmaking" with a view to obtaining a Japanese commercial entity to either buy or partner in the development of commercial entities so that Mr Maguire could introduce them. He also offered to arrange a "briefing" to Mr [Takewaka].*

5. *The intercepted call was played to Mr Maguire during the course of the public inquiry and tendered in evidence as Exhibit 367. After hearing the intercepted call Mr Maguire admitted that what he said in the call was an example of him using the consular network to which he had access as chair of the APFG with a view to pursuing his own private business interests and that it was wrong of him to do so. He agreed that he would not have engaged in the call but for the hope that he might gain a benefit.*

6. *The Commission was not concerned with the conduct of Mr [Takewaka] and there has never been any suggestion that anything he said or did was improper or inappropriate. It was made quite clear in the evidence given by Mr Maguire that he never told Mr [Takewaka] that he was motivated by the potential for private gain.*

...

52. To my mind, the Chief Commissioner's assessment, as quoted in paragraph 51 above, that the call could not reasonably be regarded as embarrassing to the Consul-General or to Japan misses the point. It is not the *content* of the call that has caused difficulties, but rather the fact that a telephone call in which one participant was the consular representative of a foreign power was intercepted, recorded, and played in public. That is the matter that is problematic, not what Mr Takewaka said. That said, I agree with what is implicit in the Chief Commissioner's letter that Mr Takewaka's conduct during the call was entirely appropriate and beyond reproach.

53. In a letter of 15 July 2021, the Chief Commissioner provided comments in response to the draft report and additional information about how it came to use the call during the public inquiry:

Mr Scott Robertson has informed me that, prior to the intercepted telephone communication being utilised, he had considered the potential application of

the Vienna Convention on Consular Relations (VCCR) and had a copy of Consular Privileges and Immunities Act 1972 (Cth) on the Bar table at the time that the intercepted telephone communication was utilised (the English text of the VCCR appears as a schedule to the Consular Privileges and Immunities Act 1972 (Cth)). Mr Robertson informs me that he did not consider the possible application of the VCDR as he understood that Mr Takewaka was not a diplomat to whom the VCDR could apply.

54. In the same letter, the Chief Commissioner also commented that:

The decision of experienced counsel assisting to adduce the intercepted call in the public inquiry was not a decision reached without due consideration. To the contrary it was a decision made with careful deliberation consistent with the high standards I have seen displayed by him in other proceedings in the Commission. It is well understood in curial proceedings that minds may legitimately differ on matters that arise for decision during the conduct of litigation. The same, of course, can arise in Commission proceedings. The evidence of the intercepted call was the subject of careful evaluation before it was led as discussed in this letter.

55. I agree that minds may legitimately differ on matters that arise for decision and accept that counsel assisting the Commission evaluated whether the intercepted call should be used in the public inquiry.

56. As is indicated through my inquiries detailed earlier, the matter was of sufficient concern for the DFAT to raise it with Japanese diplomatic representatives in Australia, and subsequently "remind" the NSW Department of Premier and Cabinet and ICAC of Australia's legal obligations under the VCCR. The legal advice that I have received from the CSO is couched in tentative terms, and relevantly concludes:

I acknowledge that difficult and sensitive questions arise concerning the proper construction of the VCCR and the CPI Act, the interaction of the TIA Act with the CPI Act, and their intersection with the practical operation of diplomatic protocols and customs, about which guidance from the Department of Foreign Affairs and Trade may be sought.

57. ICAC has made clear in its correspondence to my Office why it considered the call was of relevance to its inquiry, and that it was attempting to establish that Mr Maguire "sought, on this particular occasion, to use the consular network to which he had access as chair of the APFG with a view to benefitting himself." ICAC also

contends that it was in the public interest to expose Mr Maguire's conduct. However, I do not accept those points as a sufficient justification for ICAC to play the call during its public inquiry. There were two parties to the intercepted call: Mr Maguire and the then Consul-General. It does not necessarily follow from being satisfied that one party's conduct should be exposed, that the other party's involvement should also be exposed.

58. I do not share ICAC's view that the call "could not reasonably be regarded as embarrassing to the Consul-General or Japan". A more cautious consideration would fairly appreciate that it could be embarrassing for a representative of a friendly foreign government to be identified as having had an interaction with an Australian public official who is subject of investigation by ICAC for allegations concerning breach of public trust to improperly gain a benefit. Notwithstanding any embarrassment that may or may not have in fact followed the call being played, it would have been relevant for ICAC to also consider the broader interest of maintaining good diplomatic relations between Australia and Japan, including the interest of avoiding giving unnecessary offence to Japan.

59. In balancing those competing interests, it is my view that the Commission should have used more discretion when handling the intercepted call. Taking such a course of action would have necessitated that ICAC contact DFAT to seek its advice about the matter. Putting aside whether any advice could have revealed a settled view about the lawfulness of ICAC's conduct, it would have likely assisted ICAC to undertake a more informed consideration of other general matters including the effect of its conduct on the Commonwealth's relations with a friendly foreign nation such as Japan and the practical operation of protocols and customs.

60. The responses that ICAC has provided to my Office in relation to its use of the call have drawn attention to the conduct and decision making of counsel assisting. However, the Commission's responsibility to manage its own investigation must be accentuated. While counsel assisting made the ultimate decision to use the intercepted call in this particular instance, the call was intercepted in September 2017 and the Operation Keppel public inquiry did not commence until September 2020. By then the occurrence of the call was not a recent or live issue and a substantial period of time had passed. Commission officers from a range of teams ordinarily perform roles in the preparation of evidence and provision of it to counsel assisting. The observations in this report are directed towards the Commission and its processes, not the conduct of counsel assisting.

61. Overall, it is far from apparent that playing the intercepted call during a public inquiry was the only way in which ICAC could establish that Mr Maguire sought

to misuse the consular network. It would have been appropriate for ICAC to explore alternative options in consultation with DFAT. For example, it may have reviewed its holdings for other evidence to support the contention and instead put that to Mr Maguire. Or if no other suitable evidence existed, it could have considered different means of putting the intercepted call before him (perhaps, by only doing so during a private session, or with the making of a non-publication direction under s 112 of the ICAC Act). I note however, that any exploration of alternative options would have also required that ICAC keep an open mind to the possibility of it being advised that it should not have used the call at all.

62. It has been made clear through my inquiries with DFAT that there are well established processes in place for it to assist State agencies to ensure that their operations comply with Australia's obligations with respect to foreign relations. It is best placed to make judgements about any impact that may arise from a State agency's actions. At the time that the DFAT wrote to ICAC in December 2020, ICAC was already on notice through my inquiry that there were concerns about its conduct. DFAT clearly took a conciliatory approach in its correspondence to ICAC and expressed an offer to meet with the Chief Commissioner and ICAC CEO to assist the Commission to ensure its future operations are in keeping with Australia's obligations under the convention. ICAC did not take up that offer.

63. It would have been sensible for ICAC to do so in order for it to take appropriate steps to manage any consequences arising out of its conduct and to develop appropriate procedures to prevent recurrence. It is still open for ICAC to meet with DFAT in relation to this matter and in my draft report I recommended that it do so at the earliest available opportunity. The Chief Commissioner confirmed in his letter dated 15 July 2021 that ICAC is prepared to meet with representatives of DFAT.

Recommendations concerning ICAC policy and procedure

64. The matters raised in this report are serious. During the course of its investigations the ICAC obtains vast amounts of information through the use of a range of information gathering methodologies and statutory powers (not limited to interception under the TIA Act) and that information may be sensitive for a wide range of reasons (of which the application of the VCCR is only one example). It is important that it undertakes a careful consideration of what material is ultimately exposed during the course of a public inquiry.

65. In response to my draft report, the Chief Commissioner noted that "[t]he Commission is, of course, acutely aware of its obligations to utilise its coercive

powers (including its public inquiry power) with care and in a responsible manner." I wish to note that ICAC's handling of the intercepted call has not caused me to doubt that is the case. However, the matter has highlighted that there are circumstances in which its operations would benefit from greater co-operation with other agencies. Section 16 of the ICAC Act provides support for ICAC to take that course of action.

66. Accordingly, I recommend that the Commission:

1. Establish a clear process for identifying especially sensitive material intercepted under the TIA Act (or obtained through the use of any other methodology or power identified available to the Commission) and assessing whether that material should be disclosed during a public inquiry. That process should include a requirement for any such assessment to be documented.

2. To the extent that the exercise outlined in recommendation 1 requires ICAC to establish a process concerning how it deals with material that involves matters of public international law (including but not limited to the VCCR and VCDR), it should consult with DFAT. ICAC should also consult with any other agencies it identifies as having expertise that it may draw on for any other aspect of the exercise.

3. Take steps to ensure that any process established in response to recommendation 1 is appropriately incorporated into the Commission's relevant policies and procedures.

4. Report to my Office about its progress in implementing the above recommendations within 6 months from the date on which this report is tabled in Parliament.

Conclusion

67. While I am of the firm view that the manner in which the Commission dealt with the intercepted call does not amount to any of the matters referred to in s 57B(1)(b) or (c) and, specifically, not to "maladministration" within the meaning of the latter provision, I consider that the Commission should have both deployed more caution and discretion in its dealings with the intercepted call and, in addition, should have, at least, considered consulting with, and obtaining advice from, DFAT. My recommendations to avoid repetition of these issues are set out above.

68. Pursuant to s 78(1A) of the ICAC Act I recommend that this Report be made public forthwith.

Bruce R McClintock SC
Inspector
Independent Commission Against Corruption
27 August 2021

Attachment A

isentia

Daily Telegraph
Monday 23/11/2020
Page: 8
Section: General News
Region: Sydney Circulation: 221,641
Type: Capital City Daily
Size: 146.00 sq.cms.
Frequency: MTWTFS-

Brief: NSWPARL

MP says ICAC taps an insult to Japan

CLARE ARMSTRONG

A NSW corruption investigation into disgraced former state MP Daryl Maguire risked Australia's relationship with a critical ally by secretly taping and publishing the phone calls of diplomats, a federal government MP has warned.

Wentworth MP Dave Sharma said the NSW Independent Commission Against Corruption had become a "law unto itself" after it seemingly ignored international rules protecting diplomats by recording a conversation between Mr Maguire (below) and the Japanese Consul-General in Sydney, Keizo Takewaka, in November 2017.

Mr Sharma has raised his concerns with Attorney-General Christian Porter in a letter describing the actions of ICAC as "highly insulting" to Japan. He has suggested the NSW Government apologise on the body's behalf.

"(It) amounts to a violation of Australia's obligations under international law and ... has the potential to jeopardise Australia's diplomatic relations with a close trading and security partner," he said.

During the 2017 phone call Mr Maguire attempted to convince Mr Takewaka to help find a Japanese investor who would be willing to buy land around the new Western Sydney Airport.

ICAC heard Mr Maguire claim he had approached Mr Takewaka because he was concerned China had "too much influence" and the sale of the land to a Beijing-backed company might attract unwanted attention to his dealings.

Mr Takewaka has not been accused of any wrongdoing.

The conversation was made public in a hearing last month, for which Japanese officials were given no warning.

Mr Sharma said Australia had a "series of important obligations" towards diplomats.

Attachment B

NSW GOVERNMENT | Office of the Inspector of the Independent Commission Against Corruption

25 November 2020 Our Reference: C13 2021 01

Mr Dave Sharma MP
Federal Member for Wentworth
PO Box 545
Edgecliff NSW 2027

By email: dave.sharma.mp@aph.gov.au

Dear Mr Sharma

I fill the office of the NSW Inspector of the Independent Commission against Corruption and, as such, have statutory responsibility to deal with allegations of misconduct against the Commission.

I am considering an inquiry into the matters you are reported to have raised in the attached article in the Daily Telegraph of 23 November 2020.

I note that you are quoted as saying that the recording of the conversation to which the Japanese Consul-General was a party "amounts to a violation of Australia's obligations under international law and . . . has the potential to jeopardise Australia's diplomatic relations with a close trading and security partner".

It would assist me, as someone unfamiliar with the obligations to which you refer, if you would be so kind as to explain the basis for your statement that the Commission's conduct amounts to a violation of Australia's obligations under international law. I look forward to hearing from you.

If it makes it easier for you to respond and saves you some time, I would be happy to discuss these issues by telephone .

Yours sincerely,

B. R. McClintock

Bruce McClintock SC
Inspector, Independent Commission Against Corruption

Attachment C

NSW GOVERNMENT | Office of the Inspector of the Independent Commission Against Corruption

25 November 2020 Our Reference: C13 2021 02

The Hon Peter Hall QC
Chief Commissioner
Independent Commission Against Corruption
GPO Box 500
SYDNEY NSW 2000

By email: mpolydoropoulos@icac.nsw.gov.au

Dear Chief Commissioner

My attention has been drawn to an article published in the Daily Telegraph on 23 November 2020 (see attached). The article quotes Mr David Sharma MP the Federal member for the electorate of Wentworth as saying that the Commission's conduct in recording a conversation during its Operation Keppel investigation, to which the Japanese Consul-General was a party "amounts to a violation of Australia's obligations under international law and . . . has the potential to jeopardise Australia's diplomatic relations with a close trading and security partner". He also referred to the Commission ignoring "international rules protecting diplomats" by recording the conversation in question.

I would appreciate the Commission's response to Mr Sharma's allegations.

Yours sincerely,

B.R. McClintock

Bruce McClintock SC
Inspector, Independent Commission Against Corruption

Attachment D

DAVE SHARMA MP
Federal Member for Wentworth

The Hon Christian Porter MP
Attorney-General
House of Representatives
Parliament House
Canberra ACT 2600

11 November 2020

Dear Attorney,

I write to express my concern about recent conduct of the New South Wales Independent Commission Against Corruption (ICAC) that amounts to a violation of Australia's obligations under international law, and which has the potential to jeopardise Australia's diplomatic relations with a close trading and security partner.

At a public hearing held on 16 October 2020, ICAC disclosed the transcript of an intercepted phone call between Mr Daryl Maguire and the Japanese Consul-General in Sydney, Mr Keizo Takewaka, which took place in November 2017. (Relevant news article attached.)

Mr Maguire is being investigated by ICAC. Mr Takewaka is not. Neither Mr Takewaka nor the Government of Japan were aware of the fact that Mr Takewaka's telephone conversations were being intercepted and recorded. Nor were they made aware of the fact that the detail of such conversations would be publicly released by ICAC.

As a matter of long-standing customary international law, as codified in the Vienna Convention on Diplomatic Relations of 1961, Australia has a series of important obligations towards all diplomatic staff posted in Australia. Australia's diplomatic personnel rely extensively on these protections when posted overseas, and reciprocity in the observance of the Convention is a foundation for effective diplomatic relations.

Australia's obligations include with respect to the inviolability of person and premises. Article 22 stipulates that diplomatic premises shall be inviolable and immune from search and requistion. Article 27 stipulates that official

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correspondence of the mission shall be inviolable. Article 29 stipulates that the person of a diplomatic agent shall be inviolable and shall be treated with "due respect" by the host state, with all appropriate steps taken to prevent any attack on freedom or dignity.

Prima facie, the interception by ICAC of telephone calls involving the Japanese Consul-General appears to be a violation of Australia's obligations under the Vienna Convention, and in particular the above Articles.

Furthermore, the public disclosure of the content of this conversation, without any advance warning given, is a highly insulting and offensive diplomatic act. I do not know if Japan has registered an official protest over such an act, but they would be well within their rights to do so.

As you would know, Japan is a long-standing and exceptionally close strategic and economic partner of Australia. Our Prime Ministers enjoy close personal relations and the overall relationship is one of high trust and close proximity.

These actions by ICAC have the potential to lessen trust and undermine this close relationship, to the detriment of Australia's national interests.

It is particularly concerning that these actions have been undertaken by a quasi-judicial state government body which is not subject to executive oversight. Courts have established procedures for dealing with foreign diplomatic personnel. It would appear that in this instance ICAC is a law unto itself.

I would be grateful if you could convey this concern to the NSW Attorney General. I would suggest an apology from the NSW Government, on behalf of ICAC, to the Japanese Government would also be in order.

As an additional point, I believe this provides further reasoning for why we should proceed cautiously, carefully and deliberately with respect to the establishment of a Commonwealth Integrity Commission. Bodies of this sort have the potential to impact upon the proper functioning of the separation of powers at the federal level.

Yours truly,

Dave Sharma
Member for Wentworth

CC Senator The Hon Marise Payne, Minister for Foreign Affairs

THE AUSTRALIAN

ICAC turmoil: disgraced MP Daryl Maguire's call to consul over sale of heiress's land

By **KIERAN GAIR**, JOURNALIST
7:31PM OCTOBER 16, 2020

Daryl Maguire claimed it was concerns that China had "too much influence" in Australia that led him to try to secure a Japanese buyer for land owned by racing heiress Louise Waterhouse in western Sydney.

He made a bizarre attempt in November 2017 to persuade the consul for Japan in Sydney, Keizo Takewaka, to find a Japanese investor who would be willing to buy the land around the city's planned second airport.

In an intercepted phone call heard at the ICAC on Friday, Mr Maguire suggests to Mr Takewaka that he find a buyer for Ms Waterhouse's land near Badgerys Creek. "You might like to find one or two of the best potential partners or buyers," Mr Maguire said.

"The infrastructure is around the airport and they have, I think, a preference for some of our closer friends who we know we can rely on — do you know what I'm telling you? A South Korean company, a Japanese company."

The inquiry also heard that Mr Maguire was on a desperate crusade to pay off a $1.5m debt and believed he would be "back in the black" if he managed to help Ms Waterhouse sell the land.

The ICAC heard Mr Maguire claim he approached the consul because he was afraid China had "too much influence" and that a sale to a Beijing-backed company could attract unwanted attention to his business dealings.

Mr Takewaka, who is not accused of any wrongdoing, was told by Mr Maguire that Australia could "depend" on Japan when the country was in "trouble".

"This friend who has the land is very keen and when I said (that) Japanese expressed an interest after the Premier's visit, their eyes lit up they said 'Ah, Japanese good to do business with'," he said

in the call.

Counsel assisting the ICAC, Scott Robertson, asked Mr Maguire if he was authorised to suggest China had "too much influence" over land deals in Australia, and he replied "no".

The ICAC has previously heard that Mr Maguire and his business associate William Luong stood to earn a significant commission if they could find a buyer for Ms Waterhouse's land.

At one point, Chinese development company Country Garden was poised to pay the Waterhouse family $330m for the land, a deal that would have wiped Mr Maguire's $1.5m debt. The sale never eventuated, and nothing ever came of Mr Maguire's overtures to Mr Takewaka.

KIERAN GAIR, JOURNALIST
Kieran Gair is a reporter at The Australian. He has previously reported and produced for the ABC, Sky News, Sky News Business, and The Sydney Morning Herald. He studied Law and Journalism at UTS.

{"success":false,"message":"Widget not found"}

Attachment E

ICAC
INDEPENDENT COMMISSION
AGAINST CORRUPTION
NEW SOUTH WALES

Mr. B McClintock SC
Inspector
Office of the Inspector of the ICAC

BY EMAIL: oiicac_executive@oiicac.nsw.gov.au

Our Ref: Z20/0067

Your Ref: C13 2021 02

Dear Inspector,

Re: Operation Keppel – Daily Telegraph article of 23 November 2020

I am writing in response to your letter of 25 November 2020 concerning an article published in the *Daily Telegraph* on 23 November 2020 in which Mr David Sharma MP is quoted as saying that the Commission's conduct in recording a conversation to which the then Japanese Consul-General was a party "amounts to a violation of Australia's obligations under international law and…has the potential to jeopardise Australia's diplomatic relations with a close trading and security partner" and that the Commission ignored "international rules protecting diplomats" by recording recording the conversation.

During the course of its Operation Keppel investigation the Commission obtained a warrant under the *Telecommunications (Interception and Access) Act 1979* to intercept communications made to and from a telecommunications service operated by Mr Daryl Maguire.

One of the calls intercepted under the warrant was a call made by Mr Maguire to Keizo Takawana, the then Japanese Consul-General in Sydney, at 8:19pm on 14 September 2017. The conversation was played during the course of the Commission's Operation Keppel public inquiry on 16 October 2020 and became Exhibit 367. A copy is enclosed for your information.

The *Daily Telegraph* article does not identify the "international rules" or "international law" referred to by Mr Sharma.

It is possible that Mr Sharma had in mind the 1963 Vienna Convention on Consular Relations (VCCR). There is also a 1961Vienna Convention on Diplomatic Relations (VCDR), parts of which have been incorporated into Australian law by the *Diplomatic Privileges and Immunities Act 1967* (CW). However, it is the former that applies to Mr Takawana as, although the Consul-General of Japan in Sydney at the relevant time he does not appear to have had a diplomatic role.

The relevant part of Article 35 of the VCCR provides:

Freedom of communication

1. The receiving State shall permit and protect free communication on the part of the consular post for all official purposes. In communicating with the Government, the diplomatic missions and other consular posts, wherever

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situated, of the sending State, the consular post may employ all appropriate means, including diplomatic or consular couriers, diplomatic or consular bags and messages in code or cypher. However, the consular post may install and use a wireless transmitter only with the consent of the receiving State.

2. The official correspondence of the consular post shall be inviolable. Official correspondence means all correspondence relating to the consular post and its functions.

I note that Article 27 of the VCDR is in similar terms.

It is reasonably clear that the intercepted communication between Mr Maguire and Mr Takawana was not "*official correspondence*" in the sense that that term is used in Article 35 of the VCCR. That article is directed to ensuring that diplomatic and consular officials of a sending State have "*freedom of communication*" (see the heading to Article 35 of the VCCR) with, in particular, other nationals of the sending State including the sending State's "*Government*", "*diplomatic missions*" and "*other consular posts*" wherever situated (see para 1 of Article 35). It is reasonably clear that it is not directed to communications between consular officials and nationals of the receiving State such as Mr Maguire.

Consistent with this, the report of the International Law Commission to the General Assembly covering the work of is thirteenth session commented that the phrase "*for all official purposes*" in what became paragraph 1 of Article 35 of the VCCR "*relates to communication with the government of the sending State; with the authorities of that State, and, more particularly, with its diplomatic missions and other consulates, wherever situated; with the diplomatic missions and consulates of <u>other</u> States; and, lastly, with international organizations*": see *Yearbook of the International Law Commission, 1961* vol II at 111 (emphasis added).

In light of the above, that freedom of communication protected by Article 35 of the VCCR was not infringed by the telephone intercept in relation to Mr Maguire's telephone. That intercept did not in any way violate Mr Takewaka's freedom of communication with his Government or any other communication protected by the VCCR.

I am advised that Scott Robertson, Counsel Assisting the Commission, gave consideration to whether the Commission should not expose Mr Maguire's communication with Mr Takawana in public with a view to not embarrassing the Consul-General personally or Japan more generally. Mr Robertson took the view that the call could not reasonably be regarded as embarrassing to the Consul-General or Japan and that, in all the circumstances, the public interest in exposing Mr Maguire's conduct supported the playing of the recorded telephone call in public. I agree with that assessment.

I also note the following points:

1. Mr Sharma has not contacted the Commission about this issue.
2. The intercepted conversation was recorded as a result of intercepting a call initiated by Mr Maguire using his telecommunications service and was used for the purpose of establishing improper conduct on the part of Mr Maguire. There was no interception of any telecommunications service operated by Mr Takawana or the Japanese Consulate and no interference with any communication between Mr Takawana, the Japanese Government or other Japanese mission or consulate.
3. The intercepted call was relevant to the Commission's investigation. One of the matters being investigated by the Commission was whether Mr Maguire had misused his parliamentary position as chair of the NSW Asia Pacific Friendship Group (APFG) to

seek potential investors or purchasers of the SmartWest site near the new Sydney Airport in anticipation that if successful he would receive a financial benefit.

4. The intercepted call was relevant to establishing that Mr Maguire had sought, on this particular occasion, to use the consular network to which he had access as chair of the APFG with a view to benefitting himself. During the call Mr Maguire told Mr Takawana that "a friend" had asked him to do some "matchmaking" with a view to obtaining a Japanese commercial entity to either buy or partner in the development of the site and asked Mr Takawana to let him know of any potentially interested Japanese commercial entities so that Mr Maguire could introduce them. He also offered to arrange a "briefing" for Mr Takawana.
5. The intercepted call was played to Mr Maguire during the course of the public inquiry and tendered in evidence as Exhibit 367. After hearing the intercepted call Mr Maguire admitted that what he said in the call was an example of him using the consular network to which he had access as chair of the APFG with a view to pursuing his own private business interests and that it was wrong of him to do so. He agreed that he would not have engaged in the call but for the hope that he might gain a benefit.
6. The Commission was not concerned with the conduct of Mr Takawana and there has never been any suggestion that anything he said or did was improper or inappropriate. It was made quite clear in the evidence given by Mr Maguire that he never told Mr Takawana that he was motivated by the potential for private gain.
7. The Commission has not received any communication about this matter from the Japanese Consulate. Had the Japanese Consulate been concerned about publication of the intercepted call it would be expected that it would have made relevant representations to the Commission.
8. The Commission has not received any communications from the Commonwealth Attorney-General or any other Commonwealth government official regarding this matter.

Please let me know if you require any further information.

Yours sincerely,

The Hon Peter Hall QC
Chief Commissioner
3rd December 2020

Attachment F

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

MC20-034166

15 DEC 2020

Mr Dave Sharma MP
Member for Wentworth
PO Box 545
EDGECLIFF NSW 2027
Dave.Sharma.MP@aph.gov.au

Dear ~~Mr Sharma~~ Dave

Thank you for your letter of 11 November 2020 regarding your concerns about the recent conduct of the NSW Independent Commission against Corruption (ICAC). I share your concerns and agree that the important issues you have raised warrant the attention of the Australian Government.

The government takes seriously its obligations under the *Vienna Convention on Consular Relations*. The fact that ICAC disclosed the transcript of an intercepted phone call between Mr Daryl Maguire and former Japanese Consul-General Takewaka in the course of a public hearing, and did not provide any advance notice to the Consulate of its intention to do so was, in my view, poor handling of a sensitive issue that should have been treated with care.

My department has informed me that the Department of Foreign Affairs and Trade (DFAT) has briefed Japanese diplomatic representatives in Australia in relation to these issues. As raised in your letter, I agree it is important to register these concerns with the NSW Government and the ICAC to remind them of the Australia's legal obligations under both the *Vienna Convention on Consular Relations* and the *Vienna Convention on Diplomatic Relations*. I am advised that DFAT will raise this incident directly with the NSW Department of Premier and Cabinet and with ICAC.

I welcome your views regarding the government's proposed Commonwealth Integrity Commission (CIC). I agree that the CIC model requires careful consideration to avoid the pitfalls associated with many state-based integrity commissions, and to ensure that the CIC operates with due regard to the separation of powers. I note that under the CIC model, hearings by the public sector division, including hearings into corruption issues involving parliamentarians, would not be conducted in public. The Attorney-General would also be able to issue a certificate preventing disclosure of information by the CIC where this would be contrary to the public interest, including where the disclosure would prejudice international relations or reveal the existence or identity of a confidential source of information.

As you know, I have released the exposure draft legislation to establish the CIC for public comment by 12 February 2021 as part of a comprehensive, national consultation process on the draft model. Feedback received through the consultation process will be used to inform further work on the legislation before it is introduced to Parliament. I have asked my department to consider the issues raised in your letter to assess whether further safeguards are required to protect against disclosures of diplomatically-sensitive information.

Thank you again for bringing your concerns to my attention.

Yours sincerely

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

CC. Senator the Hon Marise Payne, Minister for Foreign Affairs

Attachment G

ADVICE

NSW GOVERNMENT | Crown Solicitor's Office

APPLICATION OF VIENNA CONVENTION ON CONSULAR RELATIONS 1963 UNDER S. 57B ICAC ACT 1988

Executive summary

1. You seek my advice as to whether the conduct of the Independent Commission Against Corruption ("the ICAC") with respect to the interception of a telephone call, to which the then Consul-General of Japan in Sydney was a party, was in contravention of the *Vienna Convention on Consular Relations 1963* ("the *VCCR*").

2. Paragraph 1 of Article 35 of the *VCCR* concerns the freedom of communication by consular officials. That paragraph is among the provisions of the *VCCR* given the force of law in Australia by the *Consular Privileges and Immunities Act 1972* (Cth) ("the *CPI Act*"). In circumstances where the ICAC's interception of the relevant telephone call occurred as a result of a warrant issued under the *Telecommunications (Interception and Access) Act 1979* (Cth) ("the *TIA Act*"), difficult and significant questions arise concerning both the proper construction of Article 35 and the interaction of the *TIA Act* with the *CPI Act*, each of those questions being relevant to the lawfulness of the ICAC's conduct. Because the effect of Article 35 is subject to doubt, I cannot presently reach a definitive conclusion, either with respect to the proper construction of Article 35, or with respect to whether the warrant issued to the ICAC under the *TIA Act* validly authorised the interception of the relevant telephone call.

Background

3. The ICAC is presently conducting an investigation, known as Operation Keppel, into allegations concerning Mr Daryl Maguire, a former Member of the NSW Parliament. In connection with that investigation, the ICAC obtained and executed a warrant, pursuant to s. 46[1] of the *TIA Act*, for the interception of a telecommunications service used by Mr Maguire. One of the intercepted telephone calls over that service, was a call on 14 September 2017 from Mr Maguire to Mr Keizo Takawana, the then Consul-General of Japan in Sydney. An audio recording of that call (to which I shall refer as "the Takawana call") was played during a public hearing of the ICAC on 16 October 2020, and Mr Maguire was asked questions in relation to it by counsel assisting the ICAC. A transcript of the Takawana call was tendered as Exhibit 367 in the investigation, and a copy of that transcript is now publicly available on the ICAC's Operation Keppel webpage.

4. Pursuant to s. 57B of the *Independent Commission Against Corruption Act 1988*, the Inspector of the ICAC is presently investigating, of his own initiative, the conduct of the ICAC with respect to the interception of the Takawana call. This follows concerns that have been expressed that the ICAC's conduct may have been inconsistent with the *VCCR*. The Chief Commissioner of the ICAC has relevantly expressed the view that the ICAC's conduct did not infringe the *VCCR*.

[1] Section 46 having been referred to at [37] of the Opening Statement of counsel assisting the ICAC in Operation Keppel: see https://www.icac.nsw.gov.au/ArticleDocuments/964/Operation%20Keppel%20Opening%20Statement_21Sep20.pdf.aspx.

Analysis

5. The lawfulness or otherwise of the ICAC's conduct in intercepting the Takawana call, and in dealing with the recording and transcript of that call, ultimately depends, as a matter of Australian law, on whether that conduct was authorised by the *TIA Act*, in particular by the warrant issued to the ICAC under s. 46 of the *TIA Act*. It is in the context of the operation of the *TIA Act*, I think, that the effect of the *VCCR* on the lawfulness of the ICAC's conduct falls to be considered.

6. An international treaty such as the *VCCR* does not, absent domestic legislation, have the force of law in Australia (see, for example, *Kioa v West* (1985) 159 CLR 550 at 570 per Gibbs CJ). That does not mean that the *VCCR*, of itself, is necessarily irrelevant to the construction of the *TIA Act*: at common law, there is a presumption that legislation is to be interpreted "as far as its language admits as not to be inconsistent with the comity of nations or with the established rules of international law" (see *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363 per O'Connor J), although the application of that presumption is limited to cases of ambiguity (see *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38 per Brennan, Deane and Dawson JJ, *Polites v Commonwealth* (1945) 70 CLR 60).

7. More pertinent, however, is the fact that certain parts of the *VCCR* have been given the force of law in Australia by s. 5(1) of the *CPI Act*, subject to certain local amendments (see s. 5(2) and, generally, ss. 6-11). Ascertaining the effect of the *VCCR* on the lawfulness of the ICAC's conduct with respect to the Takawana call therefore requires consideration of the interaction of the *TIA Act* and the *CPI Act*, the question being whether the s. 46 warrant, on which the ICAC relied to intercept the Takawana call, lawfully authorised the interception of a call to which the head of a consular post in Australia was a party.

8. If the *TIA Act* (in particular, s. 46) were properly to be read as subject to the requirements of the *CPI Act*, and if the interception of the Takawana call were inconsistent with a provision of the *VCCR* given the force of law by the *CPI Act*, that may mean that the ICAC could not have relied on the s. 46 warrant as providing lawful authority for intercepting the Takawana call. That, in turn, would raise a question as to whether the ICAC, in intercepting the Takawana call, had acted in contravention, not merely of the *CPI Act*, but also of ss. 7(1) and 105(1) of the *TIA Act*, which together have the effect that it is an offence for a person to intercept a communication passing over a telecommunications system, unless s. 7(2) applies. (By contrast, the *CPI Act* contains no provision imposing criminal liability for conduct that is inconsistent with the provisions of the *VCCR* to which the *CPI Act* gives the force of law.)

9. Section 7(2)(b) of the *TIA Act* disapplies s. 7(1) in cases where a communication is intercepted "under a warrant", which includes an "interception warrant" issued under s. 46 (see the definitions of the terms "warrant" and "interception warrant" in s. 5 of the *TIA Act*). If the interaction of the *TIA Act* and the *CPI Act* were resolved such that the s. 46 warrant issued to the ICAC did not authorise the interception of the Takawana call, because that interception contravened a provision of the *VCCR* given the force of law by the *CPI Act*, it would be necessary to identify an alternative paragraph of s. 7(2) that would disapply s. 7(1) (and s. 105(1)) with respect to the ICAC's interception of the Takawana call.

10. I do not have sufficient information before me to undertake that analysis with respect to the operation of ss. 7(1) and 105(1) of the *TIA Act*. I also do not think it is presently necessary to express a concluded view concerning the interaction of the *TIA Act* and the *CPI Act*. As I discuss below, the relevant provisions of the *VCCR* are uncertain in their meaning, such that, even if the *TIA Act* were to be read as not permitting the issuing of a warrant for the interception of a telephone call in circumstances that would contravene the *CPI Act*, uncertainty would remain as to precisely in what circumstances such interception would in fact contravene the *CPI Act*.

11. With the foregoing comments and context in mind, I turn to the relevant Articles of the *VCCR* that are given the force of law by the *CPI Act*.

12. The relevant Articles of the *VCCR* for present purposes would, I think, be: paras 1, 2 and 4 of Article 31 ("Inviolability of the consular premises"; para. 3 not being given the force of law by s. 5(1)); Article 35 ("Freedom of communication"); and Article 40 ("Protection of consular officers").

13. Beginning with Article 40, that Article provides that a receiving State "shall treat consular officers with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity". I refer to Article 40 only to note that it is not among the Articles given the force of law by the *CPI Act* (see again s. 5(1)).

14. As to Article 31, the applicable paragraphs of that Article provide:

> "*Article 31*
>
> *Inviolability of the consular premises*
>
> 1. Consular premises shall be inviolable to the extent provided in this Article.
>
> 2. The authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending State. The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.
>
> ...
>
> 4. The consular premises, their furnishings, the property of the consular post and its means of transport shall be immune from any form of requisition for purposes of national defence or public utility. If expropriation is necessary for such purposes, all possible steps shall be taken to avoid impeding the performance of consular functions, and prompt, adequate and effective compensation shall be paid to the sending State."

15. None of the information contained in your instructions suggests that the ICAC, or an officer of the ICAC, has acted contrary to the protection this Article affords to Japan's "consular premises", a term defined in Article 1 of the *VCCR* to mean "the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used exclusively for the purposes of the consular post" (see para. 1(j)). In a letter sent by the Chief Commissioner of the ICAC, a copy of which is attached to your instructions, the Chief Commissioner notes, among other things, that interception of the Takawana call did not involve "interception of any telecommunications service operated by [the Consul-General] or the Japanese Consulate" and instead involved "intercepting a call initiated by Mr Maguire using his telecommunications service" (see point 2 on p. 2 of the letter). That being

so, and in the absence of any other information going to this issue, nothing before me suggests any interference by the ICAC with "consular premises" contrary to Article 31.

16. As to Article 35, the relevant paragraphs of that Article for present purposes are paras 1 and 2, which provide:

> "*Article 35*
>
> *Freedom of communication*
>
> 1. The receiving State shall permit and protect freedom of communication on the part of the consular post for all official purposes. In communicating with the Government, the diplomatic missions and other consular posts, wherever situated, of the sending State, the consular post may employ all appropriate means, including diplomatic or consular couriers, diplomatic or consular bags and messages in code or cipher. However, the consular post may install and use a wireless transmitter only with the consent of the receiving State.
>
> 2. The official correspondence of the consular post shall be inviolable. Official correspondence means all correspondence relating to the consular post and its functions."

17. In the Chief Commissioner's letter, referred to above, the Chief Commissioner expressed the following view concerning the application of Article 35:

> "It is reasonably clear that the intercepted communication between Mr Maguire and [the then Consul-General] was not '*official correspondence*' in the sense that that term is used in Article 35 of the VCCR. That article is directed to ensuring that diplomatic and consular officials of sending State have '*freedom of communication*' (see the heading to Article 35 of the VCCR) with, in particular, other nationals of the sending State including the sending State's '*Government*' , '*diplomatic missions*' and '*other consular posts*' wherever situated (see para 1 of Article 35). It is reasonably clear that it is not directed to communications between consular officials and nationals of the receiving State such as Mr Maguire.
>
> Consistent with this, the report of the International Law Commission to the General Assembly covering the work of is thirteenth session commented that the phrase '*for all official purposes*' in what became paragraph 1 of Article 35 of the VCCR '*relates to communication with the government of the sending State; with the authorities of that State, and, more particularly, with its diplomatic missions and other consulates, wherever situated; with the diplomatic missions and consulates of other States; and, lastly, with international organizations*': see Yearbook of the International Law Commission, 1961 vol II at 111 (emphasis added).
>
> In light of the above, that freedom of communication protected by Article 35 of the VCCR was not infringed by the telephone intercept in relation to Mr Maguire's telephone. That intercept did not in any way violate [the then Consul-General's] freedom of communication with his Government or any other communication protected by the VCCR."

18. It is not clear to me that reliance on the International Law Commission report alone would be sufficient to address the intended meaning of para. 1. If limited in the manner described in that report, the scope of the "official purposes" that determine the extent of protection afforded by para. 1 of Article 35 might arguably be in tension with the extent of protection afforded by para. 2 of Article 35 to "official correspondence", a term that encompasses "all correspondence relating to the consular post **and its functions**" (my emphasis). Article 5 of the *VCCR* (which is given the force of law by s. 5(1) of the *CPI Act*) prescribes what "[c]onsular functions consist in". By paras (b) and (c) of Article 5, "consular functions" consist in, relevantly:

> "(b) furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention;

> (c) ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting thereon to the Government of the sending State and giving information to persons interested".

19. The transcript of the questioning of Mr Maguire by counsel assisting the ICAC, and the transcript of the Takawana call, suggest to me that part of Mr Maguire's purpose in approaching Mr Takawana may have been to elicit investments by Japanese companies in connection with developing land around the new airport at Badgerys Creek. This at least raises for consideration whether the purpose of the Takawana call, including on the part of Mr Takawana, related to Mr Takawana's performance of one of the "consular functions" referred to in para. (b) or para. (c) of Article 5 of the *VCCR*. If that were so, it would arguably be a surprising result if "correspondence" for that purpose were "official correspondence" protected by para. 2 of Article 35, while a telephone call for that same purpose were not for an "official purpose" that would engage the protection afforded by the immediately preceding paragraph of the same Article.[2]

20. In addition to these textual matters, certain secondary commentary concerning para. 1 of Article 27 of the *Vienna Convention on Diplomatic Relations 1961* ("the *VCDR*"), which is relevantly to the same effect as para. 1 of Article 35 of the *VCCR*, suggests that the interception generally of diplomatic telephone conversations would violate the freedom of communication afforded by Article 27. In the fourth edition of her *Commentary on the Vienna Convention on Diplomatic Relations* (2016, Oxford University Press, Oxford, p. 183), Eileen Denza refers to a 1970 publication by Finn Seyersted ("Diplomatic Freedom of Communication", in *Scandinavian Studies in Law*, 1970, Almqvist & Wiksell International, Stockholm, p. 209), in which the author describes as follows the obligation which Article 27 of the *VCDR* entails:

> "The receiving State must not attempt to become acquainted with the contents of the communications [of a diplomatic mission]—and it must take all reasonable precautions to prevent others from doing so. Thus the receiving State does not have the right to censor ordinary mail, or to open the diplomatic bag, or to listen in to telephones or private conversations, or to copy or decipher telegrams. If it employs these practices in respect of its own citizens, it must make an exception for diplomatic communications."

21. This passage has been understood by one commentator as a "clear" statement of the "legal obligation of a host State to restrain from surveillance of diplomatic communication" (see Kurbalija , J., "E-Diplomacy and Diplomatic Law in the Internet Era", in Ziolkowski, K. (ed.), *Peacetime Regime for State Activities in Cyberspace*, 2013, NATO CCD COE Publications, p. 418). The quoted passage further refers to the obligation for a receiving State to take reasonable precautions to prevent such surveillance by others.

22. While the matter is attended by considerable doubt, there may, I think, be some tension between the more confined description, in the International Law Commission's report, of the scope of communications to which the protection in para. 1 of Article 35 of the *VCCR* applies, and the somewhat broader description, in the secondary commentary referred to above, of the scope of

[2] As to the meaning of the term "correspondence" in the *VCCR*, I note that para. 3 of Article 54 of the *VCCR* draws a distinction between "official correspondence and other official communications in transit", while other references to "official correspondence" tend to suggest that such correspondence would take documentary form. Paragraph 3 of Article 35 suggests that "correspondence" may be contained in the consular bag, while para. 3 of Article 44 suggests that "official correspondence" is something that can be "produce[d]", and in neither case could such correspondence sensibly include a telephone call.

communications to which the protection in the equivalent provision of the *VCDR* applies. There does not appear to be a textual basis for distinguishing between the operation of the two provisions, and, to the extent that the freedom of communication afforded by the *VCDR* is properly understood to apply broadly to all communications by members of a diplomatic mission (or, at least, to all communications related to the functions of the mission), there is no obvious basis for reading para. 1 of Article 35 of the *VCCR* as affording a lesser degree of protection.

23. In the absence, however, of a clear and authoritative statement concerning the intended effect of para. 1 of Article 35 of the *VCCR*, I am unable to reach a definitive conclusion as to whether the ICAC's interception of the Takawana call was in contravention of that paragraph, so as to be in contravention of the *CPI Act*. In those circumstances, I am further unable to reach a definitive conclusion as to whether the warrant issued to the ICAC under s. 46 of the *TIA Act* validly authorised the interception of the Takawana call.

24. I acknowledge that difficult and sensitive questions arise concerning the proper construction of the *VCCR* and the *CPI Act*, the interaction of the *TIA Act* with the *CPI Act*, and their intersection with the practical operation of diplomatic protocols and customs, about which guidance from the Department of Foreign Affairs and Trade may be sought.

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