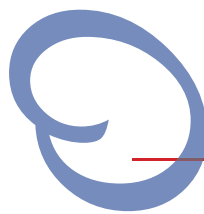




New South Wales



Office of the Inspector

of the Independent Commission
Against Corruption

**SPECIAL REPORT OF THE INSPECTOR OF THE INDEPENDENT
COMMISSION AGAINST CORRUPTION TO THE PARLIAMENT OF
NEW SOUTH WALES PURSUANT TO SECTION 77A OF THE
INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988**

**ON ISSUES RELATING TO THE INVESTIGATION BY THE INDEPENDENT
COMMISSION AGAINST CORRUPTION OF CERTAIN ALLEGATIONS
AGAINST THE HONOURABLE PETER BREEN, MLC.**



24 September 2008

Mr Peter Primrose MLC
President
Legislative Council
Parliament House
Sydney NSW 2000

The Hon. Richard Torbay MP
Speaker
Legislative Assembly
Parliament House
Sydney NSW 2000

Dear Mr President and Mr Speaker,

In accordance with s 77A of the *Independent Commission Against Corruption Act 1988*, I, as the Inspector of the Independent Commission Against Corruption, hereby furnish to each of you a Special Report on issues relating to the investigation by the Independent Commission Against Corruption of certain allegations against the Hon. Peter Breen MLC.

The report has been prepared in accordance with the requirements of the *Independent Commission Against Corruption Act 1988* ("the Act").

Pursuant to s 78(1A) of the Act, I recommend that the report be made public forthwith.

Yours sincerely,

Graham Kelly
Inspector

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Chapter 1

INTRODUCTION

1.1 The Inspector's role and functions

1.1.1 The Independent Commission Against Corruption (the ICAC or the Commission) was established by the *Independent Commission Against Corruption Act 1988* (the ICAC Act). The Inspector of the ICAC (the Inspector) is appointed pursuant to Part 5A of the ICAC Act. The Inspector is not a part of the Commission. The Inspector is supported by a small number of staff in the Office of the Inspector of the ICAC (the OIICAC). Section 3 of the ICAC Act defines "officer of the Inspector" to mean "the Inspector or a member of staff of the Inspector".

1.1.2 The functions and powers of the Inspector are set out in Part 5A of the ICAC Act. The principal functions of the Inspector are stated in s 57B (1) as being:

- (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.

1.1.3 The definition of maladministration provided in s 57B (4) is as follows:

For the purposes of this section, conduct is of the 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.

1.1.4 Section 57B (2) of the ICAC Act provides:

The functions of the Inspector may be exercised on the Inspector's own initiative, at the request of the Minister, in response to a complaint made to the Inspector or in response to a reference by the Joint Committee or any public authority or public official.

1.1.5 Section 57C sets out the powers of the Inspector as follows:

The Inspector:

- (a) may investigate any aspect of the Commission's operations or any conduct of officers of the Commission, and
- (b) is entitled to full access to the records of the Commission and to take or have copies made of any of them, and
- (c) may require officers of the Commission to supply information or produce documents or other things about any matter, or any class or kind of matters, relating to the Commission's operations or any conduct of officers of the Commission, and
- (d) may require officers of the Commission to attend before the Inspector to answer questions or produce documents or other things relating to the Commission's operations or any conduct of officers of the Commission, and
- (e) may investigate and assess complaints about the Commission or officers of the Commission, and
- (f) may refer matters relating to the Commission or officers of the Commission to other public authorities or public

- officials for consideration or action, and
- (g) may recommend disciplinary action or criminal prosecution against officers of the Commission.

1.1.6 Section 57F sets out other powers of the Inspector, described as incidental powers, as follows:

The Inspector has power to do all things necessary to be done for or in connection with, or reasonably incidental to, the exercise of the Inspector's functions. Any specific powers conferred on the Inspector are not taken to limit the generality of this section.

1.1.7 Section 57G, which commenced operation in June 2006, provides:

For the avoidance of doubt, a reference in any other provision of this Part to an officer of the Commission includes a reference to a former officer of the Commission.

1.1.8 Section 77A (a) provides as follows:

The Inspector may, at any time, 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[.]

1.2 The background to this special report

1.2.1 On 12 December 2005 the Hon. Kim Yeadon, MP, Chairman of the Parliamentary Joint Committee on the Independent Commission Against Corruption (the PJC) wrote to the Inspector on behalf of the PJC enclosing a copy of a letter that had been sent to the PJC by the Hon. Peter Breen, MLC, on 7 June 2005. In that letter, Mr Breen asserted that an application made on 3 October 2003 by an ICAC officer for a warrant to search his Parliamentary office (which was executed on 3 October 2003) contained "false and misleading" information and therefore that the warrant had been obtained on

false premises.

1.2.2 The warrant had been sought, obtained and executed in the course of an investigation that the ICAC was conducting into an anonymous allegation that it had received against Mr Breen that Mr Breen had been improperly claiming travel allowances and inappropriately using Parliamentary resources for non-Parliamentary purposes. The ICAC's final report into these allegations made no findings of corrupt conduct.

1.2.3 The application for the search warrant contained a sworn statement of information from the ICAC officer who made the application. The statement included references to information that the ICAC had obtained from Ms Adriana Sammartano, a member of staff of the Parliament who had been assigned to Mr Breen's office. In particular, the sworn statement referred to a residential property relevant to the investigation, 3 Lucia Crescent, Lismore. The sworn statement said "Ms Sammartano stated [to the ICAC] Mr Breen is a joint owner of the house in Lismore". The sworn statement then asserted that "Commission enquiries have confirmed that Mr Breen is the registered proprietor of this property". In his letter of 7 June 2005 to the PJC, Mr Breen alleged that this assertion was "false and misleading" because he was not the (or a) registered proprietor of 3 Lucia Crescent, Lismore.

1.2.4 Mr Breen's letter to the PJC said:

"The questions relating to the application for the search warrant that need to be investigated are as follows:

1. Was the judicial officer who issued the search warrant influenced by the false and misleading statement in the application that 'Commission enquiries have confirmed that Mr Breen is the registered proprietor of this property and that Valerie and Alfred Murphy reside at the property[']?
2. Was the judicial officer who issued the search warrant influenced by the false and misleading statements in the application in relation to information provided by Ms

Sammartano to the effect that:

- (1) false claims for the Sydney Allowance were made on the basis that I resided in Lismore when in fact I lived at Woolloomooloo;
 - (2) parliamentary entitlements were used for purposes not connected with my Parliamentary duties, in particular for the writing of my private books;
 - (3) changes in my living arrangements occurred as a result of the ICAC investigation into Malcolm Jones MLC?
3. Were these false and misleading statements by Ms Sammartano made by her in an interview or interviews with the ICAC, or were they inferences drawn by the ICAC officer who applied for the search warrant?
 4. Did the ICAC officer who applied for the search warrant use any information he knew to be false and misleading to bolster his application for the search warrant?"

1.2.5 Other issues that Mr Breen's letter to the PJC raised for consideration were:

- § the possibility of an offence against s 12B of the *Search Warrants Act 1985*;
- § the possibility of a breach of Parliamentary privilege (which is preserved by s 122 of the ICAC Act) in relation to the removal from Mr Breen's office of 130 privileged documents;
- § the significance and application of the *Parliamentary Precincts Act 1997*; and;
- § the adequacy or otherwise of responses from the present Commissioner of the ICAC, the Hon. Jerrold Cripps AO QC, to correspondence which raised Mr Breen's concerns directly with the Commission.

1.3 Why the OIICAC decided to investigate

1.3.1 The Inspector assessed the assertions contained in Mr Breen's letter to the PJC

to determine whether or not there was any substance to Mr Breen's allegation in the letter that there was false and misleading information in the application for the search warrant. The assessment found that there was support for Mr Breen's allegation.

1.3.2 The application for the warrant to search Mr Breen's Parliamentary office was made on 3 October 2003 by Robert Anthony Graham, an Investigator employed by the ICAC. The application asserted that "Commission enquiries have confirmed that Mr Breen is the registered proprietor of [3 Lucia Crescent, Lismore]".

1.3.3 Mr Breen provided to the OIICAC records from the Land Titles Office that showed that he had not been the owner of 3 Lucia Crescent, Lismore. Furthermore, the OIICAC's inspection of ICAC files found records that showed that on 1 October 2003 ICAC officers had obtained records that, properly understood, indicated that Mr Breen was not the owner of 3 Lucia Crescent, Lismore.

1.3.4 Following this preliminary assessment, the Inspector decided to undertake an investigation of the ICAC's handling of the allegations that had been made against Mr Breen pursuant to, among other powers, Section 57C(a) of the ICAC Act.

1.4 The scope of the OIICAC investigation

1.4.1 As part of this investigation, the Inspector examined the general circumstances surrounding:

- (a) the ICAC's decision to investigate Mr Breen;
- (b) the ICAC's understanding of, and compliance with, the relevant law including Parliamentary privilege so far as it related to the execution of the search warrant on Mr Breen's Parliamentary office;
- (c) the application for the warrant to search Mr Breen's Parliamentary office; and

- (d) the execution of the search warrant at Mr Breen's Parliamentary office (and the lead up to that execution).

1.4.2 In the course of the investigation, the Inspector learned that a second search warrant—a warrant to search 3 Lucia Crescent, Lismore—was later sought and obtained by the ICAC. It became relevant to investigate the circumstances in which this warrant was obtained and, eventually, a decision was made not to execute it.

1.5 Investigation methodology

1.5.1 The OIICAC obtained relevant files and other records from the ICAC relating to its investigation of Mr Breen and in particular its files relating to the application for and the execution of the search warrant.

1.5.2 Several interviews were also conducted in the period from May to August 2006. These included interviews with current and former ICAC officers who were involved in the application for and execution of the warrant to search Mr Breen's Parliamentary office on 3 October 2003. The names and positions held by witnesses as at October 2003 are provided in a list attached at Appendix 1.

1.5.3 In relation to issues concerning Parliamentary privilege advice was sought from Mr T.E.F Hughes AO QC. Assistance was also sought and received from Dr Gareth Griffith, Senior Research Officer, Politics and Government/Law, NSW Parliamentary Library Research Service. The OIICAC requested that the ICAC provide it with copies of any papers prepared for the ICAC prior to October 2003 on the issue of Parliamentary privilege. On 10 October 2007 the ICAC provided copies of an internal minute from Ms Annie McGlinchey dated 15 June 1989, an internal minute from Mr Simon Stretton dated 8 May 1992, a copy of an outline of submissions dated 21 June 1996 prepared by Mr Leslie Katz SC on behalf of the Speaker of the Legislative Assembly and an internal minute from Mr Roy Waldon dated 3

March 1998.

- 1.5.4 On 27 August 2008, only after the ICAC had made reference to these documents in its submission dated 15 July 2008 to the Inspector in relation to a draft of this report and only after a further specific request by the Inspector for the documents, the ICAC also forwarded to the OIICAC written advices it had received from the Solicitor General, Mr Michael Sexton SC, and the Crown Solicitor, Mr Ian Knight. These advices were provided to the ICAC in the period after the events in question had occurred.
- 1.5.5 A draft of this Report was provided to the ICAC and certain individuals for their review and to enable them to make any submissions which they wished to make. Written submissions were received from the persons listed at Appendix 2. This Report takes into account, to the extent considered appropriate, the matters raised in the written submissions.

1.6 Limitations

- 1.6.1 The ICAC routinely conducts investigations, applies for search warrants and executes those warrants. However, this report is necessarily limited to:
- (a) an examination of only one investigation conducted by the ICAC;
 - (b) a consideration of two applications for search warrants;
 - (c) a consideration of one execution of a search warrant (being an execution that was conducted at a Parliamentary office);
 - (d) the evidence provided by the particular officers and former officers of the ICAC who were interviewed by staff of the OIICAC, and that of Ms Sammartano, the authorising justices who issued the search warrants and the then Deputy Clerk to the Legislative Council; and
 - (e) a consideration of other materials supplied by the ICAC and current and former officers of the ICAC, including the submissions and legal opinions referred to above.

1.6.2 This report, its findings and conclusions are necessarily limited by reference to the above matters.

1.6.3 In addition, it should be noted that witnesses were interviewed in the period from May to August 2006 (with one further witness interviewed in November 2007) which was some time after the events in question had occurred. Most of those witnesses had moved on to other employment and had little involvement with the ICAC since the time of the events in question. The passage of time has invariably impacted on the witnesses' recall of the events in question.

Chapter 2

THE ICAC'S INVESTIGATION INTO ALLEGATIONS AGAINST MR BREEN

2.1 The Inspector's role

2.1.1 The investigation focussed on, but was not confined to, the issues articulated in Mr Breen's letter dated 7 June 2005 to the PJC. It is also focussed on matters affecting the ICAC in so far as those matters have arisen from the ICAC's investigation of Mr Breen. In each case, the investigation was directed towards investigating aspects of the Commission's operations and the conduct of its officers (including former officers).

2.1.2 The Inspector has not assumed the role of determining whether or not there was a legitimate operational basis for the ICAC to investigate the allegations against Mr Breen in the first instance. However, the decision to investigate Mr Breen and the investigation process up to the time the decision to apply for a search warrant was made are relevant to understanding the ICAC's investigation of Mr Breen. This understanding is relevant to the proper resolution of the issues raised in Mr Breen's letter to the PJC and of the matters affecting the ICAC arising out of that process.

2.2 The complaint to the ICAC

2.2.1 On 20 August 2003 the ICAC received an anonymous complaint in writing addressed to Chris Bentley, an Investigator at the ICAC. The correspondent indicated that he or she wished to remain anonymous.

2.2.2 The letter alleged corrupt conduct by Mr Breen and another named Member of the Legislative Council. The allegations against Mr Breen as contained in the anonymous letter were:

- § that Mr Breen claimed a “living outside of Sydney allowance” (a Parliamentary allowance sometimes called the “the Sydney Allowance” which can be claimed in respect of time spent in Sydney on Parliamentary business but may only be claimed by Parliamentarians who ordinarily reside outside Sydney) on the basis that his “prominent” (sic) [permanent] place of residence was Byron Bay, whereas (so it was alleged) Mr Breen resided in Sydney and when in Byron Bay Mr Breen stayed in hotel or motel accommodation;
- § that Mr Breen used his Parliamentary staffer over a period of about 6 months to type a book he was writing, this allegedly being “a direct abuse of parliamentary staff for personal profit” (the complainant named the book as being “The Book of Letters reprint 2002” and named an “Adriana” on Mr Breen’s staff as a person who could provide further evidence on this matter); and
- § that Mr Breen claimed the Parliamentary Logistical Support Allowance (LSA) when he travelled to visit an inmate at Goulburn gaol, Stephen Wayne Jamieson, when (it was alleged) Mr Breen was writing a book about Mr Jamieson for personal profit, this allegedly constituting an abuse of Parliamentary entitlements (again, Mr Breen’s staff member “Adriana” was named a person who could assist by providing information).

2.3 The ICAC’s initial assessment of the complaint

- 2.3.1 On 20 August 2003 a written assessment of the anonymous complaint was made. The assessment opined that there was “very little to go on here” but noted that “[t]he matter is interesting in terms of misuse of LSA.”
- 2.3.2 Early on 1 September 2003 a male person claiming to be the anonymous complainant telephoned the ICAC. He inquired about the status of the matter and was told that he could not be given any feedback. The caller advised that “Adriana” could assist with inquiries.¹

¹ C. Bentley, ICAC Case Note Report, 1 September 2003 at 8.20am.

- 2.3.3 An examination of information held by the ICAC from other investigations that might have been relevant to the complaint against Mr Breen revealed that in another investigation certain information had been provided by a person against Mr Breen.²
- 2.3.4 An undated two-page report entitled “assessment document” was submitted by the ICAC’s Assessments Section to the Assessment Panel of the ICAC regarding the allegations against Mr Breen and the other named Member of Parliament. The report noted that John Pritchard, the ICAC’s Executive Director, Legal, and Solicitor to the Commission, had advised that the complaint was of interest to the Legal Unit in relation to a separate investigation involving another Member of Parliament but the report recommended “that the matter not be referred to the Legal Unit”. However, the matter was subsequently referred to the Legal Unit which, by a memo dated 7 September 2003, concluded that “there is sufficient detail about the complaints and reference to specific persons who can provide information such that it cannot be dismissed at this stage and some further inquiries should be conducted”.³

2.4 The ICAC’s decision to investigate

- 2.4.1 On 7 September 2003 a memorandum was sent by Mr Pritchard to Michael Outram (the Executive Director of the Strategic Operations Division (SOD) of the ICAC) via the Deputy Commissioner, Kieran Pehm. The memorandum was entitled “Various Allegations Against Members of the Legislative Council”. It:

§ noted that the complaint against Mr Breen and the other named Member of the Legislative Council had been referred from the Assessment Panel to the Legal Unit on 2 September 2003;

² ICAC Enquiry Report, 1 September 2003 at 9.42am.

³ Mr Pehm’s submission that the matter was referred to the Legal Unit because of issues relating to Parliamentary privilege is not supported by the contemporaneous records maintained by the ICAC (including the undated assessment document and the memo of 7 September 2003 referred to above).

§ noted that a copy of the complaint document (i.e. the anonymous letter received by the ICAC on 20 August 2003), with some deletions, had also been provided to the ICAC by Australian Associated Press as it appeared that the original document had been faxed to a number of news media outlets; and

§ attached an article from *The Sydney Morning Herald* of 2 September 2003 that stated that an anonymous document listing a series of accusations against Mr Breen and the other named Member of the Legislative Council had been distributed to mail boxes in Parliament House.

The memorandum recommended that, although the motivation for making the complaint might be dubious, the allegations should be investigated because there was sufficient detail to warrant further inquiries. Next to the Deputy Commissioner's name on the document was the handwritten note, "Agreed", a signature, and the date "8/9", apparently meaning 8 September 2003.

2.4.2 In his interview with OIICAC staff on 9 May 2006, Mr Pritchard advised that he also formed the view that the complaint against Mr Breen needed to be investigated further by the ICAC because it was not a matter that could be referred back to Parliament for investigation.

2.5 The early part of ICAC's investigation

2.5.1 The complaint against Mr Breen was referred to the SOD. The SOD consisted of about 50 employees including an Executive Director, an Executive Officer, an Executive Assistant, an Operations Advisor, a Financial Investigator, an Education Officer, the Strategic Risk Assessment Unit (which in turn consisted of the Strategic Intelligence Team, Surveillance Team and Special Projects Team) and two investigation teams (each one headed by a Chief Investigator).

2.5.2 After the complaint against Mr Breen had been referred to the SOD, it was assigned to the investigations team headed by Chief Investigator Andrew Patterson. Mr Patterson was supported by a Deputy Chief Investigator.

However, for the purpose of the complaint against Mr Breen, all members of that team reported to Mr Patterson directly. Between 7 September and 2 October 2003 the investigation of the allegations against Mr Breen was conducted by Mr Patterson and Yota Findanis, a Financial Investigator assigned to Mr Patterson's team. Another member of the team who worked on the matter was Investigator Robert Graham. Lawyer Tim Lowe of the Legal Unit was assigned to assist the investigation in the role of "Team Lawyer" (a term that actually signified his allocation to the investigation, not to the Investigation Team).

2.5.3 From 16 September to 1 October 2003 Mr Patterson made several telephone calls regarding the allegations against Mr Breen and the other named Member of the Legislative Council. Several of the persons whom he contacted advised that they did not have first hand knowledge regarding the allegations and that what they did know had come second hand from other Parliamentary staff or from "corridor gossip". A number of persons advised Mr Patterson to speak to Adriana Sammartano. As noted above, Ms Sammartano was a member of staff in Mr Breen's office, whom it was suggested in the anonymous complaint could provide information. Mr Patterson also sought unsuccessfully to contact other persons, including Ms Sammartano.

2.5.4 On 30 September 2003 Mr Patterson spoke to the person who had provided information about Mr Breen (see paragraph 2.3.3 above). The person advised Mr Patterson that he or she did not have any first hand knowledge of the allegations now being investigated and nominated Ms Sammartano as a primary source of information.⁴

2.5.5 On 30 September 2003 at 2.45 pm an ICAC "Case Note Report" was created by Andrew Patterson recording that he had not been able to contact Ms Sammartano either at home or at work. The Case Note Report stated: "No message left on work answering machine as she works in BREEN's office and I don't want to announce our interest to BREEN as yet."

⁴ A. Patterson, ICAC Case Note Report, 30 September 2003 at 2.35pm.

PATTERSON: If—okay well something is what you think, or that’s your opinion, but just preface it by saying that’s what you think—

SAMMARTANO: Yeah I think he—I think he lives more in Sydney than what he lives in Lismore.

2.5.10 Ms Sammartano’s information on the issue of whether Mr Breen owned the house in Lismore was as follows:

PATTERSON: The address in Lismore, are you aware if anybody lives there?

SAMMARTANO: Yes.

PATTERSON: Who’s that?

SAMMARTANO: Well, the house belongs to Valerie Housego—Valerie Armstrong. She’s known as three names. She’s got three names. . .

2.5.11 By late afternoon on 2 October 2003 Mr Patterson’s several inquiries into Mr Breen had turned up no evidence to support the anonymous allegation against Mr Breen from any person other than the information provided by Ms Sammartano as referred to above.

2.5.12 Just before 5.50pm, Ms Sammartano telephoned Mr Patterson.⁷ The call was interpreted by Mr Patterson as raising the possibility that Mr Breen now knew of the ICAC’s investigation and could destroy relevant documents. Although the ICAC had already decided that it would ultimately execute a search on Mr Breen’s Parliamentary office, this telephone call led directly to the ICAC’s decision to bring forward the execution of that warrant. Before examining the circumstances of that decision (which is done in Chapter 5), it is convenient to refer to the ICAC’s understanding of relevant law (Chapter 3) and the ICAC’s procedures, guidelines and assignment to staff of roles and responsibilities regarding applications for search warrants (Chapter 4).

⁷ A. Patterson, ICAC Case Note Report, 2 October 2003 at 5.50pm.

Chapter 3

RELEVANT LAW AND THE ICAC'S UNDERSTANDING OF IT

3.1 Introduction

3.1.1 An understanding of the events that form the subject of this report is aided by an appreciation of the understanding held by involved ICAC personnel of relevant aspects of the law. The principal areas of law relevant to this matter are:

§ the ICAC Act;

§ Parliamentary privilege ;

§ the *Parliamentary Precincts Act 1997*; and

§ the *Search Warrants Act 1985* (which was repealed and replaced by the *Law Enforcement (Powers and Responsibilities) Act 2002*, which relevantly commenced operation on 1 December 2005).

3.1.2 The precise contents and scope of Parliamentary privilege are not easy to discern, it being significantly dependent on the Parliament's own assertion of its privileges. The interaction of Parliamentary privilege and statutory law can be complex. In fairness to those involved, these difficulties must be borne in mind when judging activities that may attract the operation of these laws.

3.2 The ICAC Act

3.2.1 Division 4 (ss 40–48) of Part 4 of the ICAC Act deals with search warrants. In October 2003 s 40 provided:

Issue of search warrant

- (1) An authorised justice to whom an application is made under subsection (4) may issue a search warrant if satisfied that there are reasonable grounds for doing so.
- (2) The Commissioner, on application made to the

Commissioner under subsection (4), may issue a search warrant if the Commissioner thinks fit in the circumstances and if satisfied that there are reasonable grounds for doing so.

- (3) Search warrants should, as far as practicable, be issued by authorised justices, but nothing in this subsection affects the discretion of the Commissioner to issue them.
- (4) An officer of the Commission may apply to an authorised justice or the Commissioner for a search warrant if the officer has reasonable grounds for believing that there is in or on any premises a document or other thing connected with any matter that is being investigated under this Act or that such a document or other thing may, within the next following 72 hours, be brought into or onto the premises.

3.2.2 Section 48 (1) provided (in October 2003):

Application of provisions of the Search Warrants Act 1985

- (1) Part 3 of the Search Warrants Act 1985 (other than sections 16–20) applies to a search warrant issued under this Act.
- (2) Part 3 of the Search Warrants Act 1985 so applies as if references in that Part to an authorised justice to whom an application for a search warrant is made or by whom a search warrant is issued included (where relevant) references to the Commissioner, where such an application is made to the Commissioner or a search warrant is issued by the Commissioner.

3.2.3 Section 122 of the ICAC Act provides:

Nothing in this Act shall be taken to affect the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament.

3.3 Parliamentary privilege

3.3.1 Dr Gareth Griffith, Senior Research Officer, Politics and Government/Law, NSW Parliamentary Library Research Service, has kindly granted permission for this Report to reproduce extracts from a paper which he wrote for the NSW Parliament, Background Paper no. 1/07 “Parliamentary Privilege: Major Developments and Current Issues”. The extracts are gratefully reproduced as a convenient introduction to relevant aspects of Parliamentary privilege. It will be seen that the paper was written after the execution of the warrant to search Mr Breen’s office and, indeed, demonstrates that the warrant triggered consideration of some issues that had not previously received attention.

3.3.2 The paper says:

Parliamentary privilege concerns the powers, privileges and immunities from aspects of the general law conferred, as a matter of inherent right or under statute, on the Houses of Parliament, their Members, officers and committees. The justification for parliamentary privilege is that, if the Houses are to perform their constitutional functions – to inquire, debate and legislate – effectively, they must have the freedom to conduct their own proceedings without undue interference from outside bodies. Parliamentary privilege refers therefore to the bundle of powers, rights and immunities ‘necessary’ for the effective performance of parliamentary functions.

As with any complex subject, various distinctions are drawn within the law of parliamentary privilege and practice. Most common is the distinction between those rights and immunities enjoyed by Members and parliamentary officers individually (but not for their personal benefit), on one side, and the rights and powers of the Houses of Parliament in their collective capacity, on the other.

In the main the immunities enjoyed on an individual basis

provide exemptions from the ordinary law and include:

Freedom of speech in Parliament, the effect of which is that members are immune from liability for anything they may say or write in the course of parliamentary proceedings.

By extension there is immunity for parliamentary witnesses from being questioned or impeached by courts or tribunals about evidence given before either House of Parliament or any parliamentary committee.

There is also qualified immunity of members and officers from legal process. For members there is exemption from compulsory attendance before a court or tribunal when Parliament is sitting. Exemption from jury service for members and officers of Parliament is another facet of this immunity.

Those rights and powers enjoyed by the Houses of Parliament on a collective or corporate basis include:

The power to control publication of debates and proceedings, which means there is a right to exclude strangers, to debate with closed doors, as well as to prohibit the publication of debates and proceedings.

The power to regulate internal affairs and procedures, which refers to the power of the House to control its own agenda and proceedings. This includes the inherent right to discipline members and, in NSW, extends to the power to expel those guilty of conduct unworthy of a member of Parliament.

The power to conduct inquiries and order production of documents, which means that witnesses before parliamentary committees (or, more usually, before either House of Parliament) can be compelled to attend, that the production of documents can be ordered and that evidence can be taken under oath.

In NSW there is no legislation comprehensively defining the powers and privileges of its Houses of Parliament. In all other Australian jurisdictions, with the limited exception of Tasmania, the privileges of Parliament are so defined either by

reference to the British House of Commons or by specific statute, as in the case of the Parliamentary Privileges Act 1987 (Cth). Certain legislation does operate in NSW in this area, including Article 9 of the Bill of Rights 1689. However, by none of these statutes, alone or in combination, does the Legislative Council or the Legislative Assembly possess the full range of powers and privileges enjoyed by the Houses of the Westminster Parliament.

Instead, the powers and privileges of the Houses of the NSW Parliament are founded largely upon the common law and, as such, are a reflection of Australia's colonial history.

However, in a legislature established by statute, as was the legislature of New South Wales, the privileges and immunities of the respective Houses and their members are limited to those either expressly conferred by or pursuant to statute; or necessarily incidental to the proper exercise of the functions vested in it.

Sources of parliamentary privilege

The NSW Parliament's powers and privileges derive from the following sources:

- the common law, as implied by reasonable necessity;
- imported by the adoption of the Bill of Rights 1689;
- conferred by the Defamation Act 2005 (NSW); and
- conferred by other legislation.

In essence, the common law test is whether any particular power or privilege is reasonably necessary today, in its present form, for the effective function of either House.

The defence of qualified privilege: Whereas 'parliamentary proceedings', including statements made by members in either House, are subject to absolute privilege, those statements made by members outside the Houses of Parliament are, on the other hand, subject to the normal laws of defamation and breach of confidence, save where they are protected by qualified

privilege.

3.3.3 Dr Griffith's paper also states in a later section:

At the Commonwealth level, the Australian Federal Police National Guideline acknowledges that 'In some cases the question will turn on what has been done with [a] document, or what a Member intends to do with it, rather than what is contained in the document or where it was found'. Based on *O'Chee v Rowley*, the following three-step test was formulated by the Privileges Committee to decide if a disputed document constitutes a proceeding in Parliament:

Were the documents brought into existence for the purposes of or incidental to the transacting of business in a House or committee?

YES → falls within 'proceedings in Parliament'

NO → move to question 2

Have the documents been subsequently used for the purposes of or incidental to the transacting of business in a House or committee?

YES → falls within 'proceedings in Parliament'

NO → move to question 3

Have the documents been retained for the purposes of or incidental to the transacting of business in a House or committee?

YES → falls within 'proceedings in Parliament'

NO → does not fall within 'proceedings in Parliament'.

Applying this test to the documents at issue in the Breen case, the claim of privilege was upheld. Summarising the Committee's findings at this second stage, the Clerk, John Evans, commented:

In its analysis of the documents and the application of parliamentary privilege in this case, the Committee noted that the documents in question had not been created for the purpose of parliamentary proceedings...However, the Committee found

that the documents had been retained by the member for purposes incidental to the transaction of parliamentary proceedings. It further found that, as the documents had been retained for such a purpose, they fell within the scope of 'proceedings in Parliament' within the meaning of Article 9. In light of these findings, the Committee recommended that the House uphold the claim of privilege made by the member in this case.

The third report, published in February 2006, returned to the long-term issue of the development of protocols for the execution of search warrants on Members' offices. The catalyst for the inquiry was the receipt in March 2005 by both the President and the Speaker of correspondence from the ICAC Commissioner proposing that a protocol be developed for the exercise of the ICAC's powers with respect to Members of Parliament. In June 2005 the Council's Privileges Committee adopted an Issues Paper which included a draft protocol for the execution of search warrants in Members' offices, a draft that drew upon protocols and procedures in place in other jurisdictions, notably the Commonwealth Parliament. This Issues Paper was sent to 11 agencies for comment, including the ICAC and NSW Police, following which a revised protocol was agreed to by the Committee for recommendation for adoption to the House. Consistent with the inquiry's terms of reference, the recommended protocol set out procedures to be followed:

- in obtaining a search warrant;
- prior to executing a search warrant;
- in executing a search warrant;
- if privilege or immunity is claimed; and
- for the resolution of disputed claims of privilege.

In respect to disputed claims of privilege, the three-step test set out in the second report of March 2004 – Parliamentary privilege seizure of documents by ICAC No 2 was adopted by

the Committee. In addition, a definition of ‘parliamentary proceedings’ was adopted in identical terms to s 16(2) of the Commonwealth *Parliamentary Privileges Act* 1987. One point of dispute that arose between the Committee on one side and ICAC on the other referred to the application of the three-step test. The Committee insisted that it was for the Clerk and the Member concerned to determine at first instance whether the documents in question were ‘proceedings in Parliament’ for the purposes of the test, and leaving it to the House to make a final determination. For its part, the ICAC rejected the three-step test:

- suggesting instead that an independent arbiter (such as a Senior Counsel or retired Supreme Court judge) should be used to resolve any dispute over contested documents. This independent person is to provide a recommendation to the House in relation to each disputed document, which is also to be made available to the member and the Commission. Ultimately the House is to determine whether or not to uphold the claim, but must table its reasons for the decision.

The NSW Police expressed a preference for items in dispute to be held by the nearest or issuing court, rather than with the Clerk, while the issue of privilege is being determined. The NSW Police position was that:

- documents may be withheld from production only when in the public interest, and that the protection of confidentiality (as opposed to privilege) of documents must be balanced against the interests of justice, including the impact on law enforcement agencies’ investigations of serious criminal offences.

In response, the Privileges Committee said that neither the ICAC nor the NSW Police had ‘demonstrated an adequate understanding of the import of parliamentary privilege in relation to the seizure of documents’, adding it was ‘not willing

to compromise on the important protection provided by the procedures in the draft protocol'. According to the Committee: 'The Parliament alone is the proper authority to determine whether or not documents are privileged'. In the event, to facilitate the expeditious handling of privilege claims, the Committee did agree to amend the Draft Protocol by providing that in cases where the House has been prorogued, or where the House is in recess and the integrity of the investigation is likely to be compromised, an independent arbiter should be appointed to verify the claim of privilege. The full text of the protocol, as recommended by the Privileges Committee, is set out in Chapter 5 of Report 33 of February 2006. To date, the proposed Protocol has not been adopted by the House. Nor has the suggestion of a common approach by the Council and Assembly been acted upon.

3.4 *Parliamentary Precincts Act 1997*

3.4.1 The *Parliamentary Precincts Act 1997* is an Act that "define[s] the Parliamentary precincts" and "provide[s] for the control, management and security of those precincts and adjoining areas".⁸

3.4.2 Dr Griffith's paper outlines the key features of the *Parliamentary Precincts Act* as follows:

Parliamentary Precincts Act 1997: This legislation has four main features. First, it defines an area called the 'Parliamentary precincts' by reference to a lot in a deposited plan. Secondly, the control and management of those precincts is vested in the Presiding Officers (s 7). Thirdly, it sets out the powers of the Presiding Officers to exclude persons from the parliamentary precincts, in which case an 'authorised officer' may arrest a person who fails to comply with a direction (ss 18-19). A

⁸ Long Title of the *Parliamentary Precincts Act 1997*.

police officer may be an 'authorised officer' for this purpose, if acting under a memorandum of understanding between a Presiding Officer and the Commissioner of Police, or in conformity with a specific authorisation by a Presiding Officer. Fourthly, for security purposes the Act defines an area called the 'parliamentary zone' by reference to a deposited plan and provides for arrangements to be made with the police for this purpose (s 15). The premises defined to be included in the parliamentary precincts may be amended by resolution of both Houses (s 12), as may the premises to be included in the parliamentary zone (s 17).

The effect of the Parliamentary Precincts Act 1997 is to enhance the power of the Houses of the NSW Parliament to control strangers. For example, s 18 empowers an 'authorised officer' to direct a stranger 'to leave or not enter the Parliamentary precincts', whereas s 20 similarly empowers an 'authorised officer' to remove strangers from the precincts of Parliament. Various offences are created under the Act, punishable by fine.

It is expressly stated that nothing in the Act derogates from the powers, privileges and immunities of Parliament, each House, their members and committees, and the Presiding Officers (s 26(1)). Note, too, that the Act does not purport to cover all other functions (if any) of police officers within the parliamentary precincts or parliamentary zone, matters the legislation contemplates will be subject to a memorandum of understanding (s 26(3)). Nor does the Act provide the Presiding Officers with powers to issue directions to Members within the parliamentary precincts or parliamentary zone (s 26(2) and s 25 respectively).

3.5 ***Search Warrants Act 1985***

3.5.1 The *Search Warrants Act 1985* was in force in October 2003. It provided that:

- a person could apply to an authorised justice for a warrant to search premises for documents; and
- an authorised justice could issue a warrant.

An “authorised justice” was defined in section 3 to include “a justice of the peace who is employed in the Department of Courts Administration and who is declared (whether by name or by reference to the holder of a particular office) by the Minister administering this Act by instrument in writing or by order published in the Gazette, to be an authorised justice for the purposes of this Act”.

3.5.2 Section 3 of the Act defined an occupier as:

occupier, in relation to any premises, includes a person in charge of the premises.

3.5.3 Section 15 (3) (a) of the *Search Warrants Act 1985* also required a copy of an occupier’s notice, containing details such as the nature of the warrant and the premises on which it was authorised to be executed, to be served “upon entry into or onto the premises or as soon as practicable thereafter” on a person “who appears to be the occupier of the premises and to be of or above the age of 18 years.”

3.5.4 Section 15 (3) (b) provided that:

if no such person is then present in or on the premises, serve the occupier’s notice on the occupier of the premises, either personally or in such manner as the authorised justice who issued the warrant may direct, as soon as practicable after issuing the warrant.

Subsection 15 (5) provided that service of an occupier’s notice pursuant to

subsection (3) (b) “shall not be postponed on any one occasion for a period exceeding 6 months.”

3.5.5 Section 16 provided that a person executing the search warrant only had to produce the warrant for inspection if requested to do so by the occupier of a premise.

3.5.6 Section 12B provided:

(1) A person must not, in or in connection with an application for a search warrant, give information to an authorised justice that the person knows to be false or misleading in a material particular.

Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.

(2) This section applies to an application by telephone as well as in person.

(3) This section applies whether or not the information given is also verified on oath or affirmation or by affidavit.

3.6 *Crane v Gething*

3.6.1 Dr Griffith’s paper discusses the law’s treatment of the nature of a search warrant application and execution as follows:

An important distinction is that, while subpoenas and orders for discovery are associated with the judicial arm of government, it has been ruled that the issuing and execution of search warrants are administrative or executive acts in aid of an executive investigation. This was the finding in *Crane v Gething*, a case concerning documents relating to a Senator’s travel arrangements, where French J concluded that it is ‘not, in the ordinary course, for the courts to decide questions of privilege as between the executive and the Parliament in litigation between the subject and the executive’. Odgers’

Australian Senate Practice comments that the ‘finding was contrary to a submission made by the Senate, to the effect that parliamentary privilege protected from seizure only documents closely connected with proceedings in the Senate, and that the court could determine whether particular documents were so protected’. It added: ‘This aspect of the judgement was not appealed and is unlikely to be regarded as authoritative’ (emphasis added).

In effect, the execution of search warrants, the issuing of subpoenas and orders for discovery process remain areas of uncertainty in the law of parliamentary privilege.

At the Commonwealth level, parliamentary privilege is defined by statute under the *Parliamentary Privileges Act 1987*.

3.6.2 In *Crane v Gething* (2000) 97 FCR 9, Justice French of the Federal Court of Australia (as His Honour then was) dealt with a case brought by a Senator after Federal search warrants had been executed on, and documents had been seized from, his home and Parliamentary and electorate offices. Initially, the Senator challenged the validity of the warrants on various grounds but those challenges were abandoned. The Court therefore did not have to rule upon whether there is any limitation on the execution of search warrants on Parliamentary offices. The Court declined to decide whether or not certain documents were privileged.

3.7 The relationship between search warrants and Parliamentary privilege

3.7.1 In the course of examining this matter, the OIICAC obtained the advice of Mr T. E. F. Hughes AO QC on the question “Whether the common law or any statute confers on the Parliament of NSW any form of inviolability from search warrants.”

3.7.2 Mr Hughes’ advice, which was dated 26 April 2006, included:

(9) Here two pieces of legislation stand prominently in the foreground. First, Article 9 of the Bill of Rights 1689 declared “*That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached in any court or place out of Parliament*”.

(10) Article 9 is part of the law of NSW: see section 6 of, also Part 1 of the Second Schedule to, the Imperial Acts Application Act, 1969.

(11) Section 122 of the ICAC Act provides: *Nothing in this Act shall be taken to affect the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament.*

(12) S. 122 serves to emphasise (in case emphasis be necessary) that the statutory powers of ICAC in relation to search warrants are limited by, and exercisable subject to, the law of parliamentary privilege as enacted by Article 9 of the Bill of Rights. This provokes an examination of the content and scope of such privilege as it applies to the Parliament of NSW.

(13) Here one turns to what must be regarded as authoritative statements in *Erskine May Parliamentary Practice* 9 (19th ed [1976] p.67):

“(P)arliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively... and by members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the ordinary law.”

(14) The elastic and potentially expansive nature of the expression “proceedings in Parliament” in Article 9 is demonstrated in the same work at pp.87-89 (copy annexed); moreover emphasis is given to these characteristics by Parliament’s undoubted power (a) to determine its own privileges (subject always to the supervisory control of the

courts – see 915); and (b) to adjudicate conclusively upon the question whether there has been a breach of an undoubted privilege. As stated in a footnote to page 77 of May’s 19th edition, Article 9 “*not only protects freedom of speech in Parliament from outside interference but also indicates the method by which it*” (scil outside interference) “*may be controlled, namely, by each House for its own members*”. If that is a correct statement of principle – and it is difficult to see why it is not - it is a statement equally applicable to the power of Parliament to control interference with freedom of “proceedings in Parliament”.

(15) The decision of the High Court in *R v Richards ex parte Fitzpatrick and Browne* ((1955) 92 CLR 157 at p.162) reserves “*to the courts to judge of the existence in either House of Parliament of a privilege, but given an undoubted privilege, it is for the House to judge of the occasion and manner of its exercise.*”

(16) In my view, it would be compatible with that statement of principle for either House of the NSW Parliament to treat a member’s parliamentary office as inviolable from *unilateral* intrusion, on the simple basis that the privacy of the parliamentary office occupied by a member is an essential incident of that member’s privilege to take part freely and effectively in the proceedings of Parliament.

3.7.3 In an addendum provided on 31 May 2006 Mr Hughes advised:

(2) In paragraph 16 of my earlier Advice, I expressed the view that it would be compatible with a statement of principle, which I quoted from *R v Richards ex parte Fitzpatrick and Browne* ((1955) 92 CLR 157 at p.162) to treat a member’s parliamentary office as inviolable from unilateral intrusion, “on the simple basis that the privacy of the parliamentary office occupied by a member is an essential incident of that member’s privilege to take part freely and effectively in the proceedings

of Parliament”. In that context I was referring to the office space in the Parliamentary precincts allocated to a member by the Presiding Officers for occupation and use by that member in connexion with the performance of parliamentary duties.

(3) It is my view that in future, the execution of any search warrant obtained by ICAC under the Law Enforcement (Powers and Responsibilities) Act 2002 and section 40 of the ICAC Act will be attended with risk to those undertaking the execution unless:

(a) the member whose office is to be searched in execution of a warrant is present at the search pursuant to prior notice, so as to enable that member to raise any question of privilege with respect to documents within the scope of the warrant; and

(b) the Presiding Officers, as defined in section 4 of the Parliamentary Precincts Act 1997 (“the Act”) having been informed of any intended entry upon the Parliamentary precincts and its purpose, permit such entry to take place.

(4) The necessity, indicated in (3) (a), for the member’s presence stems from the need to avoid the risk of a breach of privilege as a result of seizure of documents within its protection.

(5) The necessity for notice to, and permission from, the Presiding Officers stems from the vesting in them, by section 7 of the Act, of the control and management of the Parliamentary precincts as defined in section 6. The status so conferred on them is itself a statutory expression of a species of parliamentary privilege which would be infringed by entry, without their permission, for the purpose of executing a search warrant.

(6) The constraints specified in paragraph (3) (a) and (b) may well impede or frustrate the effective execution of a search warrant obtained by the ICAC. But such a result is inevitable in

the light of s. 122 of the ICAC Act: see paragraphs 11 and 12 of my Advice dated 26 April last.

3.7.4 Mr Hughes QC's opinion that it would be compatible with Parliamentary privilege to treat a member's Parliamentary office as being inviolable from unilateral intrusion is not universally accepted. Mr Bret Walker SC provided a written advice dated 9 October 2003 to the President of the Legislative Council in which he advised that:

...given the absence in New South Wales of any statutory extension of parliamentary privilege beyond that recognised and granted in Article 9 of the *Bill of Rights*, privilege attaches only in relation to proceedings, a notoriously imprecise nexus.

Probably, although not certainly, privilege prevents the seizure of material directly connected to the votes or utterances of a Member in any session of the House (including any Committee)...

...it is emphatically not the case that every document or item in a Member's office is covered by parliamentary privilege. Probably, most of them are not, in the nature of things.⁹

Mr Walker SC's advice in relation to the extension of Parliamentary privilege to a member's Parliamentary office is consistent with the advice provided by the Solicitor General to the ICAC on 10 November 2003. It is noted that the Parliamentary Standing Committee did not, in terms, resolve the question as to the inviolability of a member's Parliamentary office. Rather, the Parliamentary Standing Committee concluded that Parliamentary privilege extends to any documents which are connected to "proceedings in Parliament" irrespective of their location.¹⁰

3.7.5 It is not for the Inspector to express a view as to the correctness of any of the

⁹See page 75 of the Standing Committee on Parliamentary Privileges and Ethics, *Parliamentary Privilege and seizure of documents by ICAC*, Report 25, December 2003.

¹⁰Ibid, at pp 7-21.

competing opinions as to the scope and extent of Parliamentary privilege. However, the competing opinions highlight the particular difficulties that accompany claims to exempt material from the ambit of search warrants based on assertions of Parliamentary privilege.

3.8 The ICAC's understanding of its right to execute a search warrant on Parliament House

3.8.1 The evidence given in interviews to the OIICAC indicates that the ICAC formed the view that it had a legal right to execute a search warrant on Parliament House. The evidence of former Commissioner Irene Moss, Deputy Commissioner Kieran Pehm, Executive Director (SOD) Michael Outram and Chief Investigator Andrew Patterson was to the effect that they relied on the ICAC's in-house legal advisors, namely the Solicitor to the Commission (Legal) John Pritchard and Principal Lawyer Roy Waldon, to advise them on the issue and that they had accepted their advice that a search warrant could be executed on Parliament House. There is no reason to doubt this evidence.

3.8.2 The ICAC kept no written record of why the ICAC formed the view that it was legally entitled to execute a search warrant on Parliament House, but Mr Pritchard gave evidence as to what he believed to be the legal basis for executing a search warrant on Parliament House in his two interviews with the OIICAC.

3.8.3 In Mr Pritchard's interview of 9 May 2006, he said:

Even now there's probably differences between us about—but the only authority on the issue that there is, which is *Crane v Gething*, says that an act of executing a warrant, searching, entering, searching and seizing, does not involve a breach of Parliamentary privilege—to the extent there's any authority on it. That's the only one that there is and it supports my view at the time. In my view it supports the view that (sic.) the Commission and the conduct of the Commission.

3.8.4 In his interview with the OIICAC on 7 July 2006 Mr Pritchard gave the following evidence:

OIICAC: . . . did you have a view that you had a legal right to apply [for] and then execute a search warrant on the premises of Parliament?

PRITCHARD: Oh yes, yes. It had been done before, it had been done in the Senate.

It had been done in the House of Reps . . . And . . . we'd done a section 23 [ICAC Act] notice on [MLC] Malcolm Jones' office for some things, some time before.

OIICAC: So that was your reasoning?

PRITCHARD: Not that alone, no, no. . . .

OIICAC: . . . what would be your other reasoning?

PRITCHARD: Well, not the section on Jones, but the fact that search warrants had been issued on Senators' offices and other Member of Parliaments' offices.

OIICAC: Was there any legal advice that the ICAC had ever obtained in relation to this particular issue?

PRITCHARD: In relation to the particular issue of search warrants? No.

OIICAC: On Parliament House?

PRITCHARD: No. But . . . we had advice . . . about the nature of Parliamentary privilege . . . [i]n relation to a matter we'd done before . . . I'm still of the view that the only case reported on the issue is *Crane v Gething*. That supports [break in recording] the position. It supports the position that the execution of the search warrant, even over the material that may fall within the definition of the sitting of Parliament, is not a breach of Parliamentary privilege.

OIICAC: Right, and did you do research on the issue yourself?

PRITCHARD: Not in the detail that we did afterwards, no. But I was aware of the decision in *Crane v Gething* . . . prior to this warrant being executed.

OIICAC: And did you provide advice to the Deputy Commissioner and the Commissioner about that?

PRITCHARD: Well, I think this issue arose last time because it wasn't an issue that we considered needed advice ... because the execution of the warrant alone didn't raise Parliamentary privilege.

- 3.8.5 Contrary to the position taken by the ICAC, the Parliamentary Standing Committee concluded that Article 9 of the *Bill of Rights* applied so as to prevent the seizure of any document which had the effect of questioning or impeaching proceedings in Parliament.¹¹ However, the Parliamentary Standing Committee acknowledged the lack of judicial authority for its conclusion.¹² It also acknowledged the contrary view (submitted by the ICAC) that a distinction should be drawn between the “seizure” of privileged documents and their subsequent “use”.¹³
- 3.8.6 Given the complexity of the legal issues, the Inspector cannot make any finding as to the ICAC's power to obtain and execute a search warrant on Parliament House. The ICAC Act and the Search Warrants Act appear to provide support for such a position in spite of Parliamentary privilege. However, *Crane v Gething*, although giving some support for the ICAC's position, does not contain a judicial conclusion that search warrants can be executed on Parliamentary offices. Equally, as seemingly acknowledged by the Parliamentary Standing Committee, there is no judicial authority that suggests that the ICAC did not have the power to execute a warrant on Mr Breen's Parliamentary office.
- 3.8.7 As detailed in paragraph 3.12 below, the ICAC has now adopted procedures in relation to the execution of search warrants on Parliamentary offices which are based on the recommendations made by the NSW Legislative Council

¹¹ Ibid, at p.36 para 3.54.

¹² Ibid, at para 3.55.

¹³ Ibid.

Privileges Committee in February 2006. These procedures have been designed to involve the cooperation of the Clerks of Parliament.

3.9 The ICAC's understanding of the *Parliamentary Precincts Act 1997*

3.9.1 As noted in paragraph 3.7.3, Mr Hughes QC advised that section 7 of the *Parliamentary Precincts Act 1997* had the effect of requiring the ICAC to inform the Presiding Officers (as defined in section 4 of the Act) in advance of any intended entry upon the Parliamentary precincts and its purpose. That view appears to be supported by Part 4 of the Act (sections 18 to 25) which provide for unconditional directions requiring any person to leave or not enter the Parliamentary precincts. There is nothing to indicate that this would not extend to the ICAC's officers executing or seeking to execute a search warrant.

3.9.2 Former Commissioner Moss, Mr Pehm and Mr Pritchard could not recall whether they had specifically considered the operation and application of the *Parliamentary Precincts Act 1997*. Notwithstanding that these persons could not specifically recall giving consideration to the operation of the Act, Mr Pritchard in fact contacted Ms Lynn Lovelock, the then Deputy Clerk of the Legislative Council, prior to the execution of the warrant.

3.10 The ICAC's understanding of its right to seize privileged documents

3.10.1 In order to appreciate the ICAC's understanding of its right to seize privileged documents during the execution of the search warrant on Mr Breen's Parliamentary office, it is necessary, firstly, to ascertain what it understood about Parliamentary privilege in general and, secondly, how it might be applied by the ICAC during the course of its work.

3.10.2 Section 122 of the ICAC Act as it was in force as at 3 October 2003 stated:

Parliament

Nothing in this Act shall be taken to affect the rights and privileges of Parliament in relation to freedom of speech, and debates and proceedings, in Parliament.

- 3.10.3 The evidence given to OIICAC staff by current and former ICAC staff who were interviewed for the purpose of this investigation indicates that prior to October 2003 the ICAC had little or no experience in applying section 122 of the ICAC Act. This was largely due to the rare and exceptional cases in which questions of Parliamentary privilege arose. The senior managers of the ICAC who were interviewed for the purpose of this investigation, namely the former Commissioner, the Deputy Commissioner and the Solicitor to the Commission had a better understanding (when compared with the other staff members) of what Parliamentary privilege meant and how it applied to the work undertaken by the ICAC.
- 3.10.4 Mr Stephen Murray, who worked as Executive Officer to former Commissioner Moss during 2001 to 2002, and worked again for the ICAC at other intermittent times between 2000 and 2005, advised OIICAC staff during an interview held on 15 November 2007 that, whilst in this position, he prepared advisory papers on the issue of Parliamentary privilege for the Commissioner and/or the Deputy Commissioner to consider. These papers were prepared in the context of ongoing ICAC considerations about whether or not to investigate complaints which arose out of evidence given in Parliament or before Parliamentary committees.
- 3.10.5 Mr Murray's evidence was that during the course of his employment with the ICAC he prepared papers on the issue of Parliamentary privilege for management consideration on two or three occasions. However, Mr Murray was not required to specifically consider the execution of search warrants on Parliamentary offices. Further, Mr Murray was not legally qualified.
- 3.10.6 In his evidence to OIICAC staff on 9 May 2006 Mr Pritchard indicated that the ICAC had, prior to October 2003, obtained advice from Mr Bret Walker

SC on the extent to which the ICAC could deal with matters where words or speeches had been made in Parliament. This evidence, as well as Mr Murray's evidence that he too had prepared advices on the issue of Parliamentary privilege, led the OIICAC to request from the ICAC copies of any advices, both internal and external, which it had obtained, prior to October 2003 on the issue of Parliamentary privilege.

3.10.7 The ICAC subsequently provided advices which it had received from external legal advisors on the issue of Parliamentary privilege. None of these advices addressed the issue of the application of Parliamentary privilege to the application for, or execution of, a search warrant.

3.10.8 Mr Murray stated that he was considered the 'in-house expert' on the subject and that any questions or concerns about the application of Parliamentary privilege were referred to him for advice. This evidence is consistent with the evidence given by former Commissioner Irene Moss to OIICAC staff on the issue. In her interview with OIICAC staff on 14 August 2006 former Commissioner Moss referred to Stephen Murray as the ICAC officer who had particular knowledge about the issue as he had undertaken detailed research on the issue for the ICAC. Ms Moss's evidence was that her understanding of the issue of Parliamentary privilege and how it affected the ICAC's operations was based on advice from Stephen Murray and her senior managers, principally Mr Pehm and Mr Pritchard.

3.10.9 Mr Murray's evidence was that, not only was the issue of Parliamentary privilege not "highly understood" amongst ICAC management, but also there was little or no understanding about it, including the meaning and application of section 122 of the ICAC Act by ICAC operational staff. Senior officers of the ICAC reject Mr Murray's assertions. The Inspector accepts that Mr Murray's evidence in this respect has to be treated with caution. Mr Murray was employed for temporary and intermittent periods and ultimately his evidence is reflective only of his impression of ICAC management. The senior managers who have been interviewed for the purpose of this investigation gave evidence which would suggest that they were aware of and

understood the issue of Parliamentary privilege in general terms, though they may not have anticipated issues associated with its application.

3.10.10 Mr Murray further advised that as far as he was aware during the periods in which he was employed at the ICAC, prior to October 2003, no training was provided to ICAC staff about Parliamentary privilege. Ms Moss's evidence was again consistent with Mr Murray's evidence on this issue. Ms Moss's evidence as to the ICAC's understanding of Parliamentary privilege was as follows:

OIICAC: How well would you have expected your investigators to understand the issue?

MOSS: Because we didn't often handle, well, executions of search warrants on MPs, I suppose it would not have been foremost in their minds and I wouldn't have expected them to have an intricate understanding. I mean the understanding of it is fairly cloudy anyway. So even with the best of us I think people didn't understand well the issue of Parliamentary privilege.

3.10.11 Mr Pritchard and Mr Pehm's evidence was that no training was provided on Parliamentary privilege to ICAC staff. In his interview with OIICAC staff on 9 May 2006 Mr Pritchard expressed his view that the ICAC's understanding of s 122 of the ICAC Act was:

OIICAC:... can you just tell me what you understand to be the effect of section 122 of the Act?

PRITCHARD: What do I understand? Well, let me answer the question this way. It was the view of the Commissioner at the time that section 122 of the ICAC Act preserved Parliamentary privilege with regards to speeches, debates and procedures of Parliament from being impugned or questioned in another place or Court or Tribunal and, to that extent the Commission would be another place or Tribunal for the purposes of that section and Article 9 of the Bill of Rights.

3.10.12 The evidence of Mr Patterson and Mr Graham was that they had limited understanding of Parliamentary privilege including the effect of section 122 of the ICAC Act. Their evidence indicates a reliance on ICAC management and lawyers to advise them on relevant issues during the course of their operations. Mr Outram has submitted that Mr Patterson's and Mr Graham's limited understanding of Parliamentary privilege was indicative of the ICAC's "multi-disciplinary" approach to investigations whereby investigation teams were, and are, formed on the basis of the complementary skills of team members. Different members of each investigation team are thus able to provide input in their areas of expertise. This model is said to be typical of the contemporary approach to law enforcement. The Inspector has no reason to doubt this assertion. However, in the Inspector's view, this arrangement tends to highlight the need for detailed written procedures to guide the investigative process and the investigators.

3.10.13 The evidence given by Mr Patterson, Mr Graham, Ms Findanis and Mr Pritchard indicates that prior to the search warrant being executed on Mr Breen's Parliamentary office on 3 October 2003 there was a briefing conducted by Mr Patterson on operational issues affecting the execution of the search warrant. This briefing was based on operational orders which Mr Patterson had prepared. Mr Pritchard's evidence was that he attended the briefing session to observe and listen.

The evidence given by all of the above-mentioned ICAC officers was that the briefing session did not address any issues concerning the seizure of documents which might be affected by Parliamentary privilege.

3.11 Conclusions as to the ICAC's understanding of the relevant law

3.11.1 The issue of Parliamentary privilege is thus complex. The evidence suggests that there are differences of opinion as to the extent of the ICAC's power to execute search warrants in Parliamentary offices and to seize privileged

documents. The evidence further establishes that ICAC's senior management were conscious of and understood the issue of Parliamentary privilege, though they may not have fully appreciated all of its complexities. It is possible that the provision of education and training, together with established protocols, relating to the execution of search warrants on Parliamentary offices may assist in the better understanding of these complexities before any search warrant is sought or executed on Parliamentary offices in the future.

3.12 Observations about ICAC procedures to deal with privilege claims

3.12.1 In the opinion of the Inspector, the prospect of any kind of privilege claim during the course of an ICAC investigation necessarily requires careful attention. Consideration must be given separately as to:

- (a) whether the existence of such a privilege is likely to have any impact on the legality of any investigative action being contemplated; and
- (b) if so, how that impact is going to be managed and in particular, how any claims of privilege are going to be dealt with.

3.12.2 These questions have been addressed by Commonwealth and NSW law enforcement agencies in relation to possible claims of legal professional privilege (now often called client legal privilege) by longstanding guidelines between the Australian Federal Police and the Law Council of Australia issued in June 1990 and reissued on 3 March 1997 (the AFP/LCA guidelines) and similar guidelines between the NSW Police and the Law Society of NSW issued on 3 May 1995 (the NSW Police/LSNSW guidelines). In February 2006 these questions were addressed in relation to the NSW Parliament by a protocol recommended by the Legislative Council Privileges Committee. That protocol was designed to involve the participation of the Clerks of Parliament.

3.12.3 The issue of how to deal with claims of legal professional privilege, based on the AFP/LCA and NSW Police/LSNSW guidelines, was contained in the part of the *ICAC Operations Manual* setting out procedures for dealing with search warrants which was in use at the time of the execution of the search warrant on Mr Breen's office. That procedure had last been revised in June 2001.

However Parliamentary privilege and how to deal with it were not mentioned in those 2001 procedures.

3.12.4 The information provided by the ICAC and by the persons involved in the obtaining and executing of the search warrant on Mr Breen's Parliamentary office suggests that consideration was given to the first question, but not to the second question beyond Mr Pritchard contacting the Deputy Clerk of the Legislative Council. There is nothing to suggest that the investigators executing the search warrant on Mr Breen's Parliamentary office had the benefit of any guidelines, protocols or procedures for dealing with any claims of Parliamentary privilege that might be made.

3.12.5 The situation which prevailed in October 2003 has been progressively remedied. Revised ICAC search warrant procedures, approved in May 2005, provided specific practices to be adopted for the execution of a search warrant on a Parliamentary office, at that stage noting the absence of any NSW Parliament protocol to deal with this. Further revised ICAC search warrant procedures, approved on 28 June 2006, picked up and adopted the Legislative Council Privileges Committee protocol for dealing with Parliamentary privilege recommended in February 2006. More recently, in further revised ICAC search warrant procedures approved on 7 August 2008, the procedure has been modified in a small number of respects, still based on the protocol.

Chapter 4

THE ICAC'S PROCEDURES, GUIDELINES AND ASSIGNMENT OF ROLES AND RESPONSIBILITIES REGARDING SEARCH WARRANT APPLICATIONS

4.1 Introduction

4.1.1 As noted above, as at October 2003, a number of internal procedures and guidelines relating to aspects of the ICAC's operations were assembled in a folder called the *Operations Manual*. One section of that Manual dealt with search warrants. Key features of the procedures described in that section are mentioned below.

4.1.2 To obtain a fuller understanding of the way in which the ICAC worked, however, it is useful to go beyond the written procedures. Consideration is also given below to the roles of various officers (both generally and specifically with respect to search warrants) and to the actual roles played by them in respect of search warrants.

4.2 The written procedures

4.2.1 "Procedure No 14" in the *Operations Manual* is entitled "Search Warrants". Its title page states that it had been issued by the "Legal Unit" and that it "affected" the Investigations Unit and the Legal Unit.

4.2.2 Appendix A is a "PROGRESSIVE CHECKLIST" that indicates the roles of various officers and provides for them to record their fulfilment of those roles. The Checklist is supposed to accompany a search warrant application as it passes through the various required steps. The Checklist is reproduced here:

SEARCH WARRANT APPLICATION

PROGRESSIVE CHECKLIST

THIS FORM MUST ACCOMPANY EACH STAGE OF THE

APPLICATION

Item	Name & Date	Signature
Director of Investigations/Chief Investigator has approved that an application for a Search Warrant is appropriate.		
Case Officer prepares the draft Application.		
Team Lawyer prepares the Warrant and the Occupiers Notice and settles Application.		
All Legal Process submitted to Director of Legal for approval of documentation.		
Case Officer makes an appointment with Authorised Justice.		
Application for Warrant Approved/Refused. Warrant submitted to Property Manager by Investigator for registration. Copy given to Property Manager.		
Report to Authorised Justice completed by Investigator in consultation with Team Lawyer. Copy given to Property Manager.		

A copy of the checklist is attached at Appendix 3.

4.2.3 Section 4.2 of the Procedure is headed “Drafting and approval”. It states:

The Case Officer will be responsible for drafting the search warrant application.... The Team Lawyer will prepare the warrant and occupier’s notice and settle the application. In all cases the proposed search warrant and supporting documentation will be referred to the Director, Legal for approval.

...

Once the Director, Legal, has considered and approved the documentation it is to be returned to the Case Officer who will arrange for swearing, issue and execution. ...

4.2.4 On the face of this material, the various responsibilities were to be assigned as follows:

- § the decision to apply for a search warrant had to be made by either the Director, SOD, or a Chief Investigator;
- § the drafting of an application was to be done by the Case Officer;
- § the application was to be “settled” by the Team Lawyer;
- § the Search Warrant and Occupier’s Notice were to be drafted by the Team Lawyer; and
- § the Director, Legal, was responsible for “approval of [all] documentation”.

Thereafter, the process moved to the actual making of an application to an authorised justice.

4.3 Common practice at the ICAC regarding search warrant applications

4.3.1 The evidence suggests that at the relevant time investigation teams were deliberately formed so that they consisted of members with complementary skills, knowledge and experience considered necessary for each investigation. The team that investigated the complaints against Mr Breen consisted of Mr Patterson (as the Chief Investigator), Mr Graham (as the Investigator), Ms Findanis (as a Forensic Auditor) and Mr Waldon (who substituted for Mr Lowe as the Team Lawyer). The evidence further suggests that it was usual practice for the drafting of search warrant applications (including the sworn information therein) to be assigned to an investigator within a team working on a certain investigation, and for that investigator to swear or affirm such information, even if the information was not personally known to the investigator. This included swearing or affirming evidence obtained by other investigators via processes such as interviews.

4.3.2 The evidence from Chief Investigator Andrew Patterson on this issue as given to OIICAC staff on 24 May 2006 was as follows:

OIICAC: ...was it regular practice at the ICAC where, let's say, you had interviewed someone, you then briefed someone else, then that person drafted the affidavit or the application for the search warrant? Okay, was that regular practice at the ICAC?

PATTERSON: Yeah, the way the teams worked...the way my team worked, I can't really comment on the other one, there was, the [inaudible] when you are running investigations they were very seldom...one person running the investigation. It was a team approach ... and therefore people would be allocated tasks so yeah it's quite possible that somebody would take information from an informant or witness and then another person would be allocated the task of putting together the affidavit... that was quite normal.

[F]or a lot of the time I was there and my team did the Rockdale Council job and didn't do much else ... and that was very much done on that basis, you get the information in, it would be collated and then people would be allocated to do affidavits.

OIICAC:...[W]ere there any documents or guidelines supporting that process of how a legal process or issue of a legal process was to be handled within a team?

PATTERSON: Not within a team as far as I know. I mean there was a search warrant policy and procedure but don't ask me to remember what it said. ... But in relation to how teams did manage their investigations, no, I mean there was nothing documented in terms of management policy of investigations, it was up to the team managers.

OIICAC: ... [W]hen you came on board, just to follow through, how did you know it was okay practice to do that? Was it told to you by someone or you observed someone else

doing it?

PATTERSON: No, I think it was a practice that sort of really developed I guess. The Rockdale Council job which we tackled, we started on that on my first year of being there and that consumed us for about the next 12 months, and that was of such a scope that I mean everything was done and the whole team worked on the one investigation for the whole period, and the tasks were very closely monitored just in terms of workloads and priorities that was available etc...and what people's skills were for various tasks. ... As to how it came about I can't really say. I mean, that's the way, you know, I've always run investigations wherever I've worked on that basis to a greater or lesser extent depending on how many staff you've got and the nature of what you're doing etc.

4.3.3 The evidence given by Investigator Robert Graham to OIICAC staff on 24 May 2006 also confirmed the ICAC practice of using any investigator within a team to draft and swear or affirm the contents of a search warrant application. The evidence was as follows:

OIICAC: Okay, can you tell me about the general practice in terms of trying to obtain a search warrant? What was the general practice in terms of putting various bits and pieces together?

GRAHAM: Well, it varied. Each job varied because the situation at ICAC was that you had different teams and depending on who ran what team depended on how they wanted things done.

OIICAC: Right, how about in your team?

GRAHAM: In this particular team, well what happens is it's decided that we're going to do a search warrant on a particular premises or whatever and what the process is, is that you get all the evidence that you've got to justify the need for that warrant which you're going to present to the magistrate. So what you do is you accumulate from all the sources that are available to

you and then you do the affidavit and then you go and swear it before a magistrate.

OIICAC: Okay. Was it a regular practice at the ICAC that one person may obtain some information from somebody, a third party outside [of ICAC], and then someone else might do the affidavit?

GRAHAM: Well, what happens is, as the investigation goes, we're talking about a task force investigation where a whole team works on it ... From all the different sources you get information, it all gets recorded and what you do is tap into that to put all your stories together for the magistrate.

4.3.4 Mr Pritchard's evidence given on 9 May 2006 shows that as Solicitor to the Commission he was aware of the practice of investigators who had not obtained evidence first-hand being responsible for drafting and swearing or affirming search warrant applications. Mr Pritchard expressed the view that he did not believe such a practice created room for greater error than if the application had been drafted and sworn or affirmed by the person who had obtained the evidence first-hand:

OIICAC: ...It's not entirely clear to me why Andrew Patterson ... who was the person that interviewed Adriana Sammartano, why didn't he do the affidavit himself, instead of assigning it to Robert Graham?

PRITCHARD: Oh, it's training. It's meant to give these officers a chance, an opportunity to actually develop their own skills in the area of one, preparing their own documents because to a large extent it's part and parcel of doing these matters. You see we try and involve the investigators rather than the Chiefs in these sort of matters. But then again, that may depend on the operational parameters at the time. You'd be best to ask Andrew that, the fact that it was done by Rob.

OIICAC: ... Is that quite common practice in the Commission? Has it been regular practice that you might get the information yourself but as part of training you might give it to someone

else?

PRITCHARD: They're time consuming because they, you have to sit down and tell a story ... some of them go for pages. Chiefs have got other responsibilities beyond that particular investigation; they lead a team so they have other investigations. It's ... very resource intensive and it takes a lot of time. Rob probably would have had this matter and not anything else, whereas Andrew would have had other administrative responsibilities in relation to running his team in other matters. So to a large extent it's a matter of delegation as well.

OIICAC: Do you think perhaps though when someone is drafting an affidavit where they're not apprised of the facts first hand there might be greater room for error (inaudible) facts?

PRITCHARD: No more than usual. I mean, Andrew didn't do the searches of the Lawpoint. Andrew didn't do any of the database searches so in this case it wouldn't have made any difference. ... In fact, if anything, Rob was closer to the ground if you like, where those decisions, where those searches were being made. Andrew, like me and Roy, would have been removed.

OIICAC: Right.

PRITCHARD: I mean it sounds nice in theory but there's just other things happening, you just can't—I mean you'd have, that's why you have a team, an investigation team, you have to devolve functions and responsibilities and tasks amongst the team.

4.3.5 In evidence given to OIICAC staff on 26 May 2006 Executive Director, Strategic Operations Division, Michael Outram also confirmed that there was a practice of one team member from an investigation team being given responsibility for drafting and swearing an application for a search warrant which was part of an investigation being undertaken by the team. The evidence was as follows:

OIICAC: What's your view...in terms of what good practice might have been if one particular team member had gone off and interviewed a person and the evidence was coming from that person?

OUTRAM: If there had been interviews it should be documented.

OIICAC: ... [W]ould you have an expectation that the team member who had done the interview might then do the affidavit and include the information...

OUTRAM: Like in a search warrant?

OIICAC: Yes.

OUTRAM: Only one person can put together a search warrant, they'd have to rely on a number of sources of information with relevance so, you might rely on information from a telephone intercept possibly, you might rely on information from an informant, you might rely on information from surveillance, you might rely on information from witness statements, you might rely on information from case note and database, so it wouldn't be feasible for everybody who received that information in the first place to individually put together affidavits.

- 4.3.6 It has been submitted that the preparation of search warrant applications by a person who does not have direct knowledge of its contents is a routine task, reflects best practice across law enforcement agencies and provides for the most effective use of limited resources. The Inspector has no reason to doubt these assertions, or to cast doubt on the appropriateness of such a practice, but does suggest that such an approach needs to incorporate procedures to ensure, so far as reasonably possible, factual errors are detected and corrected.

4.4 The Commissioner

- 4.4.1 The Commissioner of the ICAC is appointed by the Governor pursuant to s. 5

of the ICAC Act. Irene Moss AO was Commissioner from 15 November 1999 to 12 November 2004.

4.4.2 The functions, powers and duties of the Commissioner are presented in general terms by the ICAC Act.

4.4.3 There is also a “position description” (a public service document detailing a public service job). The position description for the Commissioner’s position as at October 2003 included the following statement regarding the Commissioner’s key accountabilities.

The Commissioner is responsible for the general conduct, effective, efficient, equitable and ethical conduct, and economical management, of the functions and activities of the Commission. . . .

In meeting these accountabilities the Commissioner will need to exercise sound leadership and management strategies including:

. . .

- Maintaining a culture of integrity and professionalism where all employees are treated with respect and fairness;
- Employing effective operational planning;

. . .

- Establishing effective monitoring systems to ensure that he/she remains appropriately informed as to resource use and progress of major projects.

4.4.4 In her interview with OIICAC staff on 14 August 2006 former Commissioner Moss gave evidence that she had instituted a number of reforms designed to improve the quality of and accountability for decision making at the ICAC. Key reforms instituted included:

§ the creation of the role of Deputy Commissioner to oversee operational issues;

§ the establishment of internal management review groups (such as the

Assessment Panel chaired by the Deputy Commissioner) to review the recommendations of Assessment Officers on whether or not to investigate complaints; and

§ the establishment of the Investigations Management Group, whose role was to approve and review the planning for and progress of investigations. Ms Moss's evidence was that the establishment of the internal management review bodies addressed the previous problem of having the decision making concerning the management of investigations residing solely with the Director of the investigations branch within the ICAC. Ms Moss's evidence was that any decisions concerning the management of complaints and investigations would be reviewed and approved through these internal management processes and that critical to these processes was the involvement of the Deputy Commissioner.

4.4.5 In an interview with OIICAC staff on 14 August 2006 former Commissioner Moss gave evidence concerning her general approach to the management of the ICAC. She saw the Commissioner's role as less operational and more strategic (although she would expect to be orally briefed on especially sensitive and serious matters), with the Deputy Commissioner having the key operational decision-making role.

4.4.6 With respect to search warrant applications, former Commissioner Moss told the OIICAC that she "would be apprised of the desire to execute a search warrant"; and it was standard practice for her to be briefed on matters such as applications for search warrants¹⁴. Briefings would be oral, not written. She would seek advice in order to be satisfied that there were legitimate grounds to seek a search warrant and that her executives were satisfied of the same.

4.4.7 The former Commissioner told the OIICAC that she would not be involved in drafting documents and often would not be involved in "signing off on them".¹⁵ Nor would she expect to sign off on any approval or checking process

¹⁴ OIICAC Moss interview, 14 August 2006, p. 9.

¹⁵ OIICAC Moss interview, 14 August 2006 p. 9.

regarding search warrants and she did not expect to necessarily see any paperwork for search warrant applications. She did, however, expect staff to have a “paper trail” of accountability and, commensurate with their position within the ICAC, to be fully across legal and factual issues. Her expectation was that all the relevant issues to such a decision would have been thoroughly discussed by the legal staff and investigators involved in the investigation in which the search warrant application was being proposed.

4.4.8 Ms Moss also gave evidence that she was generally but not intimately familiar with the requirements of the *Search Warrants Act* and that she would have relied heavily on her staff to brief her on the relevant issues regarding any particular application.

4.5 The Deputy Commissioner

4.5.1 The position of Deputy Commissioner is not a statutory office and it is not mentioned in the ICAC Act. The position was created by former Commissioner Moss to take effect from 2001. Mr Pehm was the first Deputy Commissioner, holding that position from 12 February 2001 to 26 April 2004.

4.5.2 Former Commissioner Moss’s evidence was that she created the position of Deputy Commissioner to “act as . . . an assistant to the Commissioner and as a sort of Chief Operating Officer . . . for a range of things.” She distinguished the roles of Commissioner and Deputy Commissioner in that the Commissioner set the broader policy and direction of the ICAC while the Deputy Commissioner had a more “hands-on” role working alongside the Solicitor to the Commission on operational matters.

4.5.3 The position description relevant to the Deputy Commissioner’s position as at October 2003 states that the Deputy Commissioner has the following key accountabilities:

§ Provide the Commissioner with high level strategic oversight of all operational matters, particularly the Commission’s

investigative activities;

- § Provide leadership, vision and insight, statutory interpretation, policy analysis and sound judgement to sustain and develop the work of the Commission in improving public accountability and ethical practices across the NSW public sector;

...

- § Encourage the development of innovative solutions and exercise strong leadership to manage change throughout the organisation;
- § Develop and manage the Commission's external performance reporting and benchmarking . . .

4.5.4 Former Commissioner Moss's view of the role of the Deputy Commissioner as a central operational decision maker was reflected in the evidence given by Mr Pehm to OIICAC staff on 7 July 2006:

OIICAC: . . . In relation to processes such as search warrants was it normal practice that you would be involved in the decision-making to apply for a search warrant?

PEHM: I'm not entirely sure with search warrants. I was certainly the decision-maker and I sat before the Commissioner on the exercise of ICAC matters like notices to produce information, inspect premises, those sort of things, listening devices, applications—applications to the AAT. Search warrants were a little different in that the decision-maker was in fact the Justice or the Magistrate. So it was up to the Justice to satisfy themselves, with all the matters under the Act, but I think I was the final signatory, myself or the Commissioner on the decision to go to a Magistrate to make the application. . . . I was fairly involved in investigations and decision-making. I was involved in decision-making right across the Commission. I was Chair of the initial assessment meeting group that decided which matters should go for investigation. When they did go for investigation I was Chair of the Investigations and Management Group as I think it was called, and investigations were reported every couple of weeks. The Director of

Investigations took the day to day running of the investigations and basic operational decisions. But when it came to exercising powers under the Act I was the decision-maker. Myself or the Commissioner and generally, we worked very closely. If she wasn't there, generally, I would do it. More significant ones, I think we would liaise and I would refer the matter. It varied and ... there was significant discretion with the Director of Investigations and I suppose within his division and how much discretion was allowed with individual officers but I was fairly well involved.

- 4.5.5 Mr Pehm told the OIICAC that he was aware of the investigation manual and the existence of standard written procedures, but that he was not generally involved in all discussions concerning decisions made by the ICAC in relation to the application for, and execution of, search warrants. However, Mr Pehm was involved in part of the decision-making regarding the complaint against Mr Breen because of the exceptional nature of the investigation. In relation to the search warrant applications involving Mr Breen's Parliamentary office and the Lismore property, Mr Pehm relied on oral briefings.

4.6 The Lawyers

- 4.6.1 John Pritchard was the Executive Director, Legal, and Solicitor to the Commission, from 21 August 2001 to 25 April 2004.

- 4.6.2 The position description relevant to this position as at October 2003 included the following description of the “Nature and Scope of [the] Position”:

The Director is the primary source of legal services for the Commission. The functions of the Director are:

(a) to provide high level legal and policy advice, or to arrange for the provision of legal and policy advice to the Commissioner, Deputy Commissioner, Assistant Commissioners and other members of staff of the Commission

regarding the performance of the Commission's statutory functions and such other operational and non-operational matters as may arise from time to time,

(b) to ensure compliance with the law by:

preparing and keeping up-to-date relevant internal procedures and precedents,

providing education and training to other members of staff regarding the internal procedures and the operation of relevant laws on the Commission,

vetting draft scope and purpose documents, draft process and notices to be issued by the Commission and applications for warrants.

4.6.3 Mr Pritchard's understanding of his role and that of other lawyers in the Commission, as far as responsibility for the checking process was concerned, was that it was confined to a checking of the legal adequacy of the application, and not the accuracy of the factual material, as this was the responsibility of the person swearing the application. Mr Pritchard's evidence given on 9 May 2006 to the OIICAC included this account of his role regarding search warrant applications:

[T]he role I perform or the Legal Director performs is essentially a tick-off or a checking role to ensure that another pair of eyes has looked at it and not picked up any defects on the face of the warrant and that all the ... forms that the then Search Warrants Act provides such as the Occupier's Notice, it has to be in a certain form so that they comply with those legislative [inaudible] requirements.

4.6.4 Mr Pritchard also gave evidence that during an approval process for a search warrant application he also proceeded on the basis of receiving and providing oral briefings to other relevant personnel, including the Deputy Commissioner and the Commissioner if appropriate, about the nature of the warrant being sought and relevant issues arising. However, it was clear from Mr Pritchard's evidence that before a search warrant application went to an authorising

justice for approval, he did actually sight and approve the application documentation.

4.6.5 As at October 2003, Roy Waldon was one of the ICAC's Principal Lawyers. The "Nature and Scope" of the job of Principal Lawyer, as described in the position description, included:

The Principal Lawyer provides legal and policy advice on more complex matters to the Commissioner, Assistant Commissioner, members of Senior Management and other staff. The Principal Lawyer is assigned to investigations into complex matters and may be a leader of an investigation team or team lawyer. The Principal Lawyer plays a key management and co-ordination role in relation to formal investigations, particularly when hearings are conducted.

...The Principal Lawyer ensures the formal powers of the Commission are exercised appropriately.

4.6.6 Under the heading "Challenges and Problem Solving", the position description for principal lawyers states:

The primary challenge of the Principal Lawyer is to provide comprehensive legal, policy, tactical and strategic advice, whether written or oral, on complex matters often within very short time frames.

Under the heading "Decision Making", the position description states:

The Principal Lawyer discusses key and controversial issues with the Solicitor to the Commission and makes recommendations concerning the commencement or termination of investigations; holding of hearings, release of information or seeking applications for warrants etc.

Under the heading "Communication/Client Contact", the position description states:

As the lawyer in a multi-disciplinary team, the Principal Lawyer provides advice and guidance, prepares and supervises the preparation of notices and applications for warrants.

4.6.7 The lawyers, including Mr Waldon, were administratively assigned to the Legal Unit under the management of the Solicitor to the Commission, not to the investigation teams. However, lawyers were assigned to particular investigations. When so assigned, they were known as “team lawyers”. For the investigation of Mr Breen, the designated team lawyer was Tim Lowe. However, when the perceived need for a search warrant on Mr Breen’s Parliamentary office arose Mr Lowe was on leave and Mr Waldon, on the request of his supervisor John Pritchard, performed the role of team lawyer.

4.6.8 In his evidence to OIICAC staff given on 10 May 2006 Mr Waldon outlined his understanding of his role in relation to applications for legal process such as search warrants as follows:

[T]he role of the lawyer in relation to those is to check the documentation once it’s been prepared by the investigator. A legal checking to make sure it complies with the statutory requirements. That it’s set out appropriately. That it sets out the grounds and that I’m satisfied that there are sufficient grounds to make the application. . . . If I wanted any changes or amendments made, I would either do those myself or usually my practice would be to write it on the application and send it back to the investigator to make those changes. . . . Once they had been done, it would come back to me to recheck to make sure they had been made and that I was still satisfied ... there’s a sufficient basis to get the warrant. It would then be passed on to the Solicitor to the Commission for a final check.

4.6.9 In respect of his responsibility regarding the checking of the facts contained in a search warrant application, Mr Waldon told the OIICAC:

If during reading the application you became aware of the factual error, then you’d bring it to the attention of the person who is going to be swearing the affidavit. There’s a team lawyer who will probably have some background as to what the factual situation was, so you would probably be able to do

that. But it was not your responsibility to go back, for example, to source documents and to double check in that sense because you're relying essentially on the applicant making sure that they have got the factual situation accurate.

4.6.10 The evidence given by Mr Pritchard and Mr Waldon was that the legal officers involved in approving a search warrant application were responsible for ensuring that documents were legally sound so that an application's chances of being granted by an authorising justice would be high. Both Mr Pritchard and Mr Waldon gave evidence that ICAC lawyers involved in checking search warrant application documents had limited responsibility for checking the accuracy of the factual basis of search warrant applications and that this would occur if they had knowledge of and familiarity with the facts of the investigation.

4.6.11 Mr Pritchard's view of the role of a lawyer settling an application for a search warrant, in particular with respect to the checking of the facts asserted in the application, was explained to the OIICAC as follows:

[I]t would be ... a question of degree as to the intimacy of the knowledge that a lawyer has as to the facts of the matter. And ... it depends on what stage, in relation to search warrants. Sometimes they're early in the piece, sometimes they're quite late in an investigation, so that would also influence the degree of familiarity that a lawyer has with a matter. It depends on the lawyer to a large extent, some inject themselves more into the investigative process than others. ... [D]ifferent investigators tends to, different investigators tend to consult and involve lawyers in different ways, but I wouldn't expect a lawyer to be, I mean the lawyer is one person, the team investigators are usually more than one, it's obviously a team so I wouldn't expect the lawyer to be intimate with every detail of the matter that the investigators would be.

...

I have to preface what I say by saying I've never been a team

lawyer at the ICAC so ... I can only ... speak from my position as Director of Legal. ... [U]nless prompted by something, I wouldn't expect a lawyer to conduct a confirmation check of all factual details in an application. That would not be, I think practical. Again it depends at what stage of the investigation the warrant is obtained. If it's obtained later, they obviously may be more familiar with the facts that are the basis for the warrant than if its obtained earlier but as I said, the role of the lawyer is very much a legal one to put it broadly. It's to ensure that the warrant on its face is not invalid. That all necessary statutory obligations have been complied with. I wouldn't, as I said, I wouldn't expect a lawyer to be able to confirm each and every fact in an application.

4.6.12 The evidence given by Mr Patterson is generally consistent with the above evidence, although he does appear to suggest that it had not been made explicitly clear as to what the boundaries of a team lawyer's role were in checking an application for a search warrant. Mr Patterson's evidence was:

OIICAC: ...so what were your expectations about what the lawyers would check?

PATTERSON: I would simply expect that if the lawyers came back and said yes, the affidavit was fine to go to court, then everything was fine with it and off it went.

OIICAC: Would you have expected them to check any of the facts?

PATTERSON: I don't know how they operated with the checking.

OIICAC: Had there ever been any discussions about what the lawyers' roles were in terms of checking affidavits?

PATTERSON: No, only that every application had to go through them before it went anywhere else.

4.6.13 The evidence given by Messrs Pritchard and Waldon appears consistent with

the ICAC's policies as set out in the Operations Manual.

4.7 The Executive Director, SOD

4.7.1 Michael Outram was the Executive Director of the SOD from 5 May 2003 to 14 May 2004. He had previously worked as the Acting Executive Director of the SOD from 17 March 2003 to 14 April 2003.

4.7.2 The position description for that position as at October 2003 states under a heading "Nature and Scope of Position" that the key responsibilities of the Executive Director were:

- § develops, directs and reports on investigation and surveillance services;
- § analyses and assesses potential investigations;
- § ensures investigation plans are integrated and aligned with broader organisational directions;
- § advising the Commission as well as leading the most serious and complex investigations;
- § reporting fortnightly to the Investigations Management Group;
- § performance management;
- § effective management of Divisional resources;
- § developing and maintaining productive relationships with other law enforcement bodies and government agencies; and
- § ensuring that all investigation activities comply with applicable laws, Commission guidelines and policies;
- § contribute as a member of the Executive Management team to the Commission's planning, performance and budget processes.

Under the heading "Challenges and Problem Solving", the position description states:

The position must demonstrate strong leadership to the Division. This includes the exercise [of] considerable

discretion and judgement in identifying appropriate opportunities for investigation by the Commission, ensuring that Division staff handle investigations appropriately, constantly monitoring investigations, identifying opportunities and implementing improvements. The Executive Director must maintain a solid grasp on all matters being investigated by the Commission and make critical decisions in their daily management. Good people management skills are essential.

4.7.3 In his evidence to the OIICAC about his role, Mr Outram said that he understood his position as having “oversight” of the Operations Division.

4.7.4 Mr Outram’s responsibilities included recruitment, education, business planning, risk planning and management, human resources and disciplinary matters, budget management (for about \$7 million), stakeholder engagement, external speeches and presentations. As has been noted above, Mr Outram managed about 50 employees within the SOD.

4.7.5 Mr Outram described his experience in managing search warrant and similar applications prior to October 2003 as follows:

OIICAC: . . . Prior to October 2003, what experience did you have in managing legal process applications such as search warrants?

OUTRAM: Quite significant experience. I’d been involved in the ICAC for a year as a Manager of Strategic Risk Assessment which was involved in telephone interception applications that work very closely with the Investigations Division, so a fair bit of experience in the Australian context and before that 20 years of law enforcement in London with the Metro Police.

4.7.6 Mr Outram’s evidence indicated that he held the view that the Chief Investigator and the lawyers were responsible for checking search warrant applications.

4.7.7 Consistent with the multi-disciplinary approach to investigation teams, Mr Outram's evidence made it clear that he saw a demarcation between the role of investigators and lawyers in checking an application for a search warrant. This was consistent with the lawyers and investigators complementing each other's skills. As far as Mr Outram was concerned the lawyer's role was to ensure that an application had a sound legal basis and the investigator's role was to ensure the veracity of the facts contained in the application.

OIICAC: And in terms of lawyers, what were your expectations about what their checking role was?

OUTRAM: The team leaders [chief investigators] are there to, in my view, to ensure accuracy out of the information, to make sure everything in the warrant is ... and to quality assure it and to make sure, you know, that it's not full of typos and spellos and that sort of thing. The lawyer is there to check the law. So I think the lawyer's entitled to rely on the content of the affidavit as being fact and that's a matter for the investigator and the Chief Investigator to assure and where there's any doubt about what is fact, that should be made clear in the affidavit that there is a doubt about fact and then the lawyer is entitled to take that as fact and to basically provide their opinion advice as to the law.

4.8 The investigators

4.8.1 As noted above, the Chief Investigator of the team involved in this matter was Andrew Patterson. He held that position from 8 January 2001 to 26 April 2004.

4.8.2 As at October 2003, the relevant position description, under a heading "Work Performed", stated:

The Chief Investigator has two major roles, firstly as a manager of a team of investigation resources and secondly to personally conduct more complex and sensitive investigations.

Under the heading “Challenges and Problem Solving” the position description states:

Key challenges relate to the need to continually prioritise work between staff members to ensure optimal allocation of resources while achieving accurate outcomes. The Chief Investigator ensures that all avenues of enquiry are followed on matters that may be contentious, complex or sensitive, as these areas of corruption require careful management and thorough attention to ensure they withstand the rigours of political and public scrutiny.

One of the key accountabilities of the Chief Investigator is described as:

Supervise the preparation of briefs of evidence relating to matters detected during Commission investigations in accordance with requirements of the Office of the DPP, and review and prepare formal Commission notices and affidavits for granting of legal process prior to submission to the Legal Unit.

4.8.3 The evidence given by Mr Patterson on 24 May 2006 was that he became involved in the ICAC investigation into Mr Breen as the complaint was allocated to his team. While Mr Patterson could not recall the details of how or why he personally led the investigation, the ICAC’s Case Note Reports show that most of the inquiries made about the allegations against Mr Breen up until 3 October 2003 were made by Mr Patterson.

4.8.4 Robert Graham was an Investigator at the ICAC from 30 September 1991 to 2 January 2006. Mr Patterson’s evidence is that either late on 2 October 2003 or on the morning of 3 October 2003 he asked Mr Graham to prepare the application for a search warrant to be executed on Mr Breen’s Parliamentary office.

4.8.5 The position description relevant to the Investigator’s position as at October 2003, states that the Investigator has the following key accountabilities:

§ Conduct investigations through collecting information via

interviews, taking statements and physical and electronic surveillance, having appropriately planned investigative tactics and strategies, and liaise with other staff in the Strategic Operations Division to discuss file matters and facilitate the process of investigation. Work in multidisciplinary investigative teams for larger investigations and employ covert investigation methodologies.

- § Analyse information and prepare reports relating to preliminary inquiries and formal investigations, for consideration by the Operations Review Committee and Investigations Management Group. Prepare briefs of evidence for assessment by Commission lawyers and possible review by the Office of the DPP.
- § Liaise with public sector agencies, providing advice, recommending action and assisting in the conduct of matters relating to corruption.
- § Attend court and give evidence obtained through the process of investigation.
- § Prepare affidavits and information for various warrants and execute warrants (s40 & s23), and service notices/summonses (ss 21, 22, 35) on behalf of the Commission.

Under the heading “Challenges and Problem Solving” the position description states:

The Investigator liaises closely with Financial Investigators, Lawyers and Analysts to discuss the findings of inquiries and data analysis, while information is exchanged by the position with other Investigators and Support Officers.

- 4.8.6 The evidence shows that Mr Graham, as the investigator, understood that his role was to verify the accuracy of the factual material contained in the search warrant application which he drafted and swore to. The evidence also suggests that he worked within the framework of accepting the instruction from his

supervisor that there was a justifiable basis for obtaining the search warrant and did not query this.

4.8.7 The evidence given by Ms Yota Findanis also suggests that in terms of her understanding how she was to work as a team member, particularly on 3 October 2003, she was to undertake the tasks required of her in order to achieve the outcome of obtaining a search warrant.

4.9 Practice and procedure followed at the ICAC with regards to reporting back to the authorised justice

4.9.1 The evidence of ICAC officers suggests that the report to the authorised justice (the report) regarding the execution of the search warrant as required under Clause 8 of the *Search Warrants Regulation* 1999, was left to the investigation officer who had sworn the warrant. There was no checking of such a report by any other ICAC officer to ensure that either it had been made or that it was accurate. Mr Waldon gave evidence on 30 May 2006 as to how the ICAC records and keeps such reports:

OIICAC: I'll just take you to the authorised justice's record of application of the search warrant. Can I ask you, would you ever get these documents back at the ICAC? Do you get these documents after an investigation's finished or...?

WALDON: Do I get them?

OIICAC: Does the ICAC get them?

WALDON: Yes we should have the authorised justice's record of application. That should be part of the documents we've just kept on the...or a copy of them rather, there's a document kept on the other documents as part of the – the property holdings on the particular investigation.

OIICAC: And who receives the documents?

WALDON: The investigator should give those documents to the property officer... [Inaudible]...Kennedy or Manuel Azola who also works for property. And then they go on the file

which is maintained in property so that they have a copy of the application, a copy of the search warrant, a copy of the occupier's notice and a copy of the justice's record.

OIICAC: Okay. Does anybody – do any of the lawyers read this authorised justice's report when it comes in?

WALDON: No.

OIICAC: Does the team lawyer?

WALDON: No, I don't think so.

4.9.2 Mr Waldon's evidence is inconsistent with the progressive checklist in force in October 2003 which did require the report to the authorised justice to be completed by the investigator in consultation with the team lawyer (see paragraph 4.2.2 above).

4.10 Conclusions about the ICAC's procedures, guidelines and assignment of roles

4.10.1 The evidence before the Inspector establishes that the ICAC had a specific written procedure relating to search warrant applications. This procedure required various decisions to be made and approved by different layers of management. Although the persons interviewed by the OIICAC staff did not have specific knowledge of the details of this written procedure, it seems that they were generally aware of what the procedure required them to do. In practice, investigators carried the primary responsibility for the preparation of search warrant applications and supporting affidavits (including the responsibility to check the accuracy of facts contained within those documents), team lawyers had the responsibility of ensuring that the applications were legally sound and would check the accuracy of facts only if they had the necessary level of knowledge and familiarity with the matter, and the ICAC's management had the responsibility for making the overall decision to investigate.

4.10.2 The evidence further establishes that the ICAC's investigation teams were formed on a multi-disciplinary basis with different members of the teams contributing different skills, knowledge and experience. The evidence also establishes that a practice existed within investigation teams whereby one member of the team could be called on to prepare search warrant applications and supporting affidavits in circumstances where that person did not have direct knowledge of the facts contained in those documents. This was said to be reflective of best practice in law enforcement agencies and enabled the effective allocation of resources.

4.10.3 The application made for the search warrant executed on Mr Breen's Parliamentary office contained a factual error. The effect of the advice of the Crown Solicitor is that the particular error in question, in the particular context of the application, did not render the search warrant invalid. However, it must be noted that this outcome was by its nature "after the event" and, therefore, somewhat fortuitous. The wrong information in the application was contrary to the correct and objective information held by the ICAC. There was no adequate procedure in place to ensure that obvious errors were detected and corrected before the application was made. In the Inspector's view, this simply cannot be good practice, even if it is best practice in law enforcement agencies for search warrant applications to be sworn or affirmed by those not having direct knowledge of the facts.

Chapter 5

THE ICAC'S DECISION TO SEEK A WARRANT TO SEARCH MR BREEN'S PARLIAMENTARY OFFICE

5.1 The information that triggered the ICAC's decision

5.1.1 A Case Note Report created by Chief Investigator Andrew Patterson on 2 October 2003 at 5.50pm records that he received a phone call from Ms Adriana Sammartano. It states:

Adriana Sammartano called Ch. Inv. Patterson

She said BREEN was now aware that we were investigating him. Lucy MANNERING had called him to say that ICAC wanted to interview her. He was also aware of it from the conference he has just been to. BREEN has already been on the phone to people in Lismore sorting out what they need to say to ICAC about him living there.

Adriana said that she is going on leave after tomorrow. She believes that it is very likely that Breen will try and dispose of records in the office. Also there is relevant material on the computers in the office. BREEN's new book is on his laptop, and there is election material on Adriana's computer.

Lucy Mannering was a former staff member of Mr Breen.

5.1.2 When interviewed by the OIICAC, Executive Director (SOD) Michael Outram summarised his understanding of the situation thus: "we had an internal witness who was telling us that evidence was going to go missing."

5.1.3 Solicitor to the Commission John Pritchard told the OIICAC, in his interview on 9 May 2006, that he understood that "[t]here was some information about Breen apparently wiping things off disks in his office. That was the basis for suggesting that a warrant was required"

5.1.4 In her interview with OIICAC staff on 7 July 2006 Ms Sammartano gave evidence that she had rung Mr Patterson on the afternoon of 2 October 2003 to advise him about Mr Breen becoming aware of the ICAC's investigation.¹⁶ Her evidence continued:¹⁷

SAMMARTANO: One of [Mr Breen's] ex-employees rang him up and told him that she'd been contacted by the ICAC. ... I heard the conversation. ... [A]nd Peter [then] put me in a very uncomfortable position and asked me whether I'd been contacted. ... I didn't know how to answer those questions ... that's why I rang Andrew [Patterson] to get his advice. ... I couldn't ring [Patterson] from the office ... and I rang from a public phone on the way home and I told him ... I'm in a very uncomfortable position, Peter's found out ... about the investigation and Andrew said "what do you mean he's found out?" Well, someone's rung up, an ex-employee has rung up and told him about it and then he's started [to] question me as to whether I've been interviewed by ICAC. ... I'm in a position where I don't know what to say because if I tell him it goes against what ICAC's told me to do and if I lie to him then I'm lying to him ... [T]hat was more or less [it] ...

OIICAC: Did you say in that conversation, and I'll put something to you that's been said to us, so did you say in that conversation "I believe Peter Breen's going to remove files from his office"?

SAMMARTANO: No, I didn't say that. I think Andrew asked did I think it was possible . . . and I thought, well, now that he knows about the investigation, I mean, anyone would, that's got stuff in there that shouldn't be, I mean, I don't know, it's just common sense. I can't honestly remember what I said to him about it.

¹⁶ OIICAC Sammartano interview, 7 July 2006, p. 2.

¹⁷ OIICAC Sammartano interview, 7 July 2006, pp. 2-4.

5.2 Other indications that Mr Breen knew about the investigation

5.2.1 Ms Sammartano's call to Mr Patterson on 2 October 2003 was not the first indication the ICAC received that Mr Breen may have known of its investigation of him.

5.2.2 On 2 September 2003 *The Sydney Morning Herald* published a story concerning the Hon. Malcolm Jones MP who, in July 2003, had been found by the ICAC to have corruptly claimed a living away from home allowance. The story also reported that:

an anonymous document listing a series of allegations against Mr Jones' original accusers – Ms Rhiannon and Peter Breen, an independent – was distributed to mail boxes in Parliament House.

The article concluded by stating:

The ICAC would not confirm or deny it was in possession of a copy of the letter.

5.3 The reasoning that supported the decision to apply for a warrant

5.3.1 Mr Patterson's evidence as given to OIICAC staff was that he felt there was a need to obtain a search warrant as he was of the view that Ms Sammartano was a credible witness who in her interview of 1 October 2003 had given him certain information which led him to believe that the ICAC needed to examine further issues concerning the allegations of misuse of resources against Mr Breen. Mr Patterson stated that he was concerned about the information that Ms Sammartano had given him on 2 October 2003 about Mr Breen becoming aware of the ICAC's investigation and that this gave rise "to a concern that things might disappear from the office".

5.3.2 Mr Outram's evidence to OIICAC staff was that he formed the view that the ICAC should apply for a search warrant to be executed on Mr Breen's Parliamentary office because he accepted Mr Patterson's assessment that Adriana Sammartano was a credible witness who had provided the ICAC with some useful evidence in her interview on 1 October 2003. He therefore accepted that her reported latest concern about the likely removal of material from Mr Breen's office was credible and had to be acted on quickly in order to prevent evidence being lost.

5.3.3 In his interview with the OIICAC, Mr Outram reflected on matters to be considered in making such a decision:

The objective is to secure evidence . . . And if you've got somebody coming to you, a whistleblower, an internal witness, or whatever you want to call them, who's very close to Breen . . . saying, well, I have information here that you're going to lose evidence if you don't act very quickly and come and retrieve this material. Then you've got to look at a number of options, you got to think, well, okay, how reliable is the information, how credible is the information, in this case we're looking at someone who works for him and what are our options? Now, I would suggest even now from my recollection that the option of going and speaking to Mr Breen and saying, 'Would you please hand over the material', would have been unlikely to reveal the results we wanted. And even if he handed some material over we'd never been able to fully satisfy ourselves that he'd handed over everything we'd wanted.

. . . [Y]ou're not in control of the situation . . .

. . . [T]here was no other way legally we could have acquired that documentation and guaranteed we'd get it.

5.3.4 The evidence suggests that the only alternative to obtaining a search warrant that was discussed amongst ICAC staff was the possibility of obtaining a "s.23 notice". The term "s.23 notice" is often used by ICAC personnel to refer to the

use of s.23 of the ICAC Act, which provides for the ICAC to enter public premises, search and copy documents, but not seize documents. This option was eliminated as not being suitable to the circumstances as the risk of documents disappearing was too great and the ICAC did not feel that this would be a sufficient means of gaining access to all relevant documents. The Inspector has no reason to doubt that this operational decision was reasonably taken.

5.3.5 In an interview with the OIICAC on 9 May 2006, Mr Pritchard's evidence on the need for a search warrant was as follows:

PRITCHARD: There was some information about Breen apparently wiping things off disks in his office. That was the basis for suggesting that a warrant was required to gain access early. . . .

[W]e'd had a previous matter involving a Member of Parliament and allegations that we were investigating about misuse of resources where we had executed a Notice under section 23 to obtain the same sort of material, but there was a suggestion that Mr Breen may be deleting things from files in his office, so the warrant was seen as our best response or a better response to deal quickly with it.

OIICAC: . . . Were you aware . . . that the application, when the documents came to you were being sought in circumstances of urgency?

PRITCHARD: Oh yes, because it raised an issue of well, why wouldn't we take a similar approach to that we'd taken in the Malcolm Jones matter Malcolm Jones was issued a s.23 notice which effectively is like a search warrant. It allows you to enter, inspect but only copy, can't take originals, and the suggestion was that there was some suggestion of . . . files being deleted from databases so we were particularly interested in getting hard drives and things of that nature. It's questionable whether a section 23 notice allows you to do that because you can only copy, you can't take originals under a

section 23 notice so that is probably the difference between what we otherwise may have done which we did in the Jones matter and which was done in this matter.

5.3.6 Investigator Graham was the person who actually applied for the warrant. He told the OIICAC that the reason for seeking the warrant was that “[w]e believed the evidence was there that was needed to prove the case”.¹⁸ He said that he could not recall whether or not he was informed that there was specific information that that evidence might be removed or destroyed¹⁹ but “that’s a general risk anyway”.²⁰

5.4 The decision-making process

5.4.1 At 6.00pm on 2 October 2003—that is, about 10 minutes after Mr Patterson created the Case Note Report recording the phone call from Ms Sammartano—Mr Patterson created a Case Note Report that was headed “Decision to execute search warrant on BREEN’s Parliamentary office” which said:

Following the information from Adriana SAMMARTANO, Ch. Inv. Patterson briefed E/D Outram on events. It was agreed that the search of BREEN’s parliamentary office needed to be conducted as a matter of urgency and could not wait until next week as originally touted.

Ch. Inv. Patterson then briefed E/D Pritchard and it was agreed that a search warrant was preferable to a s.23 notice, as we would want to seize items. It was agreed that Prin. Lawyer Waldon would assist first thing in the morning with the search warrant.

¹⁸ OIICAC Graham interview, 24 May 2006, p. 9.

¹⁹ OIICAC Graham interview, 24 May 2006, p. 10.

²⁰ OIICAC Graham interview, 24 May 2006, p. 9.

5.4.2 The ICAC's only other record of the decision-making process is contained in a memorandum written on 13 October 2003 by Mr Patterson to Mr Outram after it had been discovered that the search warrant application had wrong information in it. That memorandum says:

I briefed yourself straightaway [after Ms Sammartano's phone call] and we agreed that it was imperative to bring forward the execution of a search warrant on Breen's office to the next available day, being Friday 03.10.03. (This was endorsed by the Deputy Commissioner early the next morning.)

5.4.3 The briefing of Mr Outram by Mr Patterson was oral. The subsequent briefing of Mr Pritchard was also oral. Both briefings appear, from the times of the Case Note Reports, to have occurred within ten minutes after Ms Sammartano rang Mr Patterson. The ICAC holds no record of either briefing other than the Case Note Report. It has been submitted that where urgent applications are being made (especially in the context of the perceived risk that evidence might be destroyed) it is not uncommon for oral briefings to occur.

5.4.4 The Case Note Report of 6.00pm on 2 October 2003 only partially reveals the decision-making process. That process continued on 3 October 2003 and involved, in various ways, at least former Commissioner Moss, former Deputy Commissioner Pehm, Mr Pritchard, Mr Outram and Mr Patterson.

5.4.5 That decision-making and briefing process appears to have proceeded simultaneously with the preparation of the application for the search warrant and the preparation of plans for the execution of the search warrant if granted. Aspects of that preparation will be discussed in Chapter 6, but it may be noted that early on 3 October 2003 Mr Patterson assigned the task of preparing the application to Mr Graham and assigned to Financial Investigator Ms Yota Findanis the tasks of assisting Mr Graham and making database searches. Mr Patterson himself turned to the task of preparing operational orders for the execution of the search warrant.

5.4.6 At some time during the morning Mr Pritchard told Mr Waldon of the

impending search warrant application and—in the absence of Team Lawyer Tim Lowe—assigned to Mr Waldon the role of acting as team lawyer with respect to the search warrant application.

5.4.7 Mr Waldon told the OIICAC that his recollection was that he was not involved until after the decision had been made:

I just happened to be there on that day. . . [As] a result of discussions which I wasn't a party to, but as a result of discussions, it was decided that we needed to secure documentation and the best way of doing that was to execute a search warrant. The team lawyer who was assigned to the investigation was Tim Lowe and I think he was on leave. Not just that day, but for a period of time. So I was asked by John Pritchard to undertake the legal review of the draft documentation. . . . And I think at that stage the drafting had already commenced. I think it was that, on the actual day, that the drafting had commenced which I think was the same day we actually executed the warrant.

5.4.8 Sometime during the morning of 3 October 2003 Mr Pehm was orally briefed by Mr Pritchard and perhaps again by Mr Outram. Consistent with the urgency of the application, no written records were kept of this briefing or these briefings.

5.4.9 Also, during the morning of 3 October 2003, Mr Patterson gave Commissioner Moss an informal briefing.²¹ Ms Moss's evidence was that she may also have received more formal oral briefings from, or may also have had conversations with, Mr Pehm, Mr Pritchard and Mr Waldon about the application on the morning of 3 October 2003.

5.4.10 Mr Patterson gave evidence to the OIICAC that he was not privy to any discussions between members of the ICAC Executive about the actual

²¹ OIICAC Moss interview, 14 August 2006, p. 19.

decision to apply for the search warrant. The evidence indicates that Mr Patterson briefed Mr Outram and then Mr Pritchard on 2 October and then briefed (or at least talked to) Commissioner Moss and Mr Pehm on 3 October, in each case conveying his view that there was a real risk that critical evidence was in imminent danger of being removed by Mr Breen.

5.4.11 Mr Outram's evidence to the OIICAC was that (to the best of his recollection) he was briefed by Mr Patterson about the information which had been received from Ms Sammartano on 2 October and had discussions with other members of the Executive about the search warrant application. The evidence given by Mr Outram suggests that he played a greater role than other members of the Executive in considering the reliability of the evidence provided by Ms Sammartano on 2 October 2003 regarding the imminent likelihood of Mr Breen removing critical evidence from his office:

OUTRAM: I'm stretching my memory here. As I recall it, the information was given to whoever she was speaking with, either Andrew Patterson or his team. It would have been Andrew presumably who would have referred the information to me and told me that she basically said, "I think he's going to be coming in over the weekend or tomorrow and there's going to be documents that are going to be removed." . . . And that was really, well that was, that was the basis for us taking this action, based on as I recall, at least primarily on the information provided by Ms Sammartano.

OIICAC: . . . [H]ow was the decision reached then—if that was the basis—who were the decision-makers in terms of deciding to apply for a search warrant on his Parliamentary office?

OUTRAM: Probably there would be a number of people involved. I wouldn't say there was one person who made the decision. I would have been involved in the discussion, I would imagine Kieran Pehm the Deputy Commissioner would be involved in the discussion, possibly even Irene, because there's no way we would go and run to Parliament House to execute a warrant without the Commissioner being aware.

OIICAC: Did you have those discussions yourself?

OUTRAM: I can't remember, I can't remember.

OIICAC: Can you tell me the names of the people you do recall having a discussion with?

OUTRAM: I can't remember having any discussions. I'm saying here what I presume would have happened and given my experience, but I can't say that I can remember from now two years ago sitting down in a room with Irene, Kieran, John Pritchard or any particular people. All I can say is that there is no way that this kind of exercise would have occurred without there being significant discussion at the executive level and from the ground up. So Andrew Patterson would have been talking with his team, he would have validated information. We would have wanted to know, "Is this information accurate? Is it reliable? What can we do? What are the options? You know, can we, you know, can we, you know, what's the best way we can retrieve this evidence?" And a decision would have been taken, that this is the best way in. Now, I can't say that we took them to that decision, but I certainly would have been one of the people who endorsed it, after the discussions we had that this was the best way of retrieving the evidence. Given the scenario that we faced, which I assume, to recall, was quite time critical.

OIICAC: Right. Was it the practice in that kind of scenario, and I appreciate you've said it was time critical, but to perhaps put anything in writing in terms of a written recommendation to the Deputy Commissioner or Commissioner?

OUTRAM: Well, I don't know that we'd put a written recommendation like that to the Commissioner or Deputy Commissioner. Every decision that you take in an investigation, ideally I suppose, well, you'd have a lot of documentation about why, where, how and when. The reality is that you don't always do that. There may have been a minuted meeting about this, we had regular governance

meetings. The officers, I mean Andrew Patterson himself, if he had a conversation with me he would have had the opportunity to go and make a case note about that discussion, if he got my permission to do something he would have made a case note about it I presume. I may have made a file note myself at the time but I can't remember if we did or not.

5.4.12 On the question of whose decision it was to seek a warrant, Mr Pehm told OIICAC staff:²²

OIICAC: . . . Who would have been the actual decision-maker to say, “yes we’ll go ahead and get the search warrant on Mr Breen’s Parliamentary office”?

PEHM: Well, I think I probably approved the application.

. . . I was wondering [in this interview] if I did actually sign anything off. Certainly I was aware of the proposal and I’d discussed it extensively with the Legal branch and I could see no impediment to it. I took the view that it was a matter for the authorising justice to . . . do his or her duty under the Search Warrants Act.

OIICAC: In terms of ICAC’s decision to apply for it, would you have been the decision-maker?

PEHM: I was the most senior person involved. I would have—so in de facto, well I suppose I would have to take responsibility for it.

5.4.13 Mr Pehm’s evidence to the OIICAC also included:²³

OIICAC: ... Can you tell me about how you became aware from the investigation section about the application for the search warrant?

PEHM: ... It would have been from Andrew Patterson. Certainly there were oral briefings because I recall him

²² OIICAC Pehm interview, 7 July 2006, p. 12.

²³ OIICAC Pehm interview, 7 July 2006, pp. 8-10.

advising me that he had interviewed the staff member and the information from her was that Mr Breen was proposing to remove documents or random material from his office. Whether there was any written briefing to that effect I don't know. I also consulted with Legal ... I spoke to John Pritchard ... I particularly remember speaking to Roy Waldon about the proposal for the application. ...

I was uncomfortable about the prospect of executing a search warrant on that office in Parliament House for obvious reasons. Its, its Parliament House and its not a usual thing...constitutional issues going back to Kings of England about the powers of executive and legislature and all of those issues. There were also issues around – because I remember in the previous one with Malcolm Jones we'd searched his office by way of notice to inspect premises under the ICAC Act. And I had discussions with Legal around that possibility as well as to whether there might be a more appropriate approach and I can't remember precisely what the reasons why were but I was advised that the search warrant was preferable. And I think it revolved around, in terms of giving him notice, because I think with the exercise in a power to inspect premises under the ICAC Act we had to give notice in a way that you didn't with a search warrant. And there had been some issues around that problem in the Malcolm Jones matter and the advice from legal was that a warrant was preferable in view of the prospect that evidence was probably being removed.

OIICAC: In terms of the briefing or discussions you had with Andrew Patterson, what was your state of knowledge about the searches that ICAC officers may or may not have done concerning the factual basis to go and get a search warrant?

PEHM: ... They'd be fairly extensive enquiries into the investigation as a whole. I think they'd been up to the area which is about the "out of Sydney" allowance and the residence at Lismore I think. But I think that the basis around

the warrants – the execution of the warrant on the Parliamentary office – was principally the information from the staff member that material was going to be removed. That seemed to be the urgency [M]y recollection also is that the staff member had advised – or at least this is what I was told – had told the Commission that there was relevant material there to do with claiming and allowances and the sorts of matters we were investigating.

OIICAC: What verification, if any, did you seek concerning the reliability of the information that the ICAC had received from the staff member?

PEHM: I can't recall whether it was the report, I mean the verbal reports from Andrew Patterson and whatever he said. I can't remember whether I actually saw a record of interview with her or not, I don't remember.

OIICAC: What was your usual practice in terms of verifying information that ICAC may have received, particularly in terms of risk management?

PEHM: Well, when you say usual practice, it depended on the case. I don't know that there was a usual practice in that every case I would do the same thing – depending on the circumstances, what powers sought to be exercised. So it was just a judgement based on what was happening at the time.

5.4.14 Mr Pehm also said to the OIICAC that he “kept the Commissioner briefed on all operational matters but this specific one, I'd be surprised if I didn't but . . . I can't recall any written notes or specific conversations where I did.”²⁴

5.4.15 Former Commissioner Moss's evidence to the OIICAC was that she did not make the decision to apply for the search warrant to be executed on Mr Breen's Parliamentary office. Her evidence regarding her involvement was to the following effect:

²⁴ OIICAC Pehm interview, 7 July 2006, p. 12.

- § She was orally briefed on the need for the application for a search warrant on Mr Breen's Parliamentary office at different times by former Deputy Commissioner Pehm, Mr Pritchard, Mr Waldon and Mr Patterson.
- § The thrust of these briefings was that Ms Sammartano was a reliable source of information who had indicated that it was likely that Mr Breen would remove from his office in the imminent future evidence that was critical to the ICAC's investigation. Former Commissioner Moss recalled a sense of urgency being imparted by Andrew Patterson about the need to execute a search warrant on Mr Breen's Parliamentary office.
- § Former Commissioner Moss was involved in discussions with her senior management concerning the issue of Parliamentary privilege and the general sensitivity of executing a search warrant on Parliament House. From these discussions she felt assured that the ICAC had jurisdiction to execute a search warrant on Mr Breen's Parliamentary office.
- § Former Commissioner Moss accepted the oral advice given to her by the ICAC's senior officers. She did not receive any written briefings or documents concerning the search warrant application.
- § She did not sight the search warrant application to be executed on Mr Breen's Parliamentary office. She assumed that the senior management involved in briefing her, who were more "hands-on" in their involvement in the application process, were more familiar with the details of the evidence, and would have also had a checking and documented sign-off process to ensure the accuracy of the application and its compliance with the law.

5.4.16 Mr Pritchard was Mr Pehm's principal or only legal advisor on relevant legal issues. Mr Pritchard himself had been orally briefed by Mr Patterson and Mr Outram on 2 October 2003 on the evidence that Ms Sammartano had provided at 5.50pm that day. He advised Mr Pehm on the assumption that the factual briefing he had received was accurate and justified (from an investigator's viewpoint) the obtaining of a search warrant. He advised Mr Pehm that a search warrant was preferable to a s. 23 notice. Mr Pritchard told the OIICAC that he did not know if former Commissioner Moss had been briefed on the matter of getting a search warrant; former Commissioner Moss says that Mr

Pritchard was one of those who briefed her.

5.4.17 The available evidence supports the view that the decision to approve the application for the search warrant was made, albeit somewhat informally, by executive management. The decision had been initiated by Mr Patterson forthwith after he had received the call from Ms Sammartano and each of the more senior officers with whom he discussed the matter agreed that a warrant should be obtained. The evidence suggests that the consensus style decision making involved everyone effectively concurring with the proposed decision without anyone (other than the initiator – in this case Mr Patterson) turning an independent critical mind to whether or not it was the right decision. Although Mr Pehm says that he was the ultimate decision maker, he effectively went no further than checking the legal issue and then concurring with what was being suggested from below. At least to some degree the officer with the information— Mr Patterson—was not a part of the executive decision-making.

5.5 Conclusions about the ICAC’s decision to seek a warrant to search Mr Breen’s Parliamentary office

5.5.1 Although Ms Sammartano was unable to recall in precise terms her conversation with Mr Patterson on 2 October 2003, Mr Patterson’s contemporaneous notes (as recorded in the Case Note Report) suggest that Mr Patterson concluded that Mr Breen was aware of the ICAC investigation and that there was a risk that he would dispose of relevant records. Mr Patterson then briefed Mr Outram, Mr Pritchard, Mr Pehm and former Commissioner Moss, who each seem to have been involved in the decision making process. The evidence before the Inspector establishes that the ICAC’s decision to seek a warrant was principally based on the perceived risk that evidence could be removed or destroyed. There is nothing to suggest that the question of what to do about any claims of Parliamentary privilege was considered.

5.5.2 Although the Inspector must accept that consensus style decision-making of the kind that prevailed in this case is not an unreasonable management style, in the Inspector's view, it does have risks unless a senior executive independently takes responsibility and accountability.

Chapter 6

THE PREPARATION, MAKING AND GRANTING OF THE APPLICATION FOR A WARRANT TO SEARCH MR BREEN'S PARLIAMENTARY OFFICE

6.1 The ICAC officers involved

6.1.1 On the morning of 3 October 2003 Chief Investigator Andrew Patterson delegated to Investigator Robert Graham the task of drafting the application for a search warrant. The task of conducting inquiries concerning Mr Breen's ownership of property was assigned to Financial Investigator Yota Findanis. According to Mr Patterson, on 3 October 2003 he also instructed Ms Findanis to assist Mr Graham on property ownership issues relevant to the search warrant application. Ms Findanis confirmed that her role on 3 October 2003 was to provide Mr Graham with information on property ownership issues concerning Mr Breen.

6.1.2 Mr Patterson told the OIICAC that he did not play a role in preparing or making the application for the warrant. He said that he was too busy with tasks such as preparing operational orders for the execution of the warrant. He told the OIICAC that he was not aware of any ICAC procedures requiring him to approve or sign-off on a search warrant (the role of a chief investigator in this regard is mentioned above at paragraph 4.2.4).

6.1.3 The ICAC officers involved in finalising the search warrant application were Principal Lawyer Roy Waldon (to whom Executive Director Legal John Pritchard assigned the role of acting as Team Lawyer (described above at paragraph 4.6.7) and John Pritchard himself. Mr Pritchard's role was to undertake a final check of the application and, once he had approved it, sign-off on the application (see paragraph 4.6.3. above).

6.1.4 Former Commissioner Moss, Mr Pehm and Mr Outram were not involved in the preparation of the search warrant application.

6.2 The preparation and approval of the application

6.2.1 Mr Graham prepared the application, using a template for a search warrant application which existed on the ICAC database. The template required specific information to be entered in certain fields for each individual application.

6.2.2 During his interview with the OIICAC on 24 May 2006 Mr Graham's account of the preparation of the application appeared to proceed not so much from an actual recollection of the specific application but from a recollection of how applications were usually prepared. He explained that an application for a search warrant would typically not be prepared from scratch but would be adapted from a previous application. Each time a new application was to be made, an earlier application would be retrieved and any new information and matters particular to the specific new search would be added.

6.2.3 The application for a warrant to search Mr Breen's Parliamentary office was prepared on an urgent basis. It appears that the task was assigned to Mr Graham early on the morning of 3 October 2003. Mr Patterson's interview with Ms Sammartano had not been transcribed, so Mr Patterson gave Mr Graham an oral briefing about what Ms Sammartano purportedly said in the interview. Mr Graham also had been aware of the investigation for some time and had at least a general knowledge of the investigation. He also had access to the results of Ms Findanis' searches of real estate databases and had himself in September conducted searches of the electoral roll and the Roads and Traffic Authority database, apparently to gather information on where Mr Breen lived or said he lived.

- 6.2.4 In line with the traditional²⁵ practice, the draft affidavit was not checked by Mr Patterson. Indeed, it was not checked for factual accuracy by anyone. It was checked for “legal sufficiency” (which the Inspector understands to mean “formal sufficiency”) by Mr Waldon, but he had not been involved in the investigation before 3 October 2003 and was only brought into the matter to act as team lawyer in the absence of Tim Lowe.
- 6.2.5 Mr Waldon told the OIICAC that he advised Mr Graham that the narrative needed to be redrafted to make it clearer. Once redrafting had been done, Mr Waldon advised that the application was, from a legal viewpoint, sufficient and appropriate. He did not check the accuracy of the factual statements. He proceeded on the basis that they were correct.
- 6.2.6 The documentation was then submitted to Mr Pritchard for final approval. He gave that approval.

6.3 Compliance with ICAC procedures, and required duties

- 6.3.1 As noted above (at paragraph 4.2.2) the first item in the Progressive Checklist in Appendix A to Section 14 of ICAC’s *Operations Manual* was “Director of Investigations/Chief Investigator has approved that an application for a Search Warrant is appropriate.” The evidence establishes that both the Director (Outram) and the Chief Investigator (Patterson) “approved that an application for a Search Warrant [was] appropriate.” It must be concluded that this requirement was satisfied.
- 6.3.2 The ICAC did not, however, use or maintain the Progressive Checklist. This was largely a procedural rather than a substantive failure as each of the requirements of the Progressive Checklist was observed, even though this was not done formally nor strictly in compliance with the Progressive Checklist.

²⁵ A. Patterson, memorandum, 13 October 2003, p. 3.

6.4 The terms of the application and the incorrect statements in it

6.4.1 The application that was submitted to the justice who issued the warrant, Paul Morgan, JP, is reproduced in full in Appendix 4 of this Report. Incorporated within the application document itself was a statement of information—being information said to support the issuing of a warrant—that ultimately was sworn on oath by Mr Graham.

6.4.2 Amongst the several things he said in the statement of information, Mr Graham—referring to 3 Lucia Crescent, Lismore—swore that

Commission enquiries have confirmed that Mr Breen is the registered proprietor of this property and that Valerie and Alfred Murphy reside at the property.

As already noted, information obtained from Lawpoint and RP Data (as set out at paragraph 6.5.1 below) shows, and showed, at the time, that this statement was incorrect. The ICAC accepts that this statement was incorrect.

6.4.3 In the application, Mr Graham also swore (in paragraph (x)) that:

Ms Sammartano stated Mr Breen is a joint owner of the house in Lismore, however, married couple, Valerie and Alfred Murphy reside in the property as tenants.

The house to which this statement referred was clearly the house at 3 Lucia Crescent, Lismore, and the only occasion on which Ms Sammartano might have made such a statement was in her interview with Mr Patterson on 1 October 2003. No one has suggested that Ms Sammartano might have given such information to the ICAC on another occasion.

6.4.4 The correctness of this statement must be judged by reference to the ICAC's transcript of Ms Sammartano's interview with Mr Patterson on 1 October 2003. That transcript does not record Ms Sammartano telling the ICAC that Mr Breen was a joint owner of the house at 3 Lucia Crescent, Lismore. It does

include the following:

PATTERSON: The address in Lismore, are you aware if anybody lives there?

SAMMARTANO: Yes.

PATTERSON: Who's that?

SAMMARTANO: Well, the house belongs to Valerie Housego – Valerie Armstrong. She's known as three names . . . Valerie Murphy . . . Housego – Armstrong . . . And I think she lives over with her husband.

PATTERSON: So she owns the house?

SAMMARTANO: Yes as far as I know she does.

Mr Patterson's handwritten note, made during his interview with Ms Sammartano, and apparently recording that Ms Housego owned the property, is reproduced above at paragraph 2.5.8.

6.4.5 The assertion that Ms Sammartano told the ICAC that Mr Breen owned 3 Lucia Crescent, Lismore, was plainly wrong. The ICAC also accepts that this is so.

6.4.6 The two statements together comprise three distinct, although overlapping, assertions:

- (a) that Mr Breen owned 3 Lucia Crescent, Lismore;
- (b) that Ms Sammartano had said so; and
- (c) that ICAC's inquiries had confirmed so.

All three assertions were incorrect.

6.5 How the application came to have incorrect information: sources of evidence

6.5.1 The OIICAC has had three sources of information about how incorrect information came to be in the application sworn by Mr Graham:

§ First: The OIICAC has interviewed relevant persons.

- § Second: Available to the OIICAC were copies of the printouts of data obtained via the internet (in particular from www.lawpoint.com.au and www.rpdata.com) by Ms Findanis on 1 and 3 October 2003 about the ownership of properties of interest to the ICAC. The Lawpoint internet site gives access to electronic versions of Certificates of Title held by the Land Titles Office. The RP Data internet site combines data from different sources and was considered by ICAC officers to be less reliable, although it had more information.
- § Third: As discussed later in this Report (see Chapter 9) the errors in the application were discovered by the ICAC in October 2003, leading to the ICAC's own review of the matter. During that review, Mr Graham, Mr Patterson and Ms Findanis all wrote memoranda each dated 13 October 2003. Those memoranda were available to the OIICAC during its investigation.

6.5.2 The memoranda of Mr Patterson and Mr Graham expressly refer to the erroneous information contained in the search warrant application. Mr Patterson's memorandum said:

...I submit my report on the issue that has arisen with an erroneous piece of information contained in a search warrant affidavit on ... the Commission's investigation into Peter Breen MLC.

I have caused Investigator Robert Graham and Financial Investigator Yota Findanis to report on this matter and their reports are attached.

6.5.3 Ms Findanis' memorandum is simply headed "PROPERTY SEARCHES – PETER BREEN" and contains the assurance that "[a]t all times, the information I collected and used was true and correct to the best of my knowledge and belief", but does not refer to the search warrant application. When interviewed by the OIICAC on 15 May 2006, Ms Findanis said that she was not made aware that incorrect facts were contained in the search warrant application and Mr Graham's supporting affidavit.

When she was interviewed again on 31 May 2006, Ms Findanis said that she may have heard some mention of the inaccuracies in the search warrant application, but could not recall anyone telling her specifically about those inaccuracies.

6.6 How the application came to have the incorrect statement that Ms Sammartano told the ICAC that Mr Breen owned 3 Lucia Crescent, Lismore

6.6.1 The available evidence points fairly firmly to the conclusion that Mr Patterson was the source of the statement by Mr Graham in the application for a search warrant that Ms Sammartano had told the ICAC that Mr Breen owned 3 Lucia Crescent, Lismore.

6.6.2 In his memorandum of 13 October 2003, Mr Graham said:

On Wednesday, 24th September 2003, in response to information provided to the Commission, I interrogated the COPS (RTA) database to ascertain an address history for Mr Peter Breen MLC. The results of that search revealed that between 1993 and 2003, Mr Breen had resided at addresses in Campbelltown NSW, Lismore NSW and Leumeah NSW, the most recent address being Unit 1, 3 Lucia Crescent, Lismore NSW since March 2003. I also conducted a search of the electoral roll to ascertain what address is recorded for Mr Breen. The result of that search was Flat 1, 3 Lucia Crescent, Lismore Heights NSW. On Wednesday, 1st October 2003, Mr Peter Breen's secretary, Adriana Sammartano was interviewed at the Commission, concerning Mr Breen claiming the Sydney Allowance, whilst living in Sydney and declaring his principal place of residence to be in Lismore. I understood at that time, that Mr Breen was a part or a full owner of a property in Lismore, which needed to be confirmed.

6.6.3 Mr Graham told the OIICAC that he had been involved in the investigation of Mr Breen “from beginning to end”.²⁶ Mr Graham did not participate in Mr Patterson’s interview of Ms Sammartano on 1 October 2003,²⁷ but as just quoted his memorandum says that Mr Graham “understood at that time, that Mr Breen was a part or a full owner of a property in Lismore”, although that fact “needed to be confirmed”.

6.6.4 In his interview with the OIICAC, Mr Graham said:

OIICAC: ... In terms of information concerning the ownership of 3 Lucia Crescent, where would [you] have got that from?

...

GRAHAM: Well, if Andrew did the interview he probably would have told me.

In light of other information given in the interview about the searches conducted by Ms Findanis, and Mr Graham’s own computer searches, this reference to Mr Patterson “probably” being the source of information can be seen to be a reference to Mr Patterson being the source of the information that Ms Sammartano told the ICAC that Mr Breen owned 3 Lucia Crescent, Lismore.

6.6.5 The net effect of Mr Graham’s memorandum and interview with the OIICAC is that Mr Graham seems to assert that the statement in the application for a search warrant that Ms Sammartano had told the ICAC that Mr Breen owned 3 Lucia Crescent, Lismore, was based on information provided to Mr Graham by Mr Patterson on 1 October 2003.

6.6.6 Whatever Mr Patterson precisely told Mr Graham, it is likely that it reinforced (and was reinforced by) what Mr Graham already believed from his searches of 24 September 2003.

6.6.7 Mr Patterson’s memorandum of 13 October 2003 says:

²⁶ OIICAC Graham interview, 24 May 2006, p. 10.

²⁷ OIICAC Graham interview, 24 May 2006, pp. 8 and 9.

Early Friday morning [3 October 2003] I duly tasked [Graham] with drafting the necessary affidavit and search warrant. I was unable to furnish him a transcript of Sammartano's evidence, so I had to suffice with a verbal briefing to him of her accounts, from my recollection of it.

The memorandum makes no mention of the handwritten note that Mr Patterson made during his interview with Ms Sammartano in which he noted that Valerie Housego was the owner of 3 Lucia Crescent (see paragraph 2.5.8 above).

6.6.8 Mr Patterson's proposition that he orally briefed Mr Graham on 3 October about the contents of the interview with Ms Sammartano is not necessarily inconsistent with Mr Graham's contention that he was aware of those contents on 1 October 2003.

6.6.9 As noted, the ICAC's 2003 review of how the application contained wrong information focussed only on the statement that "Commission enquiries have confirmed that Mr Breen is the registered proprietor of this property" and the ICAC did not notice that the application was also incorrect to attribute such information to Ms Sammartano. Nevertheless, Mr Patterson's memorandum of 13 October 2003 acknowledges that he was the source of information about what Ms Sammartano had said.

About the statement "Commission enquiries have confirmed . . ." he wrote: "given that I held a similar belief in relation to the Lismore property, I don't think I would have actually recognised the error even if I had read the affidavit."²⁸

6.6.10 The evidence given by Mr Graham supports a view that Mr Patterson alone was the source of information about what Ms Sammartano allegedly said at the interview concerning the ownership of 3 Lucia Crescent. In his interview with the OIICAC staff Mr Graham stated that although he could not recall it,

²⁸ A. Patterson, memorandum, 13 October 2003.

he assumed that Mr Patterson, as the person who had conducted an interview with Ms Sammartano, would have briefed him about the interview as part of instructing him on the preparation of the search warrant application. In any event, it would be surprising if Mr Graham received an account of what Ms Sammartano had said from anyone other than Mr Patterson. Either Mr Patterson gave a wrong account or Mr Graham incorrectly heard what he was told or incorrectly recalled what he had been told when preparing the affidavit.

6.7 How the application came to have the incorrect statement that ICAC enquiries had confirmed that Mr Breen owned 3 Lucia Crescent, Lismore

6.7.1 On this aspect of the matter, it is convenient to refer to Ms Findanis' searches first. The following data was obtained on 1 October 2003:

- that 3 Lucia Crescent, Lismore—being Lot 17 in Deposited Plan 242229—was owned by Valerie Alice Housego and had a single residential building on it (the result of an RP Data search);
- that Lot 61 in Strata Plan 61571 (at Byron Bay in the Local Government Area of Byron) was owned jointly by Peter James Breen, Valerie Alice Armstrong and Alfred Paul Murphy (the result of a Lawpoint search);
- that Lot 20 in Strata Plan 18851 (at Woolloomooloo in the Local Government Area of Sydney) was owned jointly by Peter James Breen and Diane Mary Thomas (the result of a Lawpoint search);
- that Lot 226 in Strata Plan 18851 (at Woolloomooloo in the Local Government Area of Sydney) was owned jointly by Peter James Breen and Diane Mary Thomas (the result of a Lawpoint search);
- that one Cooper owned 22 Debenham Way, Leumeah, and that the property had previously been owned by 'BREEN & THOMAS' (the result of an RP Data search); and
- that 1/11 Reddall Street, Campbelltown, was owned by James Freeman Bernard and Mary Agnes Breen (the result of an RP Data search).

The results of five of these searches—all except the first, the one about the Lismore address—were summarized by Ms Findanis in a Case Note Report of 5.00pm on 1 October. The Case Note Report made no mention of 3 Lucia Crescent, Lismore, or, indeed, of Lismore at all.

6.7.2 On 3 October 2003 two further searches of the RP Data database were made. The results showed that RP Data recorded Lot 20 in Strata Plan 18851 as being Unit 26 of 1 Boomerang Place, Woolloomooloo and Lot 226 in that strata plan as being Unit 226 of 1 Boomerang Street,²⁹ Woolloomooloo. Ms Findanis prepared a Case Note Report, dated 3 October 2003 at 9.47 am, summarizing these two results. The Case Note Report made no mention of Lismore.

6.7.3 Mr Graham told the OIICAC that Ms Findanis “did the initial check and gave [him] the info”.³⁰ Mr Graham’s memorandum of 13 October 2003 said:

On Wednesday, 1st October 2003, [Ms] Sammartano was interviewed ... I understood at that time, that Mr Breen was a part or a full owner of a property in Lismore, which needed to be confirmed. ... I also requested Yota Findanis to conduct an RP Data search on that address and any other address where Mr Breen has resided since 1993. From the results of the RP Data searches, it appeared that the address in Lismore and a Lot number found at Byron Bay were the same property...

While drafting the application, Yota Findanis was tasked to conduct further inquiries into other properties at Woolloomooloo NSW, where it is believed Mr Breen is currently living. I referred to a number [of] RP Data and Land Title printouts provided by Yota Findanis from her previous background searches. One Lands Title printout listed joint owners of a property to be Peter Breen, Valerie Armstrong (Murphy) and Alfred Murphy. I believed the document referred

²⁹ The UBD Sydney 2007 street directory records the street as “Boomerang Place”.

³⁰ OIICAC Graham interview, 24 May 2006, p. 29.

to and confirmed the joint ownership details of the property at 3 Lucia Crescent, Lismore Heights. Therefore, at the time of drafting the application, I was of the belief that Mr Breen was a joint owner of that property with the tenants, (a term I use for occupiers), Valerie and Alfred Murphy and therefore included that information in the application believing it to be true and correct. Since then, however, I have discovered that the Land Title printout I referred to actually pertained to an address in Cooper Street, Byron Bay, not Lucia Crescent, Lismore Heights.

Although it is not clear how a property in Byron Bay (in the Local Government Area of Byron) would be confused with a property in Lismore (which is in the Local Government Area of Lismore City), given that the two locations are approximately 50km apart by road, Mr Patterson explained, in his memorandum of 13 October 2003, that “It is easy to see how the confusion arose as [to] the different ownership configurations between the Lismore property and that at Byron Bay, particularly since the initial belief amongst the team was that we were only dealing with a single property.”

6.7.4 The account given by Mr Graham in his memorandum does not say that Ms Findanis did anything more than provide printouts. In particular, it does not assert that Ms Findanis told Mr Graham what the data contained or meant. It is consistent with Mr Graham himself reading the printouts and reaching his own misunderstanding. On the other hand, the account is not necessarily inconsistent with Mr Graham having received assistance from Ms Findanis with respect to interpreting the data.

6.7.5 Mr Patterson’s memorandum of 13 October says “I asked Yota Findanis to assist Rob with checks etc.” Mr Patterson’s evidence to the OIICAC included:

OIICAC: Ok. What discussions took place about how this factual error had occurred in the first place?

PATTERSON: Well I spoke to Robert... Obviously ... he was the one who drafted the affidavit, I don’t remember exactly what he said, but he, he said he got the information from Yota,

who should have been doing the property checks...and I can't remember exactly how the error had come about...but ... I was quite satisfied, having spoken to both of them that yeah, there was a mistake ... I can't remember exactly what [Ms Findanis] said, ... I spoke with her about it as well, because Robert said "well I got the information from her", which is normal. ... I'm not sure if a mis-reading or if there's something been mis-recorded ... there was some confusion over exactly where Mr Breen had been living... Because different sources had different addresses for him, that was part of the, part of problem...and obviously one of the issues that, as you're aware, we were looking at in the investigation, was the Sydney allowance and therefore where was he living? ... So it wasn't as cut and dried as most warrants are like that, but...I can't remember exactly what the nature of the—

OIICAC: ... [D]id you actually alert Yota to the fact that there was a factual error in the affidavit?

PATTERSON: No I think she already knew from memory.

OIICAC: Right. But your conversation with her—it was clear that (whether you told her or someone else told her) she did know that there was a factual error?

PATTERSON: Yeah, I think so, yeah. ... I mean I was certainly clear that both her and Robert were aware that there had been an error.

OIICAC: Ok and that they were aware that that error had gone into an affidavit?

PATTERSON: ... Robert was certainly aware of it, because he had to report on it...yeah I'm almost sure that that was discussed with Yota as well, the affidavit issue.

6.7.6 Ms Findanis gave evidence to the OIICAC on 15 May 2006 that she undertook a number of property searches without knowing how they were going to be used, who was relying on them and what, if any, conclusions were drawn by other ICAC officers as a result of information contained in the results of the

searches. Ms Findanis denied having any conversations with Mr Graham or Mr Patterson concerning the ownership of 3 Lucia Crescent, Lismore, and in her evidence of 30 May 2006 stated:

Whatever enquiries I conducted were put in writing. That is my normal procedure and that is what I continue to do, so whatever verbal conversations or whatever searches I had done are down in writing, they're on ICS as evidenced by my Case Notes. Now I cannot speak or say what other conversations or what other ideas, or anything else that was going through Robert or Andrew's mind or any other information they had in their possession. These were my searches, this is what had been done, prior to the search warrant being executed, it's down in writing, that's all I can say to that. There is nothing in my documentary evidence to suggest that he was the owner of 3 Lucia Crescent, Lismore, so I have no idea how Robert put that in his statement.

6.7.7 Indeed, in her evidence of 30 May 2006 Ms Findanis also stated that she was not aware on 3 October 2003 which officer was responsible for preparing the affidavit. She gave evidence that she was not aware of there being any urgency concerning the search warrant, despite accepting that she had been advised on 2 October 2003 that the ICAC would be applying for a search warrant to be executed on Mr Breen's Parliamentary office the next day.

6.7.8 In her evidence to the OIICAC on 15 May and 30 May 2006, Ms Findanis said that she did not know how Mr Graham came to make the incorrect statement concerning Commission enquiries about 3 Lucia Crescent, Lismore, or how he or Mr Patterson might have come to the view that the Commission had conducted enquiries that showed that Mr Breen was the owner of 3 Lucia Crescent, Lismore Heights.

6.7.9 Ms Findanis' memorandum of 13 October 2003 says:

I was tasked with conducting property and land title searches in relation to Peter James Breen ...

On 1 October 2003, searches were undertaken online on Lawpoint (NSW Land Titles). These inquiries indicated that Breen was a joint tenant owner of a Strata Plan lot in the Byron Bay region with Valerie Armstrong and Alfred Murphy. ...

... RP Data checks were then conducted on addresses at:

- Lucia Crescent, Lismore
- 22 Debenham Avenue, Leumeah
- 1/13 Reddall Street, Campbelltown.

The address at Lismore indicated that Valerie Housego was the owner of this property. It was not known with certainty if this was the property located in the Land Titles Search at Byron Bay due to the close proximity of Lismore and Byron Bay, and the limited information provided by Land Titles. Additionally due to the inaccuracies that have been experienced on RP Data in the past, further inquiries were required to determine if the Lot number recorded on RP Data was the correct one for the Lismore property. Based on the initial inquiries conducted at that particular time, including electoral roll searches, it appeared that the address at Lismore and the Lot number recorded on Land Titles at Byron Bay could possibly have been referring to the same property.

...

On 7 October 2003, further Land Titles and RP Data searches were conducted into Breen and associated parties. Street addresses and lot numbers were matched in relation to the Lismore and Byron Bay properties. It was found that 3 Lucia Crescent, Lismore is owned solely by Valerie Housego (now known as Valerie Murphy) and 61/11 Cooper Street, Byron Bay (as recorded in RP Data) is owned jointly by Breen, Valerie Armstrong (now known as Valerie Murphy) and Alfred Murphy.

This memorandum appears to indicate that between 1 and 3 October 2003 Ms Findanis believed that database entries for the Lismore property and the

Byron Bay property “could possibly have been referring to the same property” (and if so, it would follow that Mr Breen was a joint owner of the property because the more reliable data came from the Land Titles Office and indicated that Mr Breen was a joint owner of the Byron Bay property) and that it was not until 7 October 2003 that it was “found” that the two properties were indeed distinct, with Ms Murphy owning the one at 3 Lucia Crescent, Lismore.

6.7.10 When interviewed by the OIICAC on 15 May 2006, Ms Findanis said that the searches she had done did not indicate that Mr Breen owned a property in Lismore (which is plainly correct). She did, however, say:³¹

[T]he only place I guess you could say, blurry point was due to the proximity of Lismore and Byron Bay. We weren’t sure at the time what exact properties he owned in that region.

6.7.11 When interviewed by the OIICAC on 30 May 2006, Ms Findanis was taken to her Case Note Report of 1 October 2003. About it she said “it’s clear from this Case Note that he’s [Breen’s] not listed as an owner of 3 Lucia Crescent, Lismore.” Asked about her reference on 15 May 2006 to an “assumption” that Mr Breen owned the property at Lismore, Ms Findanis said:

That was, that could have been one of the assumptions that would, that was made at the time, but it was clear from my property searches the evidence that I had collected at the time, that he wasn’t an owner. ... So that’s why I had said to Andrew well we’ll have to do further searches to clarify and match the street address with the lot numbers to ensure. ... I can’t remember exactly the conversation on that day [with Graham] but I do remember saying it to Andrew ... around that time, could have been 1st of October 2nd of October, I can’t remember

Her evidence continued:

OIICAC: Was it prior to the search warrant being executed?

³¹ OIICAC Findanis interview, 15. May 2006, p. 13.

FINANDIS: Yes.

OIICAC: Ok, so you're saying, if I understand you correctly, that Andrew Patterson was aware before the 3rd of October, that there was no evidence to support an assertion that Mr Breen was the owner of 3 Lucia Crescent Lismore?

FINDANIS: Well there was no assertion by me to suggest that.

...

OIICAC: ...[T]he question is that you had a conversation with Andrew Patterson prior to the search warrant being executed on the 3rd of October, ok and the effect of that conversation is, there is no evidence, right?

FINDANIS: Yes.

OIICAC: That Mr Breen owns 3 Lucia Crescent?

FINDANIS: Yes.

6.7.12 The proposition that Ms Findanis advised Mr Patterson that further checks were required on the question of whether or not Mr Breen owned 3 Lucia Crescent does not appear in Ms Findanis' memorandum of 13 October 2003 or any other document provided to the OIICAC, even though Ms Findanis told the OIICAC that all her advice to Mr Patterson was in writing.

6.7.13 The evidence firmly points to Ms Findanis having made the computer searches that were the basis of Mr Graham's statement, in the application for a search warrant, that "Commission enquiries have confirmed that Mr Breen is the registered proprietor of this property". On balance, it appears likely that she provided the printouts generated by her searches, probably under cover of her Case Note Reports, to Mr Graham when he was preparing the application. It is, on balance, apparent that Mr Graham misinterpreted the printouts and, if he read them, the Case Note Reports. It may have been significant that the Case Note Report of 1 October 2003 referred only to the Byron Bay property and made no mention of Lismore or of the search that had showed that 3 Lucia Crescent was owned only by Valerie Housego. If, as Mr Patterson's memorandum of 13 October 2003 suggests, Mr Graham believed that there was only one north coast property of relevance to the investigation, the

inclusion of reference to the Byron Bay property in the Case Note Report and the omission of reference to Lismore in the Case Note Report may have, however inappropriately, reinforced the erroneous assumption that Mr Breen owned a property in Lismore.

6.7.14 The evidence as it stands does not support a clear conclusion on whether or not Ms Findanis discussed the information in the printouts with Mr Graham and, if she did, what she said. By the time of the OIICAC's investigation, and probably by 7 October 2003, Ms Findanis was able to see that the printouts did not support any contention that Mr Breen owned 3 Lucia Crescent, Lismore. But there is evidence that as at the time the application was being prepared (3 October 2003) she believed that there was a "possibility" that Land Titles Office records showed that Mr Breen was the owner of 3 Lucia Crescent, Lismore. The evidence does not support a clear conclusion on whether or not she conveyed any opinion on the matter to Mr Graham.

6.8 The making and granting of the application

6.8.1 At or about 2pm on 3 October 2003, Mr Graham and Mr Waldon attended before Paul Morgan JP at the Downing Centre court complex in Sydney. Mr Morgan was authorized to issue search warrants. Mr Graham applied for a warrant.

6.8.2 Mr Waldon's evidence was that he would not normally attend an application for a search warrant but had done so on this occasion because it was not usual for a warrant to be sought to search a Parliamentarian's office and the issuing justice might ask a question in respect of which he (Mr Waldon) might have been able to assist. Mr Waldon's attendance was reflective of the ICAC's acknowledgement of the seriousness and sensitivities of the application.

6.8.3 Mr Morgan gave the OIICAC a description of what ordinarily occurs upon an application for a search warrant:

[T]he applicant for the search warrant attends the court

premises...they have a written application prepared under legislation, before we commence the process the applicant is required to sign the application and then either swear the information on oath being true and correct or make an affirmation that the information is true and correct. . . .I require the applicant for the search warrant to swear the information in front of me. . . .After that I read the application, if I need any further information from the applicant, then I'll ask questions of them, then I'll make a decision about whether to grant or refuse the application.

6.8.4 Mr Morgan told the OIICAC that he remembered the warrant he issued to authorise a search of Mr Breen's office because a warrant to search a Parliamentarian's office was unusual. However, Mr Morgan did not "have any actual recollection of this particular application on the day." Mr Morgan could not recall who had attended before him or how many people had attended. Mr Morgan did not recall the *Parliamentary Precincts Act* being drawn to his attention but said to the OIICAC, "I don't know that particular piece of legislation itself. I've never heard of it, so I would have thought that if it had been mentioned at the time I would have consulted it." On the other hand, although he could not recall the making of the application, Mr Morgan said that he was aware of Parliamentary privilege and was "pretty sure that I would have raised that issue myself with [those applying for the warrant] because I'm aware that there is a privilege attached to the Parliament offices, building etc as there is to courthouses, but I can't remember the actual conversations, I can't remember any specific conversation but it's my impression that we would have discussed that, I mean, even if they hadn't raised it ... I can't remember if I asked them any question or whether they asked me a question...I just had the feeling that we would have discussed it in some way but I can't remember the actual conversation."

6.8.5 Mr Waldon could not recall there having been any discussion of Parliamentary privilege. He told the OIICAC: "[Mr Morgan] may have asked some [questions] but I don't really recall and certainly if he did there wouldn't have

been very many because we weren't there for that long." Asked whether any information was given to Mr Morgan about Parliamentary privilege, Mr Waldon said to the OIICAC "I don't recall, I don't think we, I didn't volunteer anything. I don't know whether he asked about it."

6.8.6 The grounds upon which the warrant was issued were recorded at the time in paragraph 3 of the "Authorised Justice's Record of Application for a Search Warrant". Paragraph 3 states:

The relevant particulars of the grounds on which I relied to justify the issue of the warrant as follows:

I am satisfied that there are reasonable grounds to believe there is in the premises a document or other thing connected with a matter that is being investigated by officers of the Independent Commission Against Corruption under the Act:

- a reliable informant, Sammartano, has given information to ICAC that Breen has been fraudulently claiming the Sydney Allowance whilst living in Sydney
- ICAC has obtained evidence that Breen owns a property in Lismore and that such property is currently being rented by other persons
- the informant also alleges that Breen has been writing a book and using the services, facilities and equipment of the Parliamentary (sic.) for that purpose and also using the Logistic Support Allocation to pay for his travel costs for purposes not connected with his Parliamentary duties
- the informant alleges that travel documentation and paperwork for the false claims are stored in archive boxes in Breen's office.

6.8.7 Mr Morgan told the OIICAC that this record was an accurate statement of his reasons for issuing the warrant. He also told the OIICAC that one of the statements on which he relied in approving the application was the assertion contained in Mr Graham's affidavit that Mr Breen was the owner of 3 Lucia Crescent, Lismore Heights.

6.8.8 The ‘Authorised Justice’s Record of Application for a Search Warrant’, signed by Paul Morgan JP, was attached to the search warrant application of Robert Graham of 3 October 2003. It records that the warrant was granted at or about 2.15pm on 3 October 2003.

6.9 The validity of the warrant

6.9.1 Notwithstanding the errors contained in the search warrant application, it is unlikely that the search warrant and its execution would be regarded as invalid. The evidence before the Inspector establishes that the ICAC had reasonable grounds to believe that Mr Breen’s Parliamentary office contained documents and things that were connected to its investigation: see *George v Rockett* (1990) 170 CLR 104 at 116. Even absent the incorrect information, there appears to have been reasonable grounds for the ICAC to believe that Mr Breen’s Parliamentary office contained items that were relevant to its investigation. In relation to this issue, the Crown Solicitor advised the ICAC that:

“I do not think the inclusion of that statement in the application meant that as a consequence the justice could not have been satisfied that there were reasonable grounds for issuing a search warrant (s.40(1), *ICAC Act*, s.12A(1), *Search Warrants Act*; *R v Malayta* 87 A Crim R 492).

6.9.2 In light of the above, the Inspector is satisfied that the inclusion of the incorrect information probably did not invalidate the search warrant.

6.10 Conclusions about the making and granting of the search warrant application relating to Mr Breen’s Parliamentary office

6.10.1 The search warrant application relating to Mr Breen’s Parliamentary office was prepared by Mr Graham based on information provided to him by Mr Patterson and Ms Findanis, as well as information that he had obtained

himself. Although the search warrant application was checked for “legal sufficiency” (i.e., formal sufficiency), it does not appear to have been checked for factual accuracy. As a result, the search warrant application incorrectly stated that Mr Breen owned 3 Lucia Crescent, Lismore, that Ms Sammartano had told the ICAC that this was the case, and that the ICAC’s inquiries had confirmed it. These statements were relied on by the Authorised Justice, Mr Paul Morgan JP, in authorising the application, but they were not the only factors that were relied upon. The Inspector is satisfied that the incorrect statements influenced the granting of the application. However, the Inspector is satisfied that this probably did not invalidate the search warrant.

Chapter 7

THE EXECUTION OF THE WARRANT TO SEARCH MR BREEN'S PARLIAMENTARY OFFICE

7.1 The operational orders

7.1.1 Operational orders outlining procedures to be followed in executing the search warrant were drafted by Chief Investigator Andrew Patterson on 3 October 2003. These orders also addressed administrative and logistical issues. The ICAC staff due to execute the search warrant were briefed on the operational orders on the afternoon of 3 October 2003, between 2pm and 3pm, after the warrant had been granted by the authorising justice.

7.1.2 The ICAC officers assigned to execute the search warrant were Mr Patterson, Mr Graham, Ms Findanis, and Investigator Chris Bentley. The operational orders identified Mr Patterson as the person in charge of the execution process.

7.2 The ICAC warns a Parliamentary officer that they are on their way

7.2.1 In 2003 Ms Lynn Lovelock was the Deputy Clerk of the Legislative Council. On 3 October 2003 she was Acting Clerk due to the absence of the then Clerk of the Legislative Council, Mr John Evans. Her evidence to the OIICAC was that she recalled being warned by telephone that ICAC officers were on their way a few minutes before they arrived. Her best recollection was that she received the call from Mr Patterson, but conceded that it may have been Mr Pritchard, from whom she subsequently received numerous calls about this matter in general. Her evidence to the OIICAC included:

Andrew [Patterson] rang me and said that he and a number of officers were on their way to the Parliament ... to execute a search warrant . . .

My memory said it was Andrew who rang me and said I'm walking up and can you ensure that we get ... entry into the building without the fuss ...

. . . The first call I had about the search warrant, in my memory, it says it was Andrew. But it could have been John ... but John didn't come up and my memory is that the person was on the street . . . and called me. Now I hope I haven't dramatised that in my head, but they were definitely on their way – they had already left the ICAC premises and were on their way to execute the search warrant. And they were giving me notice, and I thought that it was, like, did they think that I was going to somehow tell the member to run? I remember being quite perturbed by receiving such short notice that they were within five minutes of the building. Which didn't give me very long . . . my first reaction was, this is the Parliament, and I don't think you can!

. . . [W]hether it was John or Andrew, I'm not sure. I have a feeling it was Andrew who rang me and I spoke later to John. But that, I could be wrong on that, so I wouldn't want to stand up and say, this is my absolute definite memory, but as soon as he told me, whichever one it was I spoke to told me that they would like me to secure their passage into the Parliament, because we wanted to avoid media attention and any difficulties in relation to them coming to execute the search warrant. I hung up from that phone call – it was a very short one and immediately called the Crown Solicitor at the same time as I was pulling out the Act on the Precincts and whatever. And we looked at —over the phone —I got verbal advice from the Crown Solicitor, at that time, in relation to the ICAC's powers. And we couldn't find anything that would stop them. So that's what I was looking for – was something that I could go down and say look, you can't come in. Because that was my first reaction, you can't execute a search warrant on the Parliament's premises. I think we already had the MOU

signed with the police, but the ICAC aren't the police. And when they contacted me, they made it very clear that my role was to facilitate them gaining access to the member's office without – and really as a courtesy too, to make sure that...I mean they could have just turned up and then there could have been a 'media circus' which they were trying to avoid. So, they were trying to show some sort of sensitivity to the political nature of the building and that's why they contacted me. It wasn't in my role as an advisor on privilege, it was literally to ensure that we didn't have difficulties with getting them up to the floor, with the media perhaps being contacted, and with the member then being further embarrassed by the fact that this was happening.

7.2.2 Mr Patterson told the OIICAC that he could not recall who, from the ICAC, contacted an officer from Parliament House to advise that the search warrant was about to be executed:

OIICAC: . . . After the briefing's finished and you're ready to go and execute, can you tell me what steps were taken to then arrange the execution of the warrant.

PATTERSON: From memory, we contacted the Clerk of the House.

OIICAC: Who's "we contacted"?

PATTERSON: Well, the team, I think it would have been, I mean I, I remember talking to her... whether somebody more senior at the Commission made the initial contact or not, that's quite possible given the nature, but I can't remember. I mean any conversations or contact that we had would have....would presumably have been case noted. . . . But I remember she was definitely contacted because the arrangement was that when we walk down from the office down there to issue the warrant, she [Lovelock] met us...

7.2.3 Mr Pritchard's evidence of 7 July 2006 was that immediately prior to the search warrant being executed on Mr Breen's Parliamentary office, he telephoned and spoke to Ms Lovelock to advise her that the warrant was about to be executed.

7.3 Entry and notices given under the *Search Warrants Act*

7.3.1 The ICAC officers arrived at Parliament House shortly after 3.00pm on Friday, 3 October 2003.

7.3.2 The search warrant authorised entry into "the parliamentary office of Mr Peter Breen MLC at Parliament House, Macquarie Street, Sydney", a search for certain materials, and the seizure of any such materials found.

7.3.3 Section 15 (3) of the *Search Warrants Act* required an "occupier's notice" to be served on "a person who appears to be an occupier of the premises and to be of or above the age of 18 years". That Act does not define "occupier" but does (in s. 3) provide that the term "includes a person in charge of the premises". The *Parliamentary Precincts Act* provides that the Parliamentary precincts are generally under the "control and management" of the Speaker of the Legislative Assembly and the President of the Legislative Council.

7.3.4 Although when interviewed by the OIICAC in 2006 Mr Patterson and Mr Graham said that the occupier's notice was provided to Ms Lovelock, documents prepared at the time—namely, a handwritten contemporaneous note made by Mr Patterson and the "REPORT TO AUTHORISED JUSTICE ON THE EXECUTION OF A SEARCH WARRANT" made pursuant to Clause 8 of the *Search Warrants Regulation 1999*—state that the occupier's notice was served on Adriana Sammartano. The balance of evidence supports a finding that the notice was served on Ms Sammartano.

7.3.5 The proposition that Ms Sammartano could be regarded as an "occupier" of Mr Breen's office, or of Parliament House, is open to question. In the opinion

of Mr Hughes QC, there was no basis for considering Ms Sammartano to be an “occupier” of Mr Breen’s office within the meaning of the *Search Warrants Act*. This was based on the meaning of “occupier” and also, amongst other things, on Ms Sammartano’s status as an informant to the ICAC. However, the Parliamentary Standing Committee found at paragraph 3.3:

“Shortly before the officers’ arrival at Parliament House, the Solicitor to the Commission contacted the Deputy Clerk of the Legislative Council to advise of the proposed search. On arrival at the office of Mr Breen, the officers requested a member of Mr Breen’s staff to contact Mr Breen and advise him of the warrant. According to the ICAC’s submission to this inquiry, the officers were advised that Mr Breen declined to attend. The officers provided the staff member with an ‘Occupier’s notice’ relating to the search, in accordance with the requirements of the *Search Warrants Act 1985* (NSW), which was subsequently handed to the Deputy Clerk.”

In light of the findings made by the Parliamentary Standing Committee, it is open to find that the “occupier’s notice” was properly served, or at least believed to be properly served. Mr Patterson and Mr Graham told the OIICAC that they had not received any training or instruction in relation to the “occupier’s notice”.

7.4 Notice given to Mr Breen to attend the search

7.4.1 Mr Patterson’s evidence was that Mr Breen was not present in his office at the time the ICAC officers attended to execute the search warrant but that Mr Breen was contacted in order to be advised about the search warrant and to be given an opportunity to attend the execution. Mr Patterson’s evidence is as follows:

He wasn’t present when we arrived. Now, I don’t, I don’t remember exactly who said what, I could be, I mean there would be notes in the investigation files and stuff on it, but, the upshot was that he was contacted by phone. ... I think at my

request, Adriana contacted him. I think that's how it went...I'm just trying to remember who spoke to him. In any event the answer that came back was that he wasn't prepared to come back for the warrant and that just to go ahead and do it now that's all recorded somewhere, I think, as to exactly what was said, I, I'm just trying to remember whether I spoke to him or whether that message came back from Adriana. I can't remember exactly, but that, that was certainly, as a result of the contact with him, he was definitely contacted, definitely spoken to and my impression at the end of that was that he wasn't coming back to the office for the purpose of the warrant. I mean it was explained to him that we've got a search warrant and that's what we're here to do, we'd prefer you to be present, he said he wasn't coming back, he was somewhere else doing something....I can't remember what it was though...And that to just go ahead and do it...So we did.

7.4.2 Mr Graham's evidence was that Mr Patterson rang Mr Breen to give him notice about the warrant and to invite him to attend the execution.

Well [Mr Breen] wouldn't [attend], Andrew rang him and said, 'We're, this is Andrew Patterson from the ICAC, we've got a search warrant to search your office, would you like to come and sit in on the search warrant?' ... From my recollection, he said something like, 'I'm at some "do" or meeting or something and I can't make it, so go ahead'.

7.4.3 The evidence given by Ms Findanis to the OIICAC was that Mr Patterson asked Ms Sammartano to ring Mr Breen to advise him about the execution of the search warrant. The evidence is as follows:

Then we proceeded with the search warrant execution and Andrew, Chief Investigator, gave the secretary, he asked her to let Mr Breen know that we were in attendance and he was, he gave him the option of attending. ... When the secretary said, Mr Breen is not here, Andrew said, 'Can you please get Mr

Breen here?’ and she said he was—can’t remember where he was—he wasn’t present and Andrew gave him the option of being present. ... Andrew told the secretary to let him know that ICAC was executing a search warrant on his premises and if he would like to come. ... It was his office, so, he was had the option of coming.

7.4.4 Ms Sammartano’s evidence was consistent with that given by Mr Patterson, i.e. that she spoke to Mr Breen to advise him about the search warrant and to invite him to attend the execution: She stated “...they all stood there waiting until I had the conversation with Peter, no one did anything.”

7.4.5 Ms Lovelock’s evidence was also that Ms Sammartano called Mr Breen.

7.4.6 Mr Breen’s evidence was that Ms Sammartano telephoned him at approximately 4pm on 3 October 2003 to advise him that officers from the ICAC were, pursuant to a search warrant, searching his office “and placing material in boxes. When [he] returned to [his] offices at about 6:00pm the search and seizure operation was completed.”

7.5 Material seized

7.5.1 There is a record of the material seized from Mr Breen’s office in a document called Property Seizure Record. The Property Seizure Record was created by the ICAC and is dated 3 October 2003 and signed by Milka Cirjack, Support Officer. Ms Sammartano’s signature appears next to the words “SIGNATURE – OCCUPIER” on the Record. The Property Seizure Record notes that various materials such as lever-arch folders, documents, CDs, dockets and books were seized.

7.5.2 A memo from Mr Patterson to Mr Pritchard of 15 October 2003 entitled “Execution of a search warrant on the Parliamentary office of Peter Breen MLC” states:

As a result of executing the warrant, the search team seized 2 computer hard-drives and 1 laptop computer. The 2 hard-drives were removed from desktop personal computers by a Commission officer specially trained to do such removals. The laptop computer was seized whole. Given the sensitive nature of this warrant execution, I did seek over the phone, and receive, support from the Commission's Executive for my decision to seize the computer items.

The original plan was to mirror on site the hard-drives in any relevant desktop computers located, and to seize whole any relevant laptop computers located. This is frequently the standard operating procedure. The reason for seizing the hard-drives was that technical difficulties arose in relation to the mirroring process on site. Seizure of hard-drives is not uncommon during investigations, either for technical reasons, as in this case, or for other operational considerations.

- 7.5.3 There is no doubt that the computer hard drives and laptop were seized pursuant to the search warrant. Advice to the ICAC from the Crown Solicitor was that this seizure was not authorised by the search warrant according to its terms. There is no reason to doubt the correctness of that advice.

7.6 How the ICAC dealt with Parliamentary privilege

- 7.6.1 Ms Lovelock told the OIICAC in her interview on 22 August 2006:

LOVELOCK: ... As I said to Andrew, he seemed to have the right to execute the search warrant and as I understood it, that gave him certain rights to go in. But then I also said to him, 'You have absolutely no right to take anything that's privileged'.

OIICAC: Right. So, you had this conversation with him while you walked towards Mr Breen's office?

LOVELOCK: And within – I mean we had the conversation a number of times, during the course of the execution of the search warrant where I'd be....and it wasn't sort of a very formal thing, where I'm just saying, 'look, you know you cannot take anything that is privileged'.

OIICAC: And, tell me, did he indicate to you some method for how they would distinguish what was privileged?

LOVELOCK: No. That was part of the problem. I don't think that the ICAC understands what privileged material really is. But he assured me that under section ... 122...that they understand that Parliamentary privilege is sacrosanct and they're not going to breach privilege. The problem that we had ... I knew that under the law, I was required to assist them to execute the search warrant and I didn't want to be in breach of that. But, I also knew under Parliamentary privilege that ... they have this absolute sort of right to stop people from trespassing against it, it would be contempt of the Parliament. So, I found myself on the one hand trying to help them, and on the other, sort of, wanting to protect the member, but not to protect the member from the purposes of being investigated for what might end up being a breach of the law. So, it was difficult, because I wasn't sure even what they were looking for. ... I didn't get a copy of that search warrant. It wasn't handed over, I think, until the end of the search, and I don't think it was handed to me at the beginning, because it wasn't my office, and the member wasn't there.

7.6.2 Later in the interview Ms Lovelock said:

They, in executing the warrant ... they told me and reassured me that they were not seeking to abrogate privilege in any way and that they were not interested in privileged material. But, they certainly made it clear to both Adriana and myself that they had the authority to search everything in his office, go through everything and look at whatever they felt they needed.

That's my impression that they felt they had the right to – under this warrant – go through his computers, go through his filing cabinets, go through his draws and look at any material. What they did with me was, if they saw something they thought – and they assured me they'd do this – if there was something they were unclear about, they would seek my advice as to whether or not I felt that was privileged.

...

They opened his laptop and started to go through the material on that. ... And then Adriana was saying there was all this material on there and ... they asked her could she isolate what was speeches for Parliament and so forth. So, their understandings of a proceeding in Parliament were things that were said in Parliament, rather than things that might have been created for the purpose of a proceeding in Parliament. ...

Well, I told them that privilege covers a lot more than that and that's why they were dealing with me and I was speaking with them and looking at this and I'm saying, look that looks privileged, I don't think they should have that, this looks privileged. She had to go through her own computer as well, so that ... they're the sorts of things we were doing and it went on for a number of hours.

7.6.3 Mr Patterson's evidence to OIICAC was that the ICAC officers executing the search warrant relied on Lynn Lovelock to advise them on whether or not material seized was subject to Parliamentary privilege:

... Lynn Lovelock was having a look at the stuff that was being seized and she raised the issue of Parliamentary privilege over certain stuff ... I don't know whether she got handed everything ... Lynn was certainly having a look at what was being taken.

7.6.4 Mr Patterson's evidence was that Ms Lovelock only raised an objection in terms of Parliamentary privilege in respect of material contained on one of Mr

Breen's computers. Mr Patterson's evidence was that he spoke to Mr Pehm about this and as a result the ICAC agreed to the computer being securely stored by Ms Lovelock pending the resolution of the issue of Parliamentary privilege:

PATTERSON: Now the issue with Parliamentary privilege came up, certainly in relation to the computer, I think. ... Yeah it was in relation to one of the computers... And she raised the issue and I thought that it was more prudent to get advice from the executive of the Commission, rather than simply interpreting the warrant, I mean my, my view was that the warrant had force and that whatever the warrant said we could take, we could take, but given obviously the delicacy of the situation, when Lynn did raise an objection to the computer, I spoke to the Deputy Commissioner ... I spoke to Outram initially, but it was Kieran Pehm actually who discussed the issue in detail with me... Over the phone ... [T]hen the arrangement that I negotiated with Lynn Lovelock following that discussion with Kieran, was that we wouldn't seize the computer, but that she would remove it to a secure area under her control, so that obviously it wasn't accessible anymore to Mr Breen. ...

OIICAC: What assurances, if any, were given in respect of any other material, what negotiation had occurred in respect of any other material?

PATTERSON:...I'm just trying to think whether there was any other material at the time that was, an issue raised with it...from recollection there was subsequent discussion about things and I think Mr Breen was given an option to come in with his lawyers ... [a]nd go through stuff and assert, in relation to certain items, if he was claiming privilege and then ... [f]rom memory then there was a big conference between his lawyers and our lawyers ... and I think ... that if we thought there was an issue with documents, they would be sealed up as needing to be looked [at] by those in a position, I mean weren't

in a position obviously to determine what had Parliamentary privilege or not...and particularly without Mr Breen there, there was nobody there to assert on a particular item that the privilege was being claimed, which made it difficult.

OIICAC: Yes. So what would you do in that instance, when you were there? You said what you did in terms of the computer, ... but where you weren't sure about a particular document, what happened?

PATTERSON: Well, if, if I thought it was relevant to the evidence being looked for and it was covered under the warrant, then we would take it and then have it looked at before it was treated as evidence ... I'm, I'm absolutely certain that he came in at some stage with the lawyers...

OIICAC: Sure...

PATTERSON: ...To go through evidence.

OIICAC: Yeah, can I just go back to that, you said, you'd take it and have it looked at before you treated it as evidence; who would look at it?

PATTERSON: Oh the lawyers?

OIICAC: Your ICAC lawyers?

PATTERSON: I mean we weren't qualified to determine whether something was privileged or not.

7.6.5 Ms Lovelock's evidence on the issue of her raising an objection about the ICAC seizing Mr Breen's computer was as follows:

OIICAC: Did you speak to John Pritchard?

LOVELOCK: I think I may have at some point. Yes, I think we may have had a conversation from that office about – or I might have come down here – to talk about Parliamentary privilege and what they could or couldn't do and he assured me that nothing they were doing was to breach privilege. They seemed to have an understanding that they weren't to breach privilege but subsequently it became apparent that they didn't

understand. And most people don't, to be honest... I mean, most people don't understand privilege. So and even me, who I believe has a very good understanding of Parliamentary privilege, I found it impossible to identify lots of material in his office according to whether it would be privileged or not. I have no difficulties with them taking any material that he had in relation to administering his affairs, but when it came to material on his computer, letters that had been written... They were looking through to see perhaps, and in the long run decided to take the whole computer, which subsequently became an issue that they took the whole computer because there was so much material on it that they didn't bother trying to sort out what was privileged, what wasn't. They took the whole computer and I must say I feel bad that it didn't occur to me that they shouldn't have taken that whole computer because of the material that was on it.

OIICAC: At the time, I understand they "imaged" the computer disk drive.

LOVELOCK: Yes, yes.

7.6.6 Mr Pritchard wrote an email on 9 October 2003 to Mr Outram, Mr Patterson, Mr Graham, Mr Bentley and Ms Findanis (copied to Mr Pehm, Mr Lowe and Mr Waldon) entitled: "Peter Breen MLC and Search warrants". In this email Mr Pritchard advised that:

An issue has arisen as to the extent of the authority granted by the search warrant executed on Peter Breen's Parliament House office to seize and take away the hard drives for Breen's laptop computer and the two desktop hard drives used by his staffers from the office.

The email also records Mr Pritchard's understanding was that the hard-drives were not opened and sought clarification if this understanding was incorrect. The OIICAC could not locate any response from any of the recipients of the email.

- 7.6.7 Correspondence was exchanged between the President of the Legislative Council, and former Commissioner Moss from 9 October 2003 onwards concerning claims of Parliamentary privilege over material contained in the computer hard-drives which were seized. This correspondence led to a dispute between the Parliament and the ICAC concerning the scope and nature of Parliamentary privilege.
- 7.6.8 In her letter of 10 October 2003, former Commissioner Moss gave assurances that none of the seized computer hard-disk drives had been opened or accessed in any way by ICAC officers.
- 7.6.9 In a letter dated 10 October 2003 from former Commissioner Moss to the President of the Legislative Council, it was acknowledged that the Commission had seized the hard-disk drives of two computers and Mr Breen's laptop.
- 7.6.10 A Case Note Report created by Andrew Patterson, dated 15 October 2003 at 11:00am, titled: "Advice from John Prichard re seized exhibits", records the following:
- John Pritchard spoke to Ch.Inv. Patterson.
- He advised me that we should suspend examination of any items seized from the parliamentary search warrant until any arguments about parliamentary privilege have been resolved.
- I immediately informed Team 2 staff who were working on the material, being Yota Findanis, Robert Graham, and Paul Cookson.
- 7.6.11 Submissions made by Mr Breen claiming Parliamentary privilege over certain documents seized subsequently resulted in the Legislative Council's Standing Committee on Parliamentary Privilege and Ethics (the Standing Committee), holding two separate inquiries into the matter. This resulted in two reports being produced, the first being Report 25, December 2003, and the second being Report 28, March 2004. These reports made findings and

recommendations on the issue of Parliamentary privilege and the ICAC's conduct regarding the seizure of material from Mr Breen's Parliamentary office.

7.6.12 The Standing Committee's first report of December 2003 found that:

...in executing the search warrant the ICAC did in fact seize at least one document within the scope of proceedings in Parliament. The Committee is of the view that proceedings in Parliament will inevitably be hindered, impeded or impaired if documents forming part of proceedings in Parliament are vulnerable to compulsory seizure. In that context, the Committee has found that a breach of the immunities of the Legislative Council was involved in the execution of the search warrant in this case. However, as it does not appear that the ICAC acted with improper intent, or with reckless disregard as to the effect of its actions on the rights and immunities of the House and its members, no contempt of Parliament has been found. Nonetheless, the Committee is mindful that any subsequent attempt by ICAC to use documents which fall within the scope of proceedings in Parliament in their investigations could amount to a contempt.

7.6.13 The Standing Committee's second report of March 2004 dealt with the status of the disputed material and made the following findings and recommendations:

Finding 1

That the documents contained [in] the suspension file, together with the 13 letters from computer files were retained by Mr Breen for purposes of or incidental to the transacting of parliamentary business.

Finding 2

That having been retained for purposes of or incidental to the transacting of parliamentary business the documents fall within

the scope of “proceedings in Parliament” for the purposes of Article 9.

Recommendation

That the House uphold the claim of privilege by Mr Breen in relation to the suspension file and 13 letters from computer files disputed by the ICAC.

7.7 Conclusions about the execution of the search warrant on Mr Breen’s Parliamentary office

7.7.1 The evidence before the Inspector establishes that the Acting Clerk of the Legislative Council was informed of the execution of the search warrant on Mr Breen’s Parliamentary office a short time before the ICAC’s officers attended Parliament House. On balance, the evidence establishes that Ms Sammartano was served with the occupier’s notice. There is, however, an unresolved issue as to whether the service of the occupier’s notice was done in accordance with the *Search Warrants Act* and also as to whether it was appropriate to serve the notice upon Ms Sammartano given her status as someone assisting the ICAC’s inquiries. The Inspector recommends that the ICAC should give consideration to reviewing its practice in relation to the service of the occupier’s notice and should consider providing training and instruction to relevant staff members in relation to the issue, if such instruction and training has not already been provided.

7.7.2 On the evidence before the Inspector, it seems that the ICAC staff members who executed the search warrant had not given consideration to what steps needed to be taken to preserve Parliamentary privilege and to deal with any claims that might be made. This led to the seizure of a document (though not ultimately used) which was covered by the privilege. Since the time of the events in question, the ICAC has developed procedures and protocols to address questions of privilege co-operatively with the Clerks of Parliament.

Chapter 8

THE ICAC OBTAINS A WARRANT TO SEARCH 3 LUCIA CRESCENT, LISMORE

8.1 The application for and granting of a warrant

8.1.1 On 8 October 2003, at or about 3:10pm, Robert Graham attended before Ian Peebles, JP, and applied for a warrant to search 3 Lucia Crescent, Lismore.

8.1.2 The application for the warrant included a statement of information sworn by Mr Graham. The sworn statement did not assert that Mr Breen was an owner of 3 Lucia Crescent, that Ms Sammartano had said so, or that ICAC enquiries had confirmed so. Rather, paragraph 2 (b) of the statement included the following:

(vii) On 1 October 2003, Commission officers interviewed Ms Adriana Sammartano, currently employed as Mr Breen's parliamentary staff secretary. She provided information as to Mr Breen's ineligibility to claim the Sydney Allowance.

(viii) Ms Sammartano stated that Mr Breen had been claiming the Sydney Allowance since he was elected in 1999, by claiming his principal place of residence was 3 Lucia Crescent, Lismore NSW, when in fact he has been living in Sydney and currently resides at Boomerang Street, Woolloomooloo NSW, and [is] therefore not eligible to claim the allowance.

(ix) A Sydney Allowance Election Form has been sighted that shows that Mr Breen has declared the property at 3 Lucia Crescent, Lismore to be his principal place of residence for the purpose of claiming the Sydney Allowance. The Commission has interrogated the RP Data property System and Lawpoint databases, which provided information that Mr Breen has no interest in the property situated at 3 Lucia Crescent, Lismore and that the property is owned by Valerie Alice Armstrong

(nee Housego). Since married, Valerie Murphy currently resides at 3 Lucia Crescent, Lismore, with Alfred Murphy.

8.1.3 Paragraph 2 (b) (x) was at the bottom of page 2 of the application and it appears that the last line or lines of the paragraph are, for some reason, missing. The last line of the page, which line is fully aligned (or justified) with the other lines, reads “in archive boxes in Mr Breen’s office at Parliament House. Ms Sammartano”. The application is reproduced at Appendix 5.

8.1.4 On 5 March 2008 the ICAC provided to the OIICAC, under cover of a letter from Ms Theresa Hamilton, Deputy Commissioner of the ICAC, an unsigned, unsworn copy of an application for a search warrant for 3 Lucia Crescent dated 8 October 2003. The applicant named in the application was Robert Graham. Paragraph 2 (b) (x) of the application is at the bottom of page 2 of the application. However, the last line of the paragraph appears to be complete. The paragraph concludes on page 3. The last line on page 2, which is fully aligned (or justified) with the other lines, reads “in archive boxes in Mr Breen’s office at Parliament House. Ms Sammartano *stated that in the past, Mr Breen often stayed at the Byron Bay Beach Resort in Byron Bay NSW when he visited the Lismore property.*” (italics supplied)

8.1.5 The ‘Authorised Justice’s Record of Application for a Search Warrant’, records that a warrant for 3 Lucia Crescent, Lismore was granted at 3.10 pm on 8 October 2003. Mr Peebles recorded that he found “that there were reasonable grounds for issuing the warrant” and noted that he had formed the relevant belief “upon the information contained in the application”.

8.2 The preparation, authorising and checking of the application

8.2.1 In his evidence to the OIICAC Mr Graham confirmed that he personally prepared the application for the search warrant.

8.2.2 As noted above at paragraph 4.6.3, the practice at the ICAC was for

applications for search warrants to be checked and approved by the nominated team lawyer and then the Director, Legal before being taken to an authorising justice.

8.2.3 Mr Graham told the OIICAC that he sent a draft of the application to Mr Waldon for checking. Mr Graham's evidence was that he expected Mr Waldon to ensure that the application was drafted such that it complied with the law and would contain a reasonable argument for being granted by an authorising justice. By a letter dated 22 August 2008, the Inspector sought further clarification from Mr Graham about the circumstances of the preparation and making of the search warrant application of 8 October 2003. Mr Graham replied by a letter dated 3 September 2008 in which he set out a different recollection of events to that which he gave to the OIICAC in his interview on 24 May 2006. It is also different to the version set out in Mr Graham's minute of 13 October 2003. Given the inconsistencies, the Inspector is unable to place much, if any, weight on Mr Graham's recollection of events in relation to the preparation and making of this application.

8.2.4 Mr Patterson told the OIICAC that he expected Mr Graham, as the investigator swearing the application, to draft it and send it to Mr Waldon in his capacity as the team lawyer checking the application. Mr Patterson further told the OIICAC that he expected Mr Waldon to check the facts and to ensure also that the application was sound as to legal requirements so as to be approved by an authorising justice. Mr Patterson's expectation of Mr Waldon's role is inconsistent with the views expressed by Mr Pritchard, Mr Waldon and Mr Outram as to the role of the team lawyer in relation to checking factual matters.

8.2.5 Mr Outram's evidence to the OIICAC was that he expected Mr Graham as the investigator swearing the application to draft the application and to ensure the accuracy of factual statements contained therein. He expected that a lawyer checking the application would ensure that it would comply with the law and would contain a reasonable argument for being granted by an authorising justice.

- 8.2.6 Mr Waldon could not recall checking the document and neither could Mr Pritchard. It is possible that Mr Waldon and Mr Pritchard may have seen an earlier version of the application but it is not possible to make any certain conclusions about the matter.
- 8.2.7 The Inspector notes that there is some doubt as to whether the application for a search warrant for 3 Lucia Crescent, Lismore, prepared by Mr Graham, was submitted for checking and/or was checked by any of the ICAC's lawyers prior to it being submitted to the Authorising Justice, Mr Peebles.

8.3 Patterson and Graham go to Lismore

- 8.3.1 Mr Patterson and Mr Graham flew to Lismore on 8 October 2003 for the purpose of executing the warrant to search 3 Lucia Crescent on 9 October 2003.
- 8.3.2 On 9 October 2003 at or about 12:25 pm, Mr Patterson and Mr Graham, accompanied by Inspector Peter Szaak of the NSW Police, attended 3 Lucia Crescent for the purposes of executing the warrant but found no person and no vehicle present.
- 8.3.3 About half an hour later, Mr Pritchard telephoned Mr Patterson and told him not to execute the warrant until further advised. The essential reason for this decision appears to have been a realisation that the statement, made in the 3 October 2003 application, that "Commission enquiries have confirmed" that Mr Breen owned 3 Lucia Crescent was possibly not correct." The discovery of the error is discussed below in Chapter 9.
- 8.3.4 Later on 9 October 2003 a decision was made to attend 3 Lucia Crescent and seek permission to search the property without executing the warrant. On 10 October 2003 Mr Patterson and Mr Graham visited 3 Lucia Crescent, Lismore, again. They did not execute the warrant but obtained Ms Valerie Murphy's

consent to enter and search the premises. Ms Murphy also participated in a recorded interview and allowed the officers to take some documentation.

8.4 The report back to the authorising justice

8.4.1 On 14 October 2003 Mr Graham executed a written report to Mr Peebles regarding the execution of the warrant. The totality of the substantive portions of the report were:

1. The warrant was not executed for the following reasons:

The occupier of the premises voluntarily provided documents relevant to the investigation and willingly allowed the subject premises to be inspected by the officers named on the warrant.

2. The occupier's notice was not served.

There was no suggestion in the report that the warrant was not executed because on the day the warrant was to be executed it had been discovered that information in the 3 October 2003 application concerning the ownership of 3 Lucia Crescent was inaccurate. In its written submissions the ICAC said:

“108. It is clear that on 9 October 2003, Mr Pritchard directed Mr Patterson not to execute the search warrant on the premises at Lismore. This occurred after Mr Pritchard came across certain information on 9 October 2003, the nature of which he could not recall, which indicated that Mr Breen may not have had a legal interest in the premises at 3 Lucia Crescent, Lismore. Mr Pritchard spoke with Mr Pehm and then contacted Mr Patterson by telephone and advised him that he was concerned about “inconsistencies” surrounding the nature of Mr Breen’s interest in the property and until that matter was resolved the warrant should not be executed.

109. Mr Graham did not include this information in his section 21 report dated 14 October 2003 to the authorised justice. The section 21 report is an accountability measure under the *Search Warrants Act* and is replicated in the *Law Enforcement (Powers*

and Responsibilities) Act 2002 (NSW). The ICAC is satisfied that the report to the authorised justice should have included this information.

110. It cannot be determined, however, from the inquiries conducted by the OIICAC whether Mr Graham was made aware by Mr Patterson or others of the concerns held by Mr Pritchard about executing the warrant, and if he had been made aware of those concerns, the reasons why he omitted reference to those matters in the section 21 report. Neither Mr Graham nor Mr Patterson was questioned about these matters in the interviews conducted by the OIICAC.
111. It is unlikely that Mr Graham sought the advice of Mr Waldon in order to prepare the section 21 report. Mr Waldon did not recall reviewing the report before it was sent to the authorised justice. Further, as the ICAC's search warrant procedures in place at the time did not require Mr Graham to forward a draft of his section 21 report to a legal officer for review it is unlikely he did so.
112. In May 2005, the ICAC altered its procedures connected with the preparation of the section 21 report to require the case officer to prepare the report in consultation with the case lawyer. These changes are reflected in the current procedures."

8.4.2 Paragraph 111 of the ICAC's written submission is incorrect in so far as it asserts that the ICAC's search warrant procedures in place at the time did not require Mr Graham to forward a draft of his section 21 report to a legal officer for review. As stated in paragraphs 4.2.2 and 4.9.2 above, the progressive checklist in force in October 2003 did require the report to the authorised justice to be completed by the investigator in consultation with the team lawyer, but the evidence suggests that this was not done.

8.5 Conclusions about the obtaining of the search warrant in relation to 3 Lucia Crescent, Lismore

8.5.1 Mr Graham prepared a search warrant application in relation to 3 Lucia Crescent, Lismore. It is not clear whether Mr Waldon or Mr Pritchard checked the application, if in fact the document was forwarded to them. In any event, the evidence establishes that Mr Pritchard was aware that the warrant was in the process of being executed, but decided that it should not be executed because of the inconsistencies surrounding Mr Breen's alleged ownership of the property.

8.5.2 Although Mr Graham prepared a section 21 report to the authorised justice which confirmed that the warrant was not executed, the report did not correct the earlier error. In its submission to the Inspector, the ICAC accepts that the section 21 report should have referred to the earlier inaccuracy.

Chapter 9

THE ICAC DISCOVERS AN ERROR IN THE APPLICATION OF 3 OCTOBER 2003

9.1 The errors

9.1.1 As mentioned earlier in this Report, there were two incorrect statements in Robert Graham's affidavit of 3 October 2003. These were:

- § that Adriana Sammartano had told the ICAC that Mr Breen was a joint owner of 3 Lucia Crescent, Lismore; and
- § that Commission enquiries had confirmed Mr Breen to be an owner of the said property.

9.1.2 The evidence shows that subsequent to the execution of the search warrant on Mr Breen's Parliamentary office (or perhaps even before—see section 9.2 below), the ICAC realised that it had made an error in respect of the second statement, but did not realise that there was an error in relation to the first statement. There is no evidence to suggest that the ICAC ever considered this second issue even after the interview between Mr Patterson and Ms Sammartano was transcribed on 3 October 2003.

9.1.3 The evidence as to how the ICAC realised that the assertion "Commission enquiries have confirmed that Mr Breen is the registered proprietor of this property" was incorrect can be found in the memoranda written by ICAC staff on 13 October 2003 and in evidence given to the OIICAC in 2006. It should be borne in mind that different officers of the ICAC may have learned of the error at different times.

9.2 An assertion that the error was discovered before the warrant was executed

9.2.1 When Mr Graham was interviewed by the OIICAC on 24 May 2006, his evidence included the proposition that he was advised of the error regarding Mr Breen's alleged ownership of 3 Lucia Crescent, Lismore, almost immediately after he had obtained the warrant to search Mr Breen's Parliamentary office and before the warrant was executed:

GRAHAM: ... I got the information that ... was put in and then I went and swore it, believing that it was true and then on the way back I got a phone call saying "you know that information about so and so", I said "yeah", and he said "it was wrong."

...

I got a phone call on the way back to the office from swearing the warrant ... [from] Yota I think, 'cause she, I think it was her that rang me ... [a]nd said we got a problem.

OIICAC: Ok, so Yota knew this, you're pretty confident that Yota knew this?

GRAHAM: Well, she did the initial check and gave me the info which I believed was true then, and then, when I got the call which I think was her and saying that information I gave you was wrong, I think then she found out that it was wrong and then told me, 'cause she, I think she got told that I'd gone down to swear it, so she rang me, but I was on the way back, and I'd already sworn it. ... So the double checking was done by her, it wasn't done by me.

OIICAC: How do you know that?

GRAHAM: Oh I'm assuming ... I'm assuming I said 'cause she rang me. ... I'm sure it was her that rang me. ... She might have told Andrew and said "where's Robert?" and he's said "he's down to"...this is assuming 'cause I was doing the thing..." he's gone down, ring him straight away and let him

know.”

9.2.2 On the basis of evidence about the events of 7, 8 and 9 October 2003 and the warrant to search 3 Lucia Crescent, Lismore, and on the basis of a lack of any support for Mr Graham’s above recollection, it can be concluded that Mr Graham’s recollection is unreliable.

9.3 Evidence that the error was discovered on 7 October 2003

9.3.1 Some evidence indicates that the error (that Commission enquiries had confirmed Mr Breen’s alleged ownership of 3 Lucia Crescent, Lismore) was detected almost immediately after a warrant was issued for a search of that address and that an amended application for such a warrant was then made and granted prior to ICAC officers going to Lismore.

9.3.2 If the account given by Mr Graham and reproduced above at paragraph 9.2.1 is taken to be referable to the warrant to search 3 Lucia Crescent, then it is an account to the effect that the error was discovered on 7 October 2003. Mr Graham’s memorandum of 13 October 2003 indicates that Mr Graham should be taken as referring to 7 October 2003. He wrote:

On 7th October 2003, I was tasked to draft an application for a search warrant to be executed on 3 Lucia Crescent, Lismore Heights NSW. At the time of drafting the application, no other information had come to light, which changed my belief that the premises were jointly owned by Mr Breen and the Murphy’s [sic], therefore, the same information was included in the application, believing it to be true and correct. It was not until I returned from swearing the application before a Chamber Magistrate, that I was immediately informed that the property at 3 Lucia Crescent, Lismore Heights was solely owned by Valerie Housego (Murphy) and that Mr Breen was in fact a joint owner of a property in Cooper Street, Byron Bay with Valerie and Alfred Murphy. I immediately

amended the application and informed the Chamber Magistrate of the error. Completing the amendment, I immediately re-appeared before the Chamber Magistrate and rectified the mistake, again having no intention of deceiving him.

However, as noted in paragraph 8.2.3 above, Mr Graham has now provided evidence which is inconsistent with the above version. The inconsistencies suggest that Mr Graham's recollection is unreliable.

9.3.3 In March 2005, in response to a complaint received on behalf of Mr Breen (discussed in Chapter 10), Commissioner Cripps looked at what had occurred. In a letter dated 22 March 2005 replying to the complaint, Commissioner Cripps wrote:

On 7 October 2003 application was made for a search warrant for the premises at 3 Lucia Crescent. It contained similar information to that of the previous application. Subsequent to the application being granted, but prior to any steps being taken to execute the warrant, further information obtained by the Commission established that Mr Breen was not the owner of 3 Lucia Crescent. This fact was immediately brought to the attention of the issuing Justice and an amended application was made and granted.

It is not clear whether this statement was based on Mr Graham's memorandum, and therefore does not reflect an additional source of evidence to support the proposition that the error was discovered in the circumstances described by Mr Graham, or whether it reflects evidence independent of Mr Graham's version.

9.3.4 When interviewed by the OIICAC in 2006, Mr Peebles, the justice who issued the warrant to search 3 Lucia Crescent, Lismore, said that he had only received one application for such a warrant and that there had not been a second attendance at which any error was corrected, any amended application was made or any substitute warrant was issued. Mr Morgan, the justice who

issued the warrant to search Mr Breen's Parliamentary office, told the OIICAC that he did not have an actual memory as to whether Mr Graham attended on him on more than one occasion in respect of the search warrant application which he granted. He expressed the opinion, however, that it was unlikely that Mr Graham had returned on a separate occasion to advise him that the application made to him had contained an error as Mr Morgan was confident that he would have either remembered this as having occurred or made some notes about it because of the unusual nature of such an advice.

9.3.5 On 5 March 2008, Ms Theresa Hamilton, Deputy Commissioner, ICAC, wrote to the OIICAC, in response to a request to produce, amongst other documents, the two applications for a search warrant on 3 Lucia Crescent, Lismore referred to by Commissioner Cripps in his letter of 22 March 2005 to a complaint lodged on behalf of Mr Breen. Ms Hamilton responded as follows:

According to the report prepared by Investigator Graham of 13 October 2003 (a copy of which has been previously supplied to the Inspector) the first application for a search warrant for 3 Lucia Crescent was made on 7 October 2003 and a second, amended, application was made the following day. The Commission has not been able to locate any electronic or hard copy of the application for the 7 October warrant, or any other documentation associated with such an application. I understand that the Inspector has Commission file [identifying number deleted] which is the formal powers file for this investigation. The file may contain a copy of any warrant issued on 7 October and may also contain a copy of the application. Alternatively, the original of any application will be held at the local court which issued the warrant (in this case the Downing Centre).

9.3.6 In May 2008 Ms Pam Olsen, Senior Registrar of the Local Court at the Downing Centre, Sydney advised the OIICAC that the court only had one search warrant application for Mr Breen's Parliamentary office. A copy of the application was provided to the OIICAC and appears to be identical to the copy of the search warrant provided by Mr Morgan to the OIICAC in 2006 as

a copy of the warrant which he granted on 3 October 2003. Paragraph (ix) of the affidavit of Robert Graham which forms part of the application includes the following statements:

Ms Sammartano stated Mr Breen is a joint owner of the house in Lismore, however, married couple, Valerie and Alfred Murphy reside in the property as tenants.

9.3.7 Ms Olsen further advised that the court only had one search warrant application concerning 3 Lucia Crescent, Lismore. A copy of the search warrant was provided to OIICAC staff and appears to be identical to the copy of the search warrant provided by Mr Ian Peebles to the OIICAC in 2006 as a copy of the warrant which he granted on 8 October 2003. Paragraph (ix) of the affidavit of Robert Graham which forms part of the application includes the following statement:

The Commission has interrogated the RP Data property System and Lawpoint databases, which provided information that Mr Breen has no interest in the property situated at 3 Lucia Crescent, Lismore, and that the property is owned by Valerie Alice Armstrong (nee Housego). Since married, Valerie Murphy currently resides at 3 Lucia Crescent Lismore, with Alfred Murphy.

9.3.8 In her memorandum of 13 October 2003 to Mr Patterson, Ms Findanis set out the searches which she undertook on Lawpoint and RP Data regarding Mr Breen's ownership of various properties. In respect of ascertaining the ownership of 3 Lucia Crescent, Lismore Ms Findanis wrote the following:

On 1 October 2003, searches were undertaken on-line on Lawpoint (NSW Land Titles). These inquiries indicated that Breen was a joint tenant owner of a Strata Plan lot in the Byron Bay region with Valerie Armstrong and Alfred Murphy. Inquiries indicated that he was also a joint tenant owner of 2

Strata Plan lots in the Woolloomooloo area with Diane Thomas.

Checks were undertaken by Robert Graham on residential addresses that had been recorded on the COPS (RTA) database for Breen. RP Data checks were then conducted on addresses at:

- 3 Lucia Crescent, Lismore
- 22 Debenham Avenue, Leumeah,
- 1/13 Reddall Street, Campbelltown.

The address at Lismore indicated that Valerie Housego was the owner of this property. It was not known with certainty if this was the property located in the Land Titles search at Byron Bay due to the close proximity of Lismore and Byron Bay, and the limited information provided by Land Titles. Additionally due to inaccuracies that have been experienced by RP Data in the past, further inquiries were required to determine if the Lot number recorded on RP Data was the correct one for the Lismore property. Based on the initial inquiries conducted at that particular time, including electoral roll searches, it appeared that the address at Lismore and the Lot number recorded on Land Titles at Byron Bay could have possibly been referring to the same property.

9.3.9 Later in the memorandum Ms Findanis gave the following account of how the true facts regarding the ownership of 3 Lucia Crescent, Lismore, were ascertained:

On 7 October 2003, further Land Titles and RP Data searches were conducted into Breen and associated parties. Street addresses and lot numbers were matched in relation to the Lismore and Byron Bay properties. It was found that 3 Lucia Crescent, Lismore is owned solely by Valerie Housego (now

known as Valerie Murphy) and 61/11 Cooper Street, Byron Bay (as recorded in RP Data) is owned jointly by Breen, Valerie Armstrong (now known as Valerie Murphy) and Alfred Murphy.

It has since come to light, after perusing through some of the documents seized during the search warrant at Parliament that RP Data was incorrect in relation to the unit number at Byron Bay. The correct address is 60/11-19 Cooper Street, Byron Bay.

At all times, the information I collected and used was true and correct to the best of knowledge and belief.

9.4 Evidence that the error was discovered on 9 October 2003

9.4.1 A third body of evidence suggests that the error was discovered on 9 October 2003, after Mr Patterson and Mr Graham were already in Lismore.

9.4.2 As already noted, on 8 October 2003 Mr Patterson and Mr Graham travelled to Lismore to execute a warrant to search 3 Lucia Crescent; they attended that address at 12:55pm on 9 October 2003 for the purpose of executing a warrant, but no one was home; and later Mr Pritchard rang with information that led them to decide not to execute the warrant.

9.4.3 Mr Pritchard's evidence to the OIICAC on 9 May 2006 was that, through reading something after 3 October 2003 he became alerted to the possibility that Mr Breen may not have been an owner of 3 Lucia Crescent, Lismore. He subsequently telephoned Mr Patterson, who was in Lismore for the purposes of executing a search warrant on 3 Lucia Crescent to advise him not to do so:

PRITCHARD: ... I'm not sure how the chain of events transpired but ... I distinctly remember reading something that what it was, I cannot remember, that did actually, and this was after the Parliament House warrant had been executed that Mr

Breen was not ... listed as a registered proprietor of 3 Lucia Crescent contrary to what we had said in the application for the warrant and I cannot remember how I became apprised of that. I spoke to the Deputy Commissioner and we agreed that on that basis—as the team was in Lismore to execute the warrant—they should be contacted and told not to execute that warrant. And I phoned Andrew Patterson on his mobile. I think he went up the day before or something ... I didn't assert it was a fact ... I said there appeared to be some inconsistency as to whether we say he is a registered proprietor or not and until it's actually clarified we will not execute the warrant on the premises in Lismore. ... I just cannot remember [what I read], I'm sorry, I just remember reading something ... whether it was a real property search document, I have no idea; whether it was something that ... came up as a result of the correspondence back and forth between the Parliament and the office about the Parliament House warrant—but I just remember distinctly reading something ... [A]s I said I wasn't asserting to Andrew that it's a fact that he's not a registered proprietor; I said there appears to be some inconsistency between what we say and we perhaps ... need to clarify that before we go any further so. And then I think it was then discovered that he wasn't a registered proprietor of 3 Lucia Crescent. ... I don't know [who discovered that fact.] I think, I spoke to Kieran, the Deputy Commissioner, and Michael Outram, who was in the Director for Strategic Investigations and suggested as a result of those conversations whether he should actually get someone to check again what the position is regarding 3 Lucia Crescent. ... I think there was some later enquiries done by Yota Findanis about actually checking Real Property checks or what have you, the actual Lawpoint I think it's called. Umm, but whether there's a paper trail after my conversations from a direction to the way we do it, I'm not sure but I, I think there was some later searches actually done to confirm what is the

position with 3 Lucia Crescent, yes.

- 9.4.4 Mr Waldon's evidence to the OIICAC on 10 May 2006 was that on 9 October 2003 he was advised by Mr Pritchard that there was incorrect information contained in Mr Graham's affidavit of 3 October 2003 concerning the ownership of 3 Lucia Crescent, Lismore:

OIICAC: So can you tell me how you came to be aware of the correct facts regarding the ownership of 3 Lucia Crescent?

WALDON: Yes. I think John told me, John Pritchard told me. And that was some time later. In fact, I think it's in that Minute [inaudible] Andrew Patterson's of 13 October. Yes, it was some time later after the execution of the warrant. Yes I think ... in Andrew Patterson's minute on the second page, there's a paragraph referring to him being contacted by John Pritchard on 9 October 2003. My recollection is that John had advised me about the time that he'd contacted Andrew Patterson on that date. So that would have been the date that I was told.

- 9.4.5. Mr Waldon's reference to "Andrew Patterson's minute" was a reference to Mr Patterson's memorandum of 13 October 2003 addressed to Michael Outram, Executive Director, SOD. Mr Patterson wrote in this memorandum at p. 2:

On Thursday 09.10.03, whilst working at Lismore/Byron Bay, I was advised by John Pritchard that there was an issue with a part of the affidavit where it had been stated, in relation to the property at 3 Lucia Crescent, Lismore, that "*Commission enquiries have confirmed that Mr Breen is the registered proprietor of this property...*". This it transpires is factually incorrect. I was not aware of there being a problem with this affidavit until John Pritchard's phone call.

- 9.4.6 In his evidence to the OIICAC, Mr Patterson said:

OIICAC: Yes. Can you tell me what was discussed in that

phone call [from Mr Pritchard]?

PATTERSON: Other than what I've written here...I don't remember what else might have been discussed in it, I mean, he's obviously rung us ... And, and I'm not sure how they found out that it was wrong...I mean we were up there working on this particular investigation obviously so there may well have been other discussion about the investigation, but I don't recall...

...

OIICAC: What steps did you take to check this possible factual error?

PATTERSON: Well, I think that had been done while we were up at Lismore, well presumably it must have been done, otherwise they wouldn't have known it was wrong in the first place.

OIICAC: Oh, so, so just to clarify, so you thought someone had already done a check?

PATTERSON: Well John, John told me that the information was wrong ... So I assumed that they, for some reason, they had checked something and that was why it was found to be wrong.

OIICAC: Ok, so, right, so did you take any possible steps, anybody in your team take any steps to check that information any further?

PATTERSON: Well I don't know what they did at the office at the time because I was in Lismore ...

9.5 Action taken to rectify the errors

9.5.1 Mr Outram gave evidence about the steps that were taken to rectify the cause of the errors not being detected:

OUTRAM: The policy refinements, that would have come up

through the policies and training. It would have been something we would have also dealt with at team meetings, through the whatever it was called, now I can't remember what it was called now, the governance meetings, so it would have been a...you know it wouldn't be just oh let's wait 'til the policy's written, it would have been something that we would have said a team meetings, right you need to give your team meetings, you need to tell this to your people, this is what's got to happen, until we get the policy fixed. And that would have happened through Andrew, through Jock Lang and through the Deputy...there are Deputy Chiefs as well...and we would have then got to work on the policies, that's pretty much the way it would have worked and that would have been followed up then by Gary Coulter...

[Mobile phone ringing...switched off]

OUTRAM: ...I've got a feeling Gary Coulter might even have done some training around search warrants after this, I don't remember but Gary Coulter was there so there would have been a range of things we would have put in place but I remember having a conversation, as I did with you not long ago, saying at the time I mean there was a discussion about fault and blame and all that and I said, I think it was Andrew or my chiefs, quality assurance rests with you on the team. You know it's you to check fact, the lawyers, you can't blame lawyers, the lawyers are entitled to assume that what they're given in an affidavit is accurate and fact and if there's a doubt then the affidavit has to say there's a doubt. If your information only implies something then the word to be used is 'implied' and I remember this conversation very clearly.

OIICAC: Was that a conversation you had at the time with him?

OUTRAM: After, after the event, probably at around about the time of all this...13th or 14th.

OIICAC: So what kind of follow-up action, if any, sorry if I

can just follow up on that, what kind of follow-up action, if any, occurred in terms of, besides that talk, was there any kind of disciplinary action or counselling or anything like that?

OUTRAM: Robert Graham would have been counselled by Andrew on the team...and I would have taken the view at the time, looking at this at the time I asked for the written report, that's the first stage are we going to...once we got the report I would have read it, probably Kieran and Irene would probably have read it...certainly we weren't frightened of disciplining people at the ICAC whilst I was there we took disciplinary action against some people, in this case it seemed like a straight-forward error, he'd owned up to it, he'd documented it, Andrew had counselled him, Andrew had spoken to him, we all recognised there was an issue here about maybe tightening up process...[inaudible] human error, process can't cure human error...

OIICAC: Sure.

OUTRAM: ...but nonetheless it wasn't explicit in the process that [inaudible]...a determination must, as you probably should, but must see every affidavit that goes out of their team, so that's the way we were going to tidy it up, and that was through the policy.

OIICAC: Can I just ask you one thing about that, you've been very clear that certainly Robert Graham might have been counselled by Andrew, what about in terms of Yota, who I understand was the person who did the searches?

OUTRAM: My recollection, she'd done the searches and that's all she'd done, she'd done the searches and produced the results and as I recall at the time and I can't remember the detail there's no suggestion that she even [inaudible] that she'd simply got the information and provided the information, other people had made assumptions not her, she'd simply provided information, that's my recollection.

OIICAC: But you wouldn't know whether she'd given them

the source documents or just told them?

OUTRAM: I don't recall, I don't recall.

OIICAC: Do you recall that issue being looked at by anybody?

OUTRAM: The role of Yota would have been explored but I can't recall, you know, if she'd have said something to Rob Graham that was erroneous or, you know, whatever then that would have been looked into. That was obviously not the case given what Rob said in his...he's basically made a mistake.

OIICAC: That he what? I'm not trying it put words...that he read it wrong? Or he...

OUTRAM: ...yeah that he got the wrong end of the stick basically and I don't know, I can't recall any further than that. Once the error was detected and I think that bear in mind we detected the error...

OIICAC: How did he get the wrong end of the stick? That's often important to know.

OUTRAM: That's obviously where you're going to but, you know, you can ask me that question a thousand different ways, I don't know as I tell you I don't remember.

OIICAC: No that's fine, I'm not trying to ask you a thousand different ways I'm trying to ask you very obviously, 'because no one's actually answered that...

OUTRAM: ...but I've answered you a number of times and what I'm trying to do is give you some context, I'm telling you I can't answer your question because I don't remember, but what I'm saying is it would have been explored. The fact it wasn't documented, ok, maybe it should have been but, this error was detected in-house by our own...by our, by us, I don't remember how but it was picked up. The minute it was, it was identified, it was picked up as being an issue, it was documented. We had an examination of what had gone on. Andrew came back and came up with this list of what he perceived to be the problem and then we moved to fix the systems and process as best we could. But this was very much

put down to human error.

OIICAC: Sure. So let me just ask you, what...truly the very last one, so you were satisfied with the explanations in these memorandums?

OUTRAM: I don't recall the degree of satisfaction or otherwise, I think that we took the view, I took the view, we took the view that...an error had occurred, whether we wanted to go down to the level of detail well did you read it off the computer screen, was it printed off, what exactly was said, nonetheless it wouldn't have changed the fact an error had occurred. And the level [at] which the error occurred was in the affidavit. Now the facts that, that the accuracy of the affidavit hadn't been signed off on, quality assurance was the issue. Had we had that assurance with Andrew and the Deputy Chiefs then it would have been picked up, so that's the level of the fix that we sort of put in. Going and punishing Rob and Yota may have been a good solution possibly but at the time obviously we didn't think it was because we didn't do it.

OIICAC: You didn't think there were any training issues around how people read searches?

OUTRAM: Read searches?

OIICAC: Yeah. When searches were printed out there could have been possible training issues?

OUTRAM: Well, there'd been...we did thousands of searches all the time and there's lots of information and it's look, I'm sorry that investigators with experience, Rob Graham is an ex-South Australian Police Officer he's worked at the, as I remember, the Australian Bureau of Criminal Intelligence, well accustomed to reading searches, law enforcement document, databases, everything else...training isn't going to fix this, it's human error...You know this isn't an inexperienced person we're talking about here. It's not somebody who's got no experience at all and if you've got experienced investigators, how far do you micro-manage the way that you read a

document off the screen, you misinterpret the screen, I mean, crikey! I don't know, maybe you're right and if you're right, you're right. Rob Graham was an experienced investigator as I say. From my recollection he'd been in the South Australian Police, he'd been in the Australian Bureau...he'd been at ICAC for a long time as well I'd say, so we're not talking about someone here who doesn't know what a search looks like or what the information means or not to challenge if someone says some information to him, if an investigative witness says something, you know and you're not clear you clear up the ambiguity. So, yeah, I mean, Rob was talked to, he was counselled by Andrew, we put the fixes in.

9.5.2 Mr Outram further submitted that he took several proactive steps to rectify the cause of the errors not being detected, such as directing the implementation of training initiatives and directing that search warrant procedures be amended so that Chief and/or Deputy Investigators check affidavits for accuracy.

9.5.3 In his memorandum to Mr Outram of 13 October 2003, Mr Patterson stated the following with respect to avoiding the type of error made in Mr Graham's affidavit of 3 October 2003:

I do not in any way seek to find excuses for an error being made, however there are genuine circumstances which have contributed to the mistake in this instance. The error is regrettable, but understandable.

I fully support your view that we need to examine extra practices that can be introduced to lower the risk of such errors occurring. To that end, I look forward to assisting you in any way I can to refine and improve our practices.

9.5.4 Mr Patterson's evidence to the OIICAC as to what action was taken to rectify the incorrect information contained in Mr Graham's affidavit of 3 October

2003 is as follows:

OIICAC: Ok, what discussions took place about how this factual error had occurred in the first place?

PATTERSON: Well I spoke to Robert. Obviously it was him, he was the one who drafted the affidavit, I don't remember exactly what he said, but he, he said he got the information from Yota, who should have been doing the property checks...and I can't remember exactly how the error had come about...but yeah, in any event, I mean, I was quite satisfied, having spoken to both of them that yeah, there was a mistake, sure.

OIICAC: So, you spoke to Yota?

PATTERSON: Yeah.

OIICAC: Yeah, and what did she say to you?

PATTERSON: I can't remember exactly what she said, I mean, I spoke with her about it as well, because Robert said well, I got the information from her, which is normal.

OIICAC: Yes, yeah. How could the error have occurred, was it a mis-reading or something like that, was that...?

PATTERSON: ...I remember...I'm not sure if a mis-reading or if there's something been mis-recorded or...it was, there was some confusion over exactly where Mr Breen had been living...because different sources had different addresses for him, that was part of the, part of problem...and obviously one of the issues that, as you're aware, we were looking at in the investigation, was the Sydney Allowance and therefore where was he living. So it wasn't as cut and dried as most warrants are like that, but...I can't remember exactly what the nature of the...

OIICAC: Can I just go back to that conversation, or a conversation or conversations you may have had with Yota. So did you actually alert Yota to the fact that there was a factual error in the affidavit?

PATTERSON: No, I think she already knew from memory.

OIICAC: Right. But [in] your conversation with her, it was clear that, whether you told her or someone else told her, she did know that there was a factual error?

PATTERSON: Yeah, I think so, yeah. I mean I was certainly, yeah, well, I mean I was certainly clear that both her and Robert were aware that there had been an error.

OIICAC: Ok and that they were aware that that error had gone into an affidavit?

PATTERSON: Oh I mean...well Robert was certainly aware of it, because he had to report on it...yeah, I'm almost sure that that was discussed with Yota as well, the affidavit issue.

OIICAC: Ok, alright, would there have been any notes taken of that discussion at all?

PATTERSON: No, I mean that was normal management conversation with staff.

OIICAC: Ok, alright, ok.

PATTERSON: That said, that sort of thing is obviously put into a written report, like this which is what I did for Outram.

OIICAC: Ok, what can...I'm now going to talk with you about that those memos, or your memo in particular to Michael Outram of 13 of October, can you just tell me generally what the circumstances were to all these reports being written?

PATTERSON: I think we were directed to...yeah, I mean as a, yeah...that's...Outram requested me to put a report in writing.

OIICAC: Right, that's fine.

PATTERSON: And I would have asked, as Robert was one of my staff, I would have asked him obviously to put in a report as well.

OIICAC: Yep, and would you have also asked Yota?

PATTERSON: I would have thought so, you haven't got one here, so whether that means there isn't one I don't know...

OIICAC: I apologise for not having it here...

PATTERSON: ...Oh ok...

OIICAC: ...Yota did do a report to you.

PATTERSON: Oh yeah ok, I was thinking yeah, I'm sure I would have asked her...

OIICAC: Yeah sorry, I thought, for a moment I thought I had given it to you...

PATTERSON: ...No, no I've got Robert's one...

OIICAC: ...Ok, that's fine...

[Later in the interview]

OIICAC: Ok. In your memorandum, you talk about additional practices that could or should have been instituted or should be instituted to avoid, you know, factual errors occurring in the future, what additional practices were you referring to?

PATTERSON: Ok, I was, I want to come back to something in a previous question too, if I can in a minute...

OIICAC: Sure.

PATTERSON: Extra practices, well I think clearly my impression was after this episode, is that there is a gap in relation to the factual checking of the warrants, I guess we had operated under the assumption that since the lawyers were checking, they were checking, end of story.

OIICAC: Right.

PATTERSON: It was clear then, I mean certainly the lawyers were not taking responsibility for the factual error, and that's why they weren't checking for it, they weren't checking for it, but then nobody in our area was either...and that was I did subsequently suggest to Outram and I'm pretty sure this was in writing, that, that I thought we needed to ensure that all affidavits had to go through the chief first, as a matter of process rather than an ad hoc basis and that all factual assertions in the affidavit should have the documentary proof attached to the draft affidavit so the chiefs can actually verify that they were [inaudible]...clearly in this instance, as I've said in my report and I've said in my interview here with you, that if I had read the affidavit, I wouldn't have picked up the error, because I didn't think it was an error.

OIICAC: Yep.

PATTERSON: From my knowledge of the case...if I had documents attached which showed it was an error, different story of course...

OIICAC: Yes?

PATTERSON: ...and that was certainly the suggestion that I put forward, whether, I mean I left the Commission shortly afterwards anyway...

OIICAC: Right.

PATTERSON: ...what they changed, if anything, I don't know.

OIICAC: Oh ok, so you're not sure what practices were instituted?

PATTERSON: No.

OIICAC: Ok, alright. Did you get any feedback from Michael Outram about your suggestions?

PATTERSON: I think he thought it was quite a reasonable suggestion in his....they may have brought it in before I left, but as I said I left pretty soon afterwards...so...this job was still going when I left.

OIICAC: The investigation into Mr Breen?

PATTERSON: Yeah, yeah.

OIICAC: You left in April 2004?

PATTERSON: Yep.

OIICAC: Right, ok. Can I ask you though before you left in that period, what management action was taken, if by anyone, in respect of this error?

PATTERSON: You mean in terms of disciplinary action against someone or...?

OIICAC: Yeah, or any kind of counselling or feedback or...?

PATTERSON: ...Oh well, I mean, certainly in terms of feedback, I mean I spoke to all my team about the importance obviously, they were, they were briefed on the fact that something had gone in and it was wrong...I can't remember

how much detail I'd have given, but it was certainly...

OIICAC: Yep.

PATTERSON: ...Feedback was given in relation to having to check everything very thoroughly. There was certainly a discussion about obviously draft affidavits and they needed to be checked off by the chiefs, although it was acknowledged that it was obviously going to slow things down considerably. I mean there was certainly no disciplinary action taken against either Robert or Yota, I mean they, in my view, yes a mistake was made, but I mean that comes back down, to what I was going to say when you asked who was responsible for the information in the affidavit, I mean, the person preparing the affidavit has a responsibility to get things as correct as, as to the best of their knowledge and belief, if something was to be deliberately put into an affidavit, which was wrong, then yes I would say that person preparing the affidavit is responsible for that...

OIICAC: Yeah

PATTERSON: ...And in this case, I mean I was more than satisfied it was an error which had occurred and, and you know, I took within the team, I took what I thought was sufficient management steps at the time for it not to happen again...

OIICAC: Yep.

PATTERSON: ...But you can't always stop other people making mistakes...

9.6 ICAC's reforms of its procedures since the error occurred

9.6.1 In his memorandum of 13 October 2003, Mr Patterson wrote:

... Chief Investigators have not traditionally checked affidavits as they have always been checked by Commission lawyers. I certainly agree that we perhaps need to more clearly articulate

and delineate the quality assurance responsibilities for the future, especially in terms of the demarcation between legal and factual issues. ...

I fully support your view that we need to examine extra practices that can be introduced to lower the risk of such errors occurring. To that end, I look forward to assisting you in any way I can to refine and improve our practices.

9.6.2 As Mr Patterson indicated, the checking of affidavits, and equivalent documents, such as sworn applications for search warrants, has both a factual and legal aspect. It appears that the ICAC's processes involved lawyers checking the "formal sufficiency" at law of an application but not checking the accuracy of the facts asserted in an application. There was no procedure for checking the correctness of the facts asserted in such a document.

9.6.3 Ideally, an affidavit or application should be attested to by the person with the most direct knowledge of the information in question. However, in many instances that would entail several persons attesting when it is appropriate that only one person swear: this case is an example. Where a person is attesting to information that he or she does not personally know, ideally the person with the most direct knowledge should check the draft document before it is sworn unless the secondary source has already been reduced to writing and checked by the author. In this case, that would have meant, at least, both Mr Patterson and Ms Findanis checking Mr Graham's application, which would not have taken very long at all as the application was both short and narrow in scope. Where it is considered impractical or impossible to have many people check a single document it may be necessary to resort to having a single person check it for factual accuracy. That person should be the person best able to check it meaningfully. That may often be the case officer; it may sometimes be the Chief Investigator.

9.6.4 In his evidence to the OIICAC, Mr Outram said:

[W]e then sought to remedy the policy as I recall even, in relation to search warrants to insist that all the search warrants

application affidavits have to be signed off by the chief investigator as being accurate before they go upstairs, to put an onus on the chief investigator basically.

9.6.5 In his interview with the OIICAC staff on 9 May 2006 Mr Pritchard advised as to his knowledge of what reforms had been instituted to avoid any factual errors in legal processes in the future:

OIICAC: ...can I ask you about the lessons? Like, in terms of afterwards...I understand there was a memo from Andrew Patterson to his boss, Michael Outram... there's a memo from Rob Graham to Andrew Patterson, a memo from Yota to Andrew...was there anything from Legal at all?

PRITCHARD: ...we reviewed the search warrant manual which I think you've now got the new copy of.

OIICAC: That's correct, the one you...

PRITCHARD: But yes... you can write those sort of manuals and procedures 'till the cows come home but... and they're obviously a good place to start because if something does goes wrong that's your first recourse as (inaudible) what does the procedures say? But sometimes the exigency of the matter is such that things have to be done quickly and things will get lost, that doesn't mean ignore it completely, but we understood, look these are important documents and the Commission is on display. You could be challenged in a court about these things. That means there is a degree of care and attention needed. You do what you can to reinforce the message that this is a power that's quite onerous, a search warrant, a justice takes it at face value what material is put in front of him. It needs to be correct. Here there was a breakdown in the way that it worked. Did it require a complete overhaul of the way we operate? Well, I certainly wasn't of the view that that's what it required and to a large extent that was the

view that was generally taken within the Commission.

9.6.6 Since October 2003 the ICAC has, on at least three occasions, formally revised its procedures regarding the obtaining and executing of a search warrant. The first revision was issued in May 2005 and the second, “Procedure No 9. Procedures for Obtaining and Executing Search Warrants”, was issued in June 2006. A further revision of Procedure No 9 was approved on 7 August 2008. Procedure No 9 is the current operational document used by the ICAC. In summary, the key differences between the procedures which are currently in force from the ones which were used in October 2003 are that the current procedures:

- recognise that the *Search Warrants Act 1985* has been superseded by the *Law Enforcement (Powers and Responsibilities Act) 2002*;
- contain new procedures about how to obtain approval for and conduct the execution of a search warrant on a Parliamentary office;
- provide a new section, section 10, which addresses, amongst other matters, who at Parliament House is to be notified that a warrant is to be executed and also provides a mechanism for the handling of claims for privilege consistent with the protocol recommended by the Legislative Council Privileges Committee in February 2006. Section 10 aims to be more sensitive to the issue of executing a warrant on a Parliamentary office by requiring consideration to be given to giving prior notice to a Member whose Parliamentary office is to be searched, where feasible, with a view to agreeing on a time for execution of the warrant and providing for an ICAC lawyer to be present during the course of a search to advise the “Search Team” on the issue of Parliamentary privilege.
- reorganises the parts dealing with legal professional privilege so that all this information is now under the heading of “Execution of search warrants on a solicitor’s office”.

9.6.7 The most recent procedure (authorised on 7 August 2008) replaces the Progressive Checklist. It now makes provision for a “Case Officer’s Checklist”, the use of which “is not mandatory”. It is an aide-memoire to the Case Officer as to what steps need to be taken but does not have to be completed or signed off. In place of the Progressive Checklist, a simplified “Authorisation Checklist” must now be signed off by the Executive Director, Investigation Division (as to the appropriateness of the search warrant application) and countersigned by the Executive Director, Legal (who has to approve the application, warrant, occupier’s notice and (if appropriate) clause 11 certificate). This makes it clear who has made the key decision.

9.6.8 There is no guidance given as to who constitutes an occupier in respect of a search warrant to be executed on a Parliamentary office. Section 6 of Procedure 9 contains a paragraph which applies in general to the whole of the Procedure. The section says with reference to who may constitute an occupier:

A person executing a warrant is required, on entry onto the premises or as soon as practicable thereafter, to serve the Occupier’s Notice on the person who appears to be the Occupier and who is over 18 years of age.

If the occupier is absent, the Occupier’s Notice must be served either personally or as directed by the Justice as soon as practicable after executing the warrant.

9.6.9 The Inspector recommends that consideration be given to reviewing the position in relation to occupier’s notices and that further guidance be given in relation to this matter within Procedure No 9.

9.7 Conclusions as to the ICAC's discovery of the error in the search warrant application of 3 October 2003

- 9.7.1 The Inspector is unable to conclude the precise date or time at which the ICAC detected the errors in the 3 October 2003 search warrant application. On balance, it seems that the error was detected sometime after the execution of the warrant on 3 October 2003 but before Mr Patterson and Mr Graham were about to execute the second search warrant on 9 October 2003 at 3 Lucia Crescent, Lismore. Once the error in the earlier application was detected, the ICAC directed an internal review of what had happened, which has resulted in changes being made to the ICAC's procedures in relation to the application for search warrants and the execution of them on Parliamentary offices.
- 9.7.2 In relation to reporting the errors to the authorising justices, the ICAC took the position that as the first search warrant (executed on 3 October 2003) had already been executed "it [was] difficult to see what purpose would have been served by notifying Mr Morgan of the errors". The Inspector notes it was not a specific requirement of section 21 of the *Search Warrants Act* 1985 (now section 74 of the *Law Enforcement (Powers and Responsibilities) Act* 2002) and therefore perhaps not legally necessary. However, it would seem to have been prudent to have done so, and to do so would have been frank and transparent conduct. The ICAC's procedures require team lawyers to be involved in the preparation of mandatory reports to authorising justices. It may be that a team lawyer will consider advising an issuing justice of a mistake, irrespective of whether that is a formal requirement of (now) section 74.
- 9.7.3 The Inspector recommends that the ICAC review its position in relation to the service of occupier's notices and ensure that this is addressed in its operating procedures.

Chapter 10

THE ICAC'S RESPONSE TO MR BREEN'S COMPLAINT

10.1 The letters

10.1.1 On 17 March 2005 Mr John Marsden AM, a solicitor acting for Mr Breen, wrote to Commissioner Cripps in terms that included:

In relation to Clause (b) of the application [for a search warrant on 3 October 2003], the following sentence appears “Commission enquiries have confirmed that Mr Breen was the registered proprietor of this property, 3 Lucia Crescent, Lismore” and that Valerie and Alfred Murphy resided at the property. This information is not only wrong, he has never been the proprietor, and a search of the Land Titles Office by efficient officers of ICAC would have found out that that information was wrong. Also that he was a tenant of the property—that was wrong, a lie.
... I suggest that you might now properly investigate the matter.

10.1.2 On 22 March 2005 Commissioner Cripps responded to Mr Marsden. He wrote:

I have examined the relevant files and made other enquiries in relation to the issues raised in your letter.
... [T]he statement in paragraph 2(b)(x) of the application that Mr Breen is the registered proprietor of 3 Lucia Crescent Lismore is incorrect. Prior to the application being made a number of on-line searches were undertaken that indicated Mr Breen was the part owner of a Strata Plan lot in the Byron Bay area. Based on other enquires conducted at that time it appeared that this property was the property at 3 Lucia Crescent. This information was relied on by the investigator responsible for making the application. At the time he made the application he believed the information in paragraph 2 (b)(x) to be correct.

The warrant was granted and executed on 3 October 2003.

On 7 October 2003 application was made for a search warrant for the premises at 3 Lucia Crescent. It contained similar information to that of the previous application. Subsequent to the application being granted, but prior to any steps being taken to execute the warrant, further information obtained by the Commissioner established that Mr Breen was not the owner of 3 Lucia Crescent. This fact was immediately brought to the attention of the issuing Justice and an amended application was made and granted. For operational reasons this search warrant was not executed.

Internal enquiries were made at the time to establish how incorrect information had come to be provided. In undertaking my enquiries I have had access to and considered the reports prepared at that time....

On one view, inclusion of the incorrect statement weakened rather than strengthened the case for the issuing of a warrant. Claiming Mr Breen as an owner of 3 Lucia Crescent showed a connection to the property he claimed as his principal place of residence that could be considered as supportive of such a claim.

Having carefully considered this matter I am satisfied that the reference to Mr Breen being the registered proprietor of 3 Lucia Crescent in paragraph 2(b)(x) of the application was an honest mistake on the part of the Commission officer responsible for making the application. In these circumstances I do not propose to take any further action in the matter.

- 10.1.3 The sentence “For operational reasons this search warrant was not executed” obscures what in fact took place. Mr Pritchard made it clear that he directed that the search warrant not be executed because of his concern that the application for that warrant possibly contained incorrect information (see paragraph 8.3.3). The search took place by consent without needing to use the warrant.

10.1.4 The Commissioner's view that "[o]n one view, inclusion of the incorrect statement weakened rather than strengthened the case for the issuing of a warrant" was correct. As the warrant was issued in pursuit of an investigation into alleged abuse of the Sydney Allowance by Mr Breen allegedly falsely claiming Lismore to be his principal place of residence, the assertion that Mr Breen owned a property in Lismore tended to counter the allegation of abuse of the allowance and weaken the case for a warrant.

10.1.5 However, on another view the assertion that "Commission enquiries have confirmed that Mr Breen is the registered proprietor of this property" strengthened the case for a warrant. That is because the case for a warrant was advanced almost entirely on the basis of information from (or allegedly from) Ms Sammartano, including the (incorrect) information that Ms Sammartano had said that Mr Breen owned 3 Lucia Crescent, Lismore. The effect of the statement "Commission enquiries have confirmed that Mr Breen is the registered proprietor of this property" was to corroborate Ms Sammartano and add credence to her information generally.

10.1.6 As noted, Mr Morgan in part relied on the incorrect information when he decided to issue the warrant to search Mr Breen's Parliamentary office. On 7 April 2005 Mr Breen himself wrote to Mr Clive Small, the then Executive Director of the SOD. The letter contained a request that Mr Small investigate the issue of there being incorrect information in the search warrant application of 3 October 2003.

10.1.7 Commissioner Cripps responded to this letter in a letter dated 8 April 2005. Commissioner Cripps's letter referred (inter alia) to his earlier letter to Mr Marsden and continued:

There is nothing further I wish to add to my letter of 22 March 2005 regarding the issues you have now raised suffice to repeat that I am satisfied that the reference to you as the registered proprietor of 3 Lucia Crescent in the application for the search warrant was an honest mistake on the part of the officer responsible for making the application.

If however you are of the view that there are criminal offences associated with the application for the search warrant, I suggest that the NSW Police is the most appropriate place to refer those matters.

10.1.8 The evidence obtained by the OIICAC investigation does not warrant any criminal prosecution. To the extent that this report identifies any concerns with the ICAC's operations, none of them is appropriate for referral to the police.

10.1.9 Mr Breen did write to the then Commissioner of Police, Ken Moroney. The Commissioner's Chief of Staff replied on behalf of Acting Commissioner Scipione. He suggested that Mr Breen might raise his issues with the Parliamentary Joint Committee on the ICAC, which Mr Breen did, leading to the referral to the Inspector in the letter from the then Chairman of the PJC on 12 December 2005.

10.2 The Inspector's query

10.2.1 On 1 March 2006, the Inspector wrote to Mr John Pritchard, by then the Deputy Commissioner of the ICAC. The letter sought several documents and asked several questions. Point 5 of the letter requested provision to the OIICAC of "[a]ny documents relating to the inquiries made by Commissioner Cripps in 2005 concerning how wrong information concerning the ownership of 3 Lucia Crescent, Lismore came to be provided to the authorising justice."

10.2.2 Mr Pritchard's reply, dated 24 March 2006, addressed many matters and enclosed several documents. His letter advised in respect of Point 5 that "[t]here were no further inquiries conducted by Commissioner Cripps or anyone else on his behalf in addition to those undertaken at the time of the warrant in October 2003 ..."

10.2.3 The apparent discrepancy between Commissioner Cripps's assertion to Mr Marsden that he had "examined the relevant files and made other enquiries" and Mr Pritchard's assertion to the Inspector that "[t]here were no further inquiries conducted by Commissioner Cripps or anyone else on his behalf" was clarified by Commissioner Cripps in a letter received by the OIICAC on 27 April 2006:

The "other enquiries" referred to in my letter to Mr Marsden ... were discussions with Mr Waldon ... and Mr Pritchard ... concerning Mr Marsden's request. I made no other enquiries.

...

... I did not make any notes of my conversations with Mr Waldon and Mr Pritchard.

The letter ... to Mr Marsden was drafted by Mr Pritchard after the discussions referred to above. It was signed by me and, of course, I accept responsibility for any ambiguity that may have resulted from my use of the term "other enquiries".

It follows from what I have said that Mr Pritchard's comment in his letter ... to the effect that there were "no further inquiries conducted by" me is correct provided it is understood that in addition to inspecting the files I had discussions with Mr Waldon and Mr Pritchard ...

10.3 Conclusions about the ICAC's response to Mr Breen's complaint

10.3.1 The Inspector notes that the Commissioner responded to the complaint made on behalf of Mr Breen by acknowledging that a mistake had been made, but that no further action was proposed to be taken by the ICAC. The Commissioner's blunt statement that he proposed to take no further action was regrettable: it would surely have been far better to have acknowledged that the mistake should not have occurred and that processes were being or had been

put in place to avoid such mistakes in the future. The ICAC has extraordinary powers; citizens are entitled to expect that it has in place procedures to ensure that the exercise of those powers is properly factually based.

10.3.2 The Inspector also observes that, in response to further correspondence from Mr Breen's legal representative, the Commissioner stated that if Mr Breen's representative considered that criminal offence had been associated with the search warrant application, then those matters should be taken up with the NSW Police. In the Inspector's opinion, the Commissioner's suggestion that the issue be taken up with the NSW Police was regrettable. A comment of this type was not a constructive way in which to resolve the concerns of a person with a legitimate grievance of the nature of that at stake in this case. This is especially so as it has transpired that items were seized that were beyond the scope of the warrant, both as to its terms (as advised by the Crown Solicitor) and by reason of a breach of Parliamentary privilege (as found by the Parliamentary Standing Committee).

Chapter 11

ANALYSIS AND CONCLUSIONS

11.1 Key conclusions

11.1.1 The evidence referred to above does not, to the Inspector's mind, disclose precisely why the ICAC decided:

- (a) To pursue the investigation of the allegations against Mr Breen, particularly in view of the fact that the original assessment report recommended against taking the investigation any further (to the extent that the evidence discloses the reasoning, it seems to have been based on a view that the allegations were sufficiently specific and raised important issues);
- (b) Against referring the allegations to the Parliamentary authorities in accordance with Section 53 of the ICAC Act or otherwise (to the extent that the evidence discloses the reasoning behind this decision, it seems to have been based on a view that to do this was not "appropriate", without any articulation of why this was so);
- (c) To seek a warrant to search Mr Breen's Parliamentary office apparently without considering whether the critical information could be obtained otherwise.

11.1.2 However, each of these decisions involves issues in respect of which the ICAC necessarily has a very broad discretion. It is not the Inspector's role to substitute his own views for those of the ICAC. Rather, in the absence of any evidence whatsoever of any improper motive or other illegality, the relevant question is whether the decision is so unreasonable that no reasonable person could make it. There is nothing in the evidence that would support such a conclusion in this case.

- 11.1.3 Nevertheless, in relation to c. above, in such an important case as an investigation involving the Parliament of New South Wales, including a search of Parliamentary premises, it seems surprising that, at some critical stages, the ICAC does not appear to have carefully considered relevant issues at a senior level with one senior officer clearly being identified as responsible and accountable for them. Matrix management (including multi-disciplinary team management) is, in the Inspector's view, no substitute for clear accountability in an agency with as extensive compulsory powers as the Commission has.
- 11.1.4 The Inspector is of the view that, in essence, before critical steps were taken, the whole process, including relevant factual issues, should have been reviewed with a clear head and in a calm manner by senior management in a manner commensurate with their accountabilities. The evidence seems to suggest that this did not occur at key stages leading up to the execution of the search warrant on Mr Breen's Parliamentary office.
- 11.1.5 That the search of Mr Breen's office was to be effected in the Parliament of New South Wales should have served if anything to require particular care and attention to proper process. To put it colloquially, there simply seems to have been a "rush of blood to the head" by the ICAC, rather than the careful and thoughtful exercise of important compulsory powers in a highly sensitive environment.
- 11.1.6 There was, apparently, a perception of urgency arising from the belief that Mr Breen might have been about to destroy evidence; however, there seems to have been no real questioning of the likelihood of this actually being the case.
- 11.1.7 However, the Inspector is of the view that it cannot be concluded that the absence of such scrutiny and responsibility, and the errors that were made, in this case amount to "maladministration" within the meaning of the relevant provisions of the ICAC Act.

11.1.8 The Inspector concludes from all of the evidence, taking into account the submissions made in response to a draft of this report, that:

- (a) insufficient care was exercised by the ICAC in the preparing and checking of the 3 October 2003 application for a search warrant on Mr Breen's Parliamentary office to ensure that all relevant facts asserted were correct, largely by reason of the lack of a system that required a person having the best knowledge of the facts to check the information;
- (b) consideration of the issue of Parliamentary privilege by the ICAC was confined to the question of whether a warrant could be legally obtained and executed and did not extend to how its execution would be managed, especially in terms of dealing with any claims of Parliamentary privilege;
- (c) in October 2003, the ICAC's written procedures for search warrants did not address Parliamentary privilege at all and in particular did not address how to deal with claims of Parliamentary privilege. This has since been rectified by the adoption by the ICAC in written procedures of a protocol recommended by the Legislative Council's Privileges Committee, with those procedures most recently being revised on 7 August 2008;
- (d) there are differing opinions as to whether or not the service of the occupier's notice as required under the *Search Warrants Act* 1985 (now the *Law Enforcement (Powers and Responsibilities) Act* 2002) is effective in being served on a Parliamentary staff member. The Parliamentary Standing Committee reported that it was satisfied that this requirement was met on this occasion. However, even if the legal obligation was met, it was at least arguably imprudent of the ICAC to have the notice served on the person who had been assisting the ICAC with its investigation, and whose information had been the primary basis upon which the warrant had been obtained;
- (e) the errors made in the application for the search warrant on Mr Breen's Parliamentary office were not discovered until after the search warrant had been executed but do not appear to invalidate the warrant;
- (f) the issuing justice was not advised by the ICAC of the errors made in the application for the search warrant. While this may not have been a legal obligation it would have been a prudent and transparent thing to do;

- (g) the ICAC did not use the search warrant application progressive checklist which was part of its written procedures in October 2003. This meant that at the time there was no documentary record of who, in ICAC management, had approved the application for a search warrant on a Parliamentary office, or that it had been settled by a lawyer. The evidence shows, however, that both of these steps did in fact take place, albeit without a formal recording process which should have taken place given the general significance of the obtaining of any search warrant by the ICAC. The Inspector notes that in its submission to him the ICAC has accepted that in relation to the search warrant on the Lismore Crescent property, the report to the authorised justice should have included (but did not include) the information concerning the inconsistencies surrounding the nature of Mr Breen's alleged interest in that property. However, the ICAC's assertion in its submission that Mr Graham is unlikely to have sought the advice of Mr Waldon in preparing the report to the authorised justice because the procedures in place at the time did not require the investigator to forward the report to the team lawyer for review is incorrect. The progressive checklist which was in force in October 2003 did require the report to the authorised justice to be completed by the investigator in consultation with the team lawyer;
- (h) the ICAC has now introduced a mandatory procedure for the recording of who makes the decision to obtain a search warrant and who has approved the specific application, warrant and occupier's notice. However, there is no mandatory procedure for recording who has taken responsibility for ensuring factual assertions in such an application are correct;
- (i) the complaints made by or on behalf of Mr Breen about the search warrant obtained and executed on his Parliamentary office were not handled as well as they could have been in light of Mr Breen having a genuine grievance about wrong information being contained in the application for that search warrant.

11.2 Mr Breen's complaint

11.2.1 The specific responses to the questions raised by way of complaint by Mr Breen's letter to Mr Yeadon are as follows:

Q.1: Was the judicial officer who issued the search warrant influenced by the false and misleading statement in the application that "Commission enquiries have confirmed that Mr Breen is the registered proprietor of this property and that Valerie and Alfred Murphy reside at the property["]?

A.1: Yes, the judicial officer was influenced by the false and misleading statement. However, the statement was made in error and did not result in an invalid search warrant being issued.

Q.2: Was the judicial officer who issued the search warrant influenced by the false and misleading statements in the application in relation to information provided by Ms Sammartano to the effect that:

(1) False claims for the Sydney Allowance were made on the basis that Mr Breen resided in Lismore when in fact he lived at Woolloomooloo;

(2) Parliamentary entitlements were used for purposes not connected with his Parliamentary duties, in particular for the writing of his private books;

(3) Changes in Mr Breen's living arrangements occurred as a result of the ICAC investigation into the Hon Malcolm Jones MLC?

A.2: The judicial officer was influenced by these statements, being information that was supplied by Ms Sammartano and which she evidently believed to be true. The conveying of that information in the application was therefore not a false statement on the part of the applicant for the search warrant because it was, as it was stated to be, information coming from Ms Sammartano. Accordingly, the provision of this information in the application for the search warrant did not make the search warrant invalid.

Q.3: Were these false and misleading statements by Ms Sammartano made by her in an interview or interviews with the ICAC, or were they

inferences drawn by the ICAC officer who applied for the search warrant?

A.3: The statements attributed to Ms Sammartano recorded in the application were necessarily a compilation of what she had told the ICAC and what the ICAC officer made of what the ICAC had been told, as conveyed to him.

Q.4: Did the ICAC officer who applied for the search warrant use any information he knew to be false and misleading to bolster his application for the search warrant?

A.4: No, the ICAC officer did not use any information he knew to be false and misleading to bolster his application for the search warrant.

11.2.2 Four other issues were raised by Mr Breen for consideration and the responses to them are as follows:

- (a) there does not appear that any offence against s 12B of the *Search Warrants Act* 1985 has been committed;
- (b) as found by the Parliamentary Standing Committee, there was a breach of Parliamentary privilege in respect of certain documents taken from Mr Breen's office;
- (c) the *Parliamentary Precincts Act* 1997, which is considered in Chapter 3 of this report, affects the approach to be taken to the execution of a search warrant on a Parliamentary office but does not confer any general immunity from the execution of a warrant on such an office;
- (d) the adequacy or otherwise of the responses from the Commissioner of the ICAC to correspondence which raised Mr Breen's concerns directly with the ICAC are dealt with above.

11.3 General observations

11.3.1 In the Inspector's view, the mistakes that were made in connection with the search warrant application of 3 October 2003 should never have happened, nor ever be allowed to happen again. Sloppiness of this kind has no place in an organisation with such important compulsory powers as the ICAC has.

11.3.2 The Inspector concurs with the view expressed by former Commissioner Moss in her submission that any allegation of corruption made against any public official should be treated with equal impartiality and irrespective of a public official's position, status or rank. Parliamentarians should not be treated more favourably than other public officials. However, the fact that the search warrant on Mr Breen's office involved an incursion into the Parliamentary office of an elected representative of the people of New South Wales (in other words necessarily involved issues of Parliamentary privilege) should have been cause for particular care and caution.

11.3.3 Furthermore, the mistakes in the case of each of the search warrant applications involved inaccurate material being placed before a judicial officer. The Inspector believes that it should be incumbent upon an organisation such as the ICAC, with extensive compulsory powers, to do all that is reasonably possible to ensure that material placed before judicial officers in the exercise of those powers is accurate, even in situations of some apparent urgency.

11.3.4 Nevertheless, in the absence of any evidence of lack of good faith or the like, this sloppiness (which the current Commissioner Cripps described to Mr Marsden as an "honest mistake") does not appear to the Inspector to amount to maladministration or misconduct on the part of either the Commission as such or of any of the current officers or former officers involved.

11.4 Recommendations

11.4.1 The issue of Parliamentary privilege is complex with there being divergent opinions as to its scope and its application in particular situations. Ultimately, the question of whether any Parliamentary privilege claimed does or does not exist is a matter for the Parliament itself. This makes procedures for dealing with Parliamentary privilege claims critical. The ICAC has now adopted appropriate procedures for dealing with those claims. If and when the issue of

Parliamentary privilege arises again it may well be of critical importance and require urgent and accurate attention. The Inspector, therefore, recommends that at least key personnel at the ICAC are fully conversant with this issue and with those procedures. It also follows, in the Inspector's view, that the ICAC should ensure that these issues are fully and carefully considered before any search warrant is sought or executed on Parliamentary premises.

11.4.2 The application made for the search warrant executed on Mr Breen's Parliamentary office contained a factual error which was not detected. The Inspector notes that the search warrant checklist in the ICAC procedures has now been downgraded to a guideline and that the mandatory component is confined to recording who has made the decision to obtain a search warrant and who has settled the formal paperwork. A search warrant authorises what is otherwise a serious invasion of personal liberty. The Inspector recommends that a part of the decision-making record should include a suitably senior person who takes responsibility for ensuring that factual information is accurate.

Appendix 1

LIST OF WITNESSES INTERVIEWED

<u>Name of Witness</u>	<u>Job Title (as of 3.10.2003)</u>	<u>Date of Interview</u>
John Pritchard	Executive Director, Legal	9.5.06 & 7.7.06
Roy Waldon	Principal Lawyer	10 & 30.5.06
Yota Findanis	Financial Investigator	15, 30 & 31.5.06
Robert Graham	Investigator	24.5.06
Andrew Patterson	Chief Investigator	24.5.06
Michael Outram	Executive Director, SOD	26.5.06
Paul Morgan	Authorising Justice	6.6.06
Ian Peebles	Authorising Justice	6.6.06
Kieran Pehm	Deputy Commissioner	7.7.06
Adriana Sammartano	Parliamentary Staff Member	7.7.06
Irene Moss	Commissioner	14.8.06
Lynn Lovelock	Deputy Clerk to Legislative Council	22.8.06
Stephen Murray	Executive Officer	15.11.07

Appendix 2

LIST OF SUBMISSIONS RECEIVED

<u>Name</u>	<u>Date(s) of Submissions</u>
Irene Moss	29 May 2007 (sic.)
John Pritchard	26 June 2008
Kieran Pehm	26 June 2008
Andrew Patterson	4 July 2008
Robert Graham	4 July & 3 September 2008
Roy Waldon	14 July 2008
Michael Outram	14 July 2008
The ICAC	15 July 2008

Appendix 3

PROGRESSIVE CHECKLIST

SEARCH WARRANT APPLICATION

PROGRESSIVE CHECKLIST

THIS FORM MUST ACCOMPANY EACH STAGE OF THE APPLICATION

Item	Name & Date	Signature
Director of Investigations/ Chief Investigator has approved that an application for a Search Warrant is appropriate		
Case Officer prepares the draft Application.		
Team Lawyer prepares the Warrant and Occupiers Notice and settles Application.		
All Legal Process submitted to Director of Legal for approval of documentation.		
Case Officer makes an appointment with Authorised Justice.		
Application for Warrant Approved/Refused. Warrant submitted to Property Manager by Investigator for registration. Copy given to Property Manager.		
Report to Authorised Justice completed by Investigator in consultation with Team Lawyer. Copy given to Property Manager.		

Appendix 4

SEARCH WARRANT APPLICATION OF 3 OCTOBER

2003

(Clause 10)

CERTIFICATE

RECORDS NOT AVAILABLE FOR INSPECTION

(Search Warrants Regulation 1999)

I, P. MORGAN
(name of authorised justice)

a justice authorised and empowered to issue search warrants under section 40(1) of the *Independent Commission Against Corruption Act 1988*, having on this date granted a search warrant ("the warrant") authorising the applicant Robert Anthony Graham, an officer of the Independent Commission Against Corruption, to enter and search the parliamentary office of Mr Peter Breen MLC at Parliament House, Macquarie Street, Sydney, New South Wales, and being satisfied that:

- (a) the application (including the authorised justice's record of application for a search warrant) contains matter that, if disclosed, may seriously compromise the investigation of the matter the subject of the warrant;

issue this certificate pursuant to Clause 10 (1) (b) of the Search Warrants Regulation 1999 **AND ORDER THAT** the abovementioned documents may not be disclosed and are not to be made available for inspection under clause 9(3) of the Search Warrant Regulation 1999.

Signed by me)
)
) P. MORGAN [Signature]
) (Print name) (Signature)

Date: 3-10-03

*Certificate is REVOKED
at request of ICAC.
Application may be inspected
by Occupier.
(See letter dated 3-2-05 from ICAC)
[Signature]
4-2-05*

Search Warrants Regulation 1999
Form 2

(Clause 4(b))

**APPLICATION FOR A SEARCH WARRANT
(OTHER THAN A PART 2 SEARCH WARRANT)**

(Independent Commission Against Corruption Act 1988)
(Search Warrants Act 1985)

On 3 October 2003, I, Robert Anthony Graham, being a person with authority to apply for a search warrant under section 40(4) of the *Independent Commission Against Corruption Act 1988* ("the Act"), apply for a search warrant to enter the parliamentary office of Mr Peter Breen MLC at Parliament House, Macquarie Street, Sydney NSW ("the premises").

I swear that:

1. I am an officer of the Independent Commission Against Corruption ("the Commission") and I am authorised by section 40(4) of the Act to apply for a search warrant.
2. I have reasonable grounds for believing the following matters, which justify this application for the issue of a search warrant:
 - (a) The Commission is conducting an investigation under the Act, into the use of Parliamentary resources and allowances by Mr Peter Breen MLC.
 - (b) There is in or on the premises documents or other things connected with the matter that is being investigated under the Act, or that such documents or other things may, within the next following 72 hours, be brought into or onto the premises, for the following reasons:
 - (i) Mr Peter Breen was elected as a Member of the NSW Legislative Council in March 1999. Mr Breen is also the President of a political party known as the Reform The Legal System Party.
 - (ii) Members of the NSW Legislative Council are provided with certain entitlements that are additional to their basic remuneration or salary and are for the purpose of facilitating the efficient performance of the parliamentary duties of members. These entitlements include a fully equipped and staffed office at Parliament House, a "Logistic Support Allocation" to cover the member's expenditure in the areas of transport, communications, printing and stationary, and a fixed monetary allowance for expenses incurred by Members who reside in country areas called the Sydney Allowance. The Sydney Allowance is provided to members who reside in non-Metropolitan electorates to compensate for the additional costs including commercial accommodation, meals and incidental costs associated with staying in Sydney to attend sessions of Parliament, meetings of Parliamentary committees or other Parliamentary business.



- (iii) Terms and conditions of these additional entitlements are matters for annual determination by the Parliamentary Remuneration Tribunal (PRT), a body established by the *Parliamentary Remuneration Tribunal Act*. The Determinations made by the PRT provide that expenditure by Members of Parliament is only to be incurred in connection with the parliamentary duties of Members.
- (iv) The Guidelines published by the PRT specifically exclude “activities of a direct electioneering or political campaigning nature” in relation to the use of these additional entitlements.
- (v) The General Conditions established by the PRT in relation to the “Logistic Support Allocation” specifically provide that expenditure is only to be incurred in connection with the parliamentary duties of Members.
- (vi) The PRT Guidelines and General Conditions in relation to the Sydney Allowance make it clear the allowance is only payable to Members who reside in non-metropolitan electorates. The PRT Determination provides that Members are required to maintain records which clearly document the occasions they stayed in Sydney in connection with their parliamentary duties.
- (vii) Members of Parliament are also subject to the Code of Conduct for Members. The Code provides that “Members must apply the public resources to which they are granted access according to any guidelines or rules about the use of those resources.”
- (viii) On 20 August 2003, the Commission received information alleging that Peter Breen MLC has claimed his Sydney Allowance, which he was not entitled to as he was living in Sydney at the time. The information also alleged that Mr Breen misused parliamentary staff resources during work hours to prepare election paperwork and write a private book and that Mr Breen has claimed his Logistical Support Allocation for travel to Correctional Centres to interview prisoners for the purpose of writing another private book.
- (ix) On 1 October 2003, Commission officers interviewed Ms Adriana Sammartano, currently employed as Mr Breen’s parliamentary staff secretary. Ms Sammartano provided evidence that Mr Breen has used certain of these entitlements for purposes not connected with his parliamentary duties, in particular for the writing of private books. She also provided information as to Mr Breen’s ineligibility to claim the Sydney Allowance and the Logistic Support Allocation.
- (x) Ms Sammartano stated that Mr Breen has been claiming the Sydney Allowance since he was elected in 1999, by claiming his principal place of residence was at 3 Lucia Crescent, Lismore NSW, when in fact he has been living in Sydney and currently resides at Boomerang Street, Woolloomooloo NSW, and therefore not eligible to claim the allowance. Ms Sammartano

2 206

stated that Mr Breen is a joint owner of the house in Lismore, however, married couple, Valerie and Alfred Murphy reside in the property as tenants. Commission enquiries have confirmed that Mr Breen is the registered proprietor of this property and that Valerie and Alfred Murphy reside at the property.

- (xi) Ms Sammartano stated that since mid 2003, when the Commission's investigation into the conduct of Malcolm Jones MLC became public knowledge, Mr Breen has been visiting the Lismore property regularly, but prior to then he wasn't going so regularly. Ms Sammartano stated that on the occasions that Mr Breen travelled to Lismore, she was responsible for preparing the relevant paperwork. Ms Sammartano stated that in the past Mr Breen has often stayed at the Byron Bay Beach Resort. Ms Sammartano stated that all of the travel documentation and the paperwork for the false claims for the Sydney Allowance are stored in archive boxes in Mr Breen's office at Parliament House.
- (xii) Ms Sammartano stated that as a member of Mr Breen's office staff, she was also required to type Mr Breen's private book. Office staff are an additional entitlement, as a component of the services, facilities and equipment, provided to Members. Ms Sammartano stated that the private book she was required to write during parliamentary office hours, had no connection with Mr Breen's parliamentary duties. Ms Sammartano stated that she was also required by Mr Breen to prepare electoral paperwork for the Reform The Legal System Party during the last State Elections. Ms Sammartano stated that all of the party documents are stored on her personal computer in Mr Breen's office at Parliament House.
- (xiii) Ms Sammartano stated that Mr Breen is currently writing another book, which requires Mr Breen to travel to Correctional Centres to visit and interview prisoners. Ms Sammartano stated that Mr Breen has been using his Logistic Support Allocation to reimburse his travel costs to the different correctional centres when Mr Breen has visited prisoners for his private book. Ms Sammartano stated that the claims are kept in archive boxes in Mr Breen's office at Parliament House.
- (xiv) The items to be seized (whether in original or copy form) are: computer tapes and any magnetic, electronic or other computer storage medium, containing any information and any hard copy printout of any such information, documents, books, statements of account, accounting records, cash books, ledgers, journals, bank deposit and withdrawal slips, bank statements, cheque butts, credit card vouchers or records, receipts, documents of title and other documents evidencing interests present, future or contingent in real or personal property, diaries, telephone diaries, appointment books, note books, address books, correspondence, tax returns, whether in paper form or computer or electronic form, connected with the matter being investigated under the *Independent Commission Against Corruption Act 1988* being the use of parliamentary resources and allowances by Mr Peter Breen MLC.

R ACO

4. Pursuant to clause 10 of the Search Warrant Regulations 1999, I seek the issue of a certificate that the application for the search warrant (including the authorised justice's record of application for the search warrant), not be made available for inspection. I make this application on the following grounds:

these documents contain information that if disclosed, will seriously compromise the investigation.

5. I and Andrew Patterson, Christopher Bentley, Yota Findanis and Milka Cirjak, seek to be able to perform the following specific functions on entry:
- (a) To search for the documents or things described in paragraph 2 connected with the matter that is being investigated and seize any such documents or other things found in or on the premises and deliver them to the Commission.
 - (b) Use any persons necessary to assist in the execution of this warrant.
 - (c) Use any force that is reasonably necessary to enter the premises and to open any receptacle on the premises for the purpose of a search.
 - (d) Search, if a member of the Police Service or a senior Commission investigator named in and executing the warrant, a person found in or on the premises whom the member of the Police Service or senior Commission investigator reasonably suspects of having a document or other thing mentioned in the warrant.
 - (e) Seize a document or other thing that the person executing this search warrant believes on reasonable grounds to be evidence that would be admissible in the prosecution of a person for an indictable offence against the law of the Commonwealth, a State or a Territory, and the first-mentioned person believes on reasonable grounds that it is necessary to seize the document or other thing in order to prevent its concealment, loss, mutilation or destruction, or its use in committing such an offence.
 - (f) Retain a document or other thing seized pursuant to this search warrant if, and for so long as, its retention by the Commission is reasonably necessary for the purposes of the investigation referred to in paragraph 2. If the retention of the document or other thing by the Commission is not, or ceases to be, reasonably necessary for such purposes, the Commission shall cause it to be delivered to the person who appears to the Commission to be entitled to possession of the document or other thing, or the Attorney General or the Director of Public Prosecutions, with a recommendation as to what action should be taken in relation to the document or other thing.

2 [Signature]

6. (To be completed only if a previous application for the warrant has been made and refused)

The following are details of the refusal of the previous application:

.....
.....
.....

The additional information which I consider justifies the making of this further application is:.....

.....
.....
.....


Sworn before me on the..... 3rd.....day

of..... OCTOBER 2003.....

at..... SYDNEY.....

in the State of New South Wales.....


..... Roy Walden.....
Justice of the Peace
Solicitor


(Applicant's signature)

Re-sworn before me on
the 3rd October 2003
at Sydney in the State of NSW.


JP.

IT IS AN OFFENCE UNDER SECTION 12B OF THE SEARCH WARRANTS ACT 1985 TO GIVE INFORMATION IN THIS APPLICATION KNOWING IT IS FALSE OR MISLEADING IN A MATERIAL PARTICULAR. THE MAXIMUM PENALTY IS A FINE OF 100 PENALTY UNITS AND 2 YEARS IMPRISONMENT.



Search Warrants Regulation 1999
Form 4

(Clause 5(b))

**SEARCH WARRANT
- OTHER THAN PART 2 WARRANT**

(Independent Commission Against Corruption Act 1988)
(Search Warrants Act 1985)

This search warrant expires at 2.15 a.m./p.m. on 17-10-03
(date)

, and must not be used after that time.

NOTE: If no time for expiry is specified above, pursuant to s 46 of the *Independent Commission Against Corruption Act 1988* the warrant expires one month after the time it was issued.

On 3rd October 2003
(date)

P. MORGAN
(name of authorised justice)

a justice authorised and empowered to issue search warrants under section 40(1) of the *Independent Commission Against Corruption Act 1988* granted this search warrant authorising Robert Anthony Graham, an officer of the Independent Commission Against Corruption (the applicant), and the following officers of the Independent Commission Against Corruption (Commission), Andrew Patterson, Christopher Bentley, Yota Findanis and Milka Cirjak:

1. to enter between the hours of 6.00 a.m and 9.00 p.m. the parliamentary office of Mr Peter Breen MLC at Parliament House, Macquarie Street, Sydney NSW ("the premises"); and
2. there to search for (whether in original or copy form) computer tapes and any magnetic, electronic or other computer storage medium, containing any information and any hard copy printout of any such information, documents, books, statements of account, accounting records, cash books, ledgers, journals, bank deposit and withdrawal slips, bank statements, cheque butts, credit card vouchers or records, receipts, documents of title and other documents evidencing interests present, future or contingent in real or personal property, diaries, telephone diaries, appointment books, note books, address books, correspondence, tax returns, whether in paper form or computer or electronic form, connected with the matter being investigated under the *Independent Commission Against Corruption Act 1988* being the use of parliamentary resources and allowances by Mr Peter Breen MLC; and

- 3. seize any such documents or other things found in or on the premises and deliver them to the Commission.

In executing this search warrant the applicant may exercise the powers provided by the *Search Warrants Act 1985* and the above Act. These include the power to:

- (a) Enter the premises.
- (b) Use any persons necessary to assist in the execution of this warrant.
- (c) Use any force that is reasonably necessary to enter the premises and to open any receptacle on the premises for the purpose of the search.
- (d) Search, if a member of the Police Service or a senior Commission investigator named in and executing the warrant, a person found in or on the premises whom the member of the Police Service or senior Commission investigator reasonably suspects of having a document or other thing mentioned in the warrant.
- (e) Seize a document or other thing that the person executing this search warrant believes on reasonable grounds to be evidence that would be admissible in the prosecution of a person for an indictable offence against the law of the Commonwealth, a State or a Territory, and the first-mentioned person believes on reasonable grounds that it is necessary to seize the document or other thing in order to prevent its concealment, loss, mutilation or destruction, or its use in committing such an offence.
- (f) Retain a document or other thing seized pursuant to this search warrant if, and for so long as, its retention by the Commission is reasonably necessary for the purposes of the investigation referred to in paragraph 2. If the retention of the document or other thing by the Commission is not, or ceases to be, reasonably necessary for such purposes, the Commission shall cause it to be delivered to the person who appears to the Commission to be entitled to possession of the document or other thing, or the Attorney General or the Director of Public Prosecutions, with a recommendation as to what action should be taken in relation to the document or other thing.

NOTE: The applicant must deliver this search warrant when reporting to the issuing justice within 10 days after the execution of the warrant, or if not executed, within 10 days after the expiry of the warrant.

Signed by me)
)
)

P. MORGAN

 (Print name)

[Handwritten Signature]

 (Signature)

Date: *3-10-03*

FOR OFFICE USE ONLY

(Note. In the case of an application by telephone (but not by facsimile) this form of application should be completed by the authorised justice for record purposes as if it were made in person by the applicant but not on oath)

AUTHORISED JUSTICE'S RECORD OF APPLICATION FOR A SEARCH WARRANT

On the 03/10/2003 at 02:00 PM

I, the undersigned authorised justice received this application for a search warrant.

1. The application was made in person.

1. The application was made by facsimile transmission and I was satisfied that the warrant was required urgently and it practicable for the application to be made in person.

2. On considering the application I found that there were reasonable grounds for issuing the warrant.

(If warrant issued - continue)

3. The relevant particulars of the grounds on which I relied to justify the issue of the warrant are as follows:

I am satisfied that there are reasonable grounds to believe there is in the premises a document or other thing connected with a matter that is being investigated by officers of the Independent Commission Against Corruption under the Act

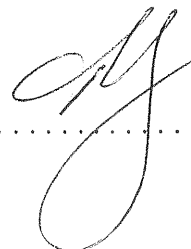
- a reliable informant, Sammartano, has given information to ICAC that Breen has been fraudulently claiming the Sydney Allowance whilst living in Sydney
- ICAC has obtained evidence that Breen owns a property in Lismore and that such property is currently being rented by other persons
- the informant also alleges that Breen has been writing a book and using the services, facilities and equipment of the Parliamentary for that purpose and also using the Logistic Support Allocation to pay for his travel costs for purposes not connected with his Parliamentary duties
- the informant alleges that travel documentation and paperwork for the false claims are stored in archive boxes in Breen's office

~~4. (To be completed if the warrant may be executed by night). The grounds on which I relied to justify the execution of the warrant by night are as follows:~~

- ~~(a) execution of the warrant by day is unlikely to be successful~~
- ~~(b) there is likely to be less risk to the safety of any person~~
- ~~(c) an occupier is likely to be on the premises only at night to allow entry without the use of force~~
- (d)

5. The search warrant was issued at 2.15pm on the 03/10/2003

Signed:



**OCCUPIER'S NOTICE
OTHERWISE THAN FOR A PART 2 WARRANT**

(Independent Commission Against Corruption Act 1988)
(Search Warrants Act 1985)

**IMPORTANT INFORMATION FOR OCCUPIERS CONCERNING THE
SEARCH WARRANT**

A search warrant has been issued by an authorised justice. It gives the authority and power to the persons named in the search warrant to enter and search the parliamentary office of Mr Peter Breen MLC at Parliament House, Macquarie Street, Sydney NSW ("the premises").

Expiry

The search warrant will expire at 2.15 ~~am~~ p.m. on 17-10-03
(date).

Force

The persons granted the power to enter under the warrant may use such force as is reasonably necessary to gain entry to the premises and to carry out the purpose of the warrant.

YOU HAVE THE RIGHT TO INSPECT THE SEARCH WARRANT BUT YOU MUST NOT HINDER OR OBSTRUCT THE PERSONS EXECUTING IT, AS TO DO SO MAY BE A CRIMINAL OFFENCE. UNDER SECTION 84 OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988, THE MAXIMUM PENALTY FOR OBSTRUCTING OR HINDERING A SEARCH WITHOUT REASONABLE EXCUSE IS A FINE OF 20 PENALTY UNITS OR IMPRISONMENT FOR TWO YEARS, OR BOTH.

The powers given by the search warrant

The search warrant gives the power to the persons executing it to:

- (a) Enter the named premises.
- (b) Search for the following things (whether in original or copy form): computer tapes and any magnetic, electronic or other computer storage medium, containing any information and any hard copy printout of any such information, documents, books, statements of account, accounting records, cash books, ledgers, journals, bank deposit and withdrawal slips, bank statements, cheque butts, credit card vouchers or records, receipts, documents of title and other documents evidencing interests present, future or contingent in real or personal property, diaries, telephone diaries, appointment

books, note books, address books, correspondence, tax returns, whether in paper form or computer or electronic form, connected with the matter being investigated under the *Independent Commission Against Corruption Act 1988* being the use of parliamentary resources and allowances by Mr Peter Breen MLC.

- (c) Seize any such documents or other things found in or on the premises and deliver them to the Independent Commission Against Corruption (“Commission”).
- (d) Perform the following functions:
 - (i) Search, if a member of the Police Service or a senior Commission investigator named in and executing the warrant, a person found in or on the premises whom the member of the Police Service or senior Commission investigator reasonably suspects of having a document or other thing mentioned in the warrant.
 - (ii) Seize a document or other thing that the person executing this search warrant believes on reasonable grounds to be evidence that would be admissible in the prosecution of a person for an indictable offence against the law of the Commonwealth, a State or a Territory, and the first-mentioned person believes on reasonable grounds that it is necessary to seize the document or other thing in order to prevent its concealment, loss, mutilation or destruction, or its use in committing such an offence.
 - (iii) Retain a document or other thing seized pursuant to this search warrant if, and for so long as, its retention by the Commission is reasonably necessary for the purposes of the investigation referred to in paragraph 2. If the retention of the document or other thing by the Commission is not, or ceases to be, reasonably necessary for such purposes, the Commission shall cause it to be delivered to the person who appears to the Commission to be entitled to possession of the document or other thing, or the Attorney General or the Director of Public Prosecutions, with a recommendation as to what action should be taken in relation to the document or other thing.
- (e) Exercise such other powers as are specified in the *Independent Commission Against Corruption Act 1988*, including:
 - (i) to use such force as is reasonably necessary for the purpose of entering the premises;
 - (ii) to break open any receptacle in or on the premises for the purposes of the search if it reasonably necessary to do so;
 - (iii) to execute the search warrant with the aid of such assistants as the person executing the warrant considers necessary;

Issue details

The search warrant was granted by P. MORGAN

an authorised justice under Section 40(1) of the *Independent Commission Against Corruption Act 1988* on 3-10-03 at 2:15 PM

(date) (time)

The search warrant was issued on the application of Robert Anthony Graham, who is an officer of the Independent Commission Against Corruption, which is located at level 21/133 Castlereagh Street, Sydney, New South Wales 2000.

Basis for the issue of the warrant

The warrant was granted on the basis that the authorised justice found that there were reasonable grounds for the issue of the warrant and, in particular, that the applicant had reasonable grounds to believe:

- (i) that the Commission is conducting an investigation for the purposes of section 13 of the ICAC Act of the conduct of Mr Peter Breen MLC, a Member of the Legislative Council; and
- (ii) that there is in or on the premises documents or other things connected with the matter being investigated referred to in paragraph (b) above.

Challenging the issue of the warrant or conduct of the search

If you are dissatisfied with the issue of the warrant or the conduct of the people executing the warrant you should seek legal advice. This advice may assist you to decide whether your rights have been infringed and what action you can take. If your rights have been infringed you may be entitled to a legal remedy.

You should keep this notice as it will assist you if you seek advice.

You should produce this notice at the court when seeking to inspect the application.

Limitations on the powers conferred

1. The warrant must be executed before the date and time of expiry given above.
2. Any force used must be reasonably necessary.
3. The warrant authorises entry only between the time of 6.00 am and 9.00 pm unless other times are specified on the warrant.
4. The warrant must be shown to you if you ask to see it.

- 5. Only functions and powers authorised under the warrant or by the Act authorising the issue of the warrant may be performed.

Inspection

The application for the issue of the warrant, written reasons for the issue of the warrant and other associated documents are to be held at..... Local Court.

DOWNING CENTRE, LEVEL 4
143-147 LIVERPOOL ST., SYDNEY

Court. You may inspect those documents by arrangement with that Court.

Signed:..... Date: 3-10-03
(Authorised Justice)

1368/03

REPORT TO AUTHORISED JUSTICE ON THE EXECUTION OF A SEARCH WARRANT

(Independent Commission Against Corruption Act 1988)
(Search Warrants Act 1985)

This report is made to the authorised justice who issued the attached search warrant.

1. The warrant was executed on Friday, 3 October 2003, at 3.00pm.
2. The result of the execution of the warrant (including a description of the things seized) is briefly as follows:

a laptop computer, financial documents, allowance claims documentation, election party documents, private company documents, travel documents, diaries, documentation relating to books written by Mr Breen, legal documents, administration documents, computer hard drives, CD containing computer data.

(Refer to attached ICAC Property Seizure Record)

3. The things seized are now in the custody of Ms. Lyn Kennedy, Property Officer for the Independent Commission Against Corruption, level 21/133 Castlereagh Street, Sydney, New South Wales 2000.
4. The occupier's notice was personally served on Mr Breen's secretary, Ms Adriana Sammartano, who was present throughout the duration of the search.

Signed: [Signature] Date: 7/10/2003

Name: R. A. GRAHAM

Designation: INVESTIGATOR

Place of Work: Independent Commission Against Corruption, level 21/133 Castlereagh Street, Sydney, New South Wales 2000.

Date of receipt of Report by Authorised Justice 14. 10. 03

Signed.....
(Authorised Justice)

Search Warrants Regulation 1999
Form 4

(Clause 5(b))

**SEARCH WARRANT
- OTHER THAN PART 2 WARRANT**

(Independent Commission Against Corruption Act 1988)
(Search Warrants Act 1985)

This search warrant expires at 2-15 a.m./p.m. on 17-10-03
(date)

, and must not be used after that time.

NOTE: If no time for expiry is specified above, pursuant to s 46 of the *Independent Commission Against Corruption Act 1988* the warrant expires one month after the time it was issued.

On 3rd October 2003
(date)

P. MORGAN
(name of authorised justice)

a justice authorised and empowered to issue search warrants under section 40(1) of the *Independent Commission Against Corruption Act 1988* granted this search warrant authorising Robert Anthony Graham, an officer of the Independent Commission Against Corruption (the applicant), and the following officers of the Independent Commission Against Corruption (Commission), Andrew Patterson, Christopher Bentley, Yota Findanis and Milka Cirjak:

1. to enter between the hours of 6.00 a.m and 9.00 p.m. the parliamentary office of Mr Peter Breen MLC at Parliament House, Macquarie Street, Sydney NSW ("the premises"); and
2. there to search for (whether in original or copy form) computer tapes and any magnetic, electronic or other computer storage medium, containing any information and any hard copy printout of any such information, documents, books, statements of account, accounting records, cash books, ledgers, journals, bank deposit and withdrawal slips, bank statements, cheque butts, credit card vouchers or records, receipts, documents of title and other documents evidencing interests present, future or contingent in real or personal property, diaries, telephone diaries, appointment books, note books, address books, correspondence, tax returns, whether in paper form or computer or electronic form, connected with the matter being investigated under the *Independent Commission Against Corruption Act 1988* being the use of parliamentary resources and allowances by Mr Peter Breen MLC; and

E03/1390/7/1

- 3. seize any such documents or other things found in or on the premises and deliver them to the Commission.

In executing this search warrant the applicant may exercise the powers provided by the *Search Warrants Act 1985* and the above Act. These include the power to:

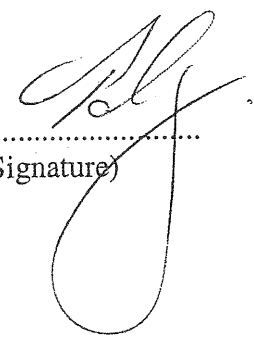
- (a) Enter the premises.
- (b) Use any persons necessary to assist in the execution of this warrant.
- (c) Use any force that is reasonably necessary to enter the premises and to open any receptacle on the premises for the purpose of the search.
- (d) Search, if a member of the Police Service or a senior Commission investigator named in and executing the warrant, a person found in or on the premises whom the member of the Police Service or senior Commission investigator reasonably suspects of having a document or other thing mentioned in the warrant.
- (e) Seize a document or other thing that the person executing this search warrant believes on reasonable grounds to be evidence that would be admissible in the prosecution of a person for an indictable offence against the law of the Commonwealth, a State or a Territory, and the first-mentioned person believes on reasonable grounds that it is necessary to seize the document or other thing in order to prevent its concealment, loss, mutilation or destruction, or its use in committing such an offence.
- (f) Retain a document or other thing seized pursuant to this search warrant if, and for so long as, its retention by the Commission is reasonably necessary for the purposes of the investigation referred to in paragraph 2. If the retention of the document or other thing by the Commission is not, or ceases to be, reasonably necessary for such purposes, the Commission shall cause it to be delivered to the person who appears to the Commission to be entitled to possession of the document or other thing, or the Attorney General or the Director of Public Prosecutions, with a recommendation as to what action should be taken in relation to the document or other thing.

NOTE: The applicant must deliver this search warrant when reporting to the issuing justice within 10 days after the execution of the warrant, or if not executed, within 10 days after the expiry of the warrant.

Signed by me)
)
)

P. MORGAN

 (Print name)



 (Signature)

Date: 3-10-03

INDEPENDENT COMMISSION AGAINST CORRUPTION
PROPERTY SEIZURE RECORD

OPERATION TRITON

ADDRESS PARLIAMENT HOUSE

DATE 3/10/03

ITEM No E03/1390/3/1 MEMBER'S NAME C. Bentley
DESCRIPTION Laptop - PC1 - MOD. # A31
16M Thinkpad - serial No - LC. NSW B/CODE No. LC15409.
LOCATION Mr Breen's office

ITEM No E03/1390/3/2 MEMBER'S NAME C. Bentley
DESCRIPTION PC 2 Desktop HP Vectra
15424 (Asset No.) - Harddisk Drive removed - Seagate
LOCATION office area. ST320413A Serial - 6E02KTJK/20. 4meg

ITEM No E03/1390/3/3 MEMBER'S NAME C Bentley
DESCRIPTION PC 3
Hard-drive - LC15405 (Asset No).
LOCATION office area

ITEM No E03/1390/3/4 MEMBER'S NAME R. Graham
DESCRIPTION 1 Alien & Unwin Remittance Advice
document.
LOCATION Mr Breen's office.

ITEM No E03/1390/3/5 MEMBER'S NAME _____
DESCRIPTION 1 box 'LSA, Sydney Allowance, motor vehicle'
1/7/2002 - 31/12/2002 & 1/1/2002 - 30/6/2003.
LOCATION _____

SIGNATURE - OFFICER Mejath

PRINT NAME Mejath

SIGNATURE - OCCUPIER [Signature]

PRINT NAME A. SAMMARTANO

WHITE - COMMISSION COPY BLUE - OCCUPIER'S COPY

INDEPENDENT COMMISSION AGAINST CORRUPTION
PROPERTY SEIZURE RECORD

OPERATION TRITON
ADDRESS PARLIAMENT HOUSE
DATE 3/10/03

ITEM No E03/1390/3/6 MEMBER'S NAME R. Graham
DESCRIPTION 1 Box contains documentation re LSA, Sydney Allowance, motor vehicle, electoral Allow to dates 1/7/2001 - 31/12/01 & 1/1/2002 - 30/6/2002.
LOCATION Mr Breen's office.

ITEM No E03/1390/3/7 MEMBER'S NAME R. Graham
DESCRIPTION 1 box contains documentation re LSA Electoral Allow, motor vehicle, Sydney Allow dates 1/1/2001 - 30/6/2001
LOCATION _____

ITEM No E03/1390/3/8 MEMBER'S NAME Yota Findanis
DESCRIPTION 1 White Arch Lever labelled 'State Election 2003'.
LOCATION Shelf, Mr Breen's office

ITEM No E03/1390/3/9 MEMBER'S NAME Yota Findanis
DESCRIPTION 1 White Lever Arch folder labelled 'Writequick Account's
LOCATION Shelf, Mr Breen's office.

ITEM No E03/1390/3/10 MEMBER'S NAME Yota Findanis
DESCRIPTION 1 Arch lever folder Labelled 'Writequick Volume 1'
LOCATION Shelf, Mr Breen's office

SIGNATURE - OFFICER [Signature] SIGNATURE - OCCUPIER [Signature]
PRINT NAME M. C. Gale PRINT NAME A. SAMMARITANO

WHITE - COMMISSION COPY BLUE - OCCUPIER'S COPY

INDEPENDENT COMMISSION AGAINST CORRUPTION
PROPERTY SEIZURE RECORD

OPERATION TRITON
ADDRESS PARLIAMENT HOUSE
DATE 3/10/03

ITEM No E03/1390/3/11 MEMBER'S NAME Yota Findanis
DESCRIPTION 1 White Lever Arch folder labelled 'Sydney Allowance'
LOCATION shelf, Mr Breen's office.

ITEM No E03/1390/3/12 MEMBER'S NAME Yota Findanis
DESCRIPTION 1 Manila folder 'not labelled'
LOCATION On shelf, Mr Breen's office.

ITEM No E03/1390/3/13 MEMBER'S NAME Yota Findanis
DESCRIPTION 1 Blue Arch lever containing miscellaneous documents.
LOCATION Shelf, Mr Breen's office.

ITEM No E03/1390/3/14 MEMBER'S NAME Yota Findanis
DESCRIPTION 1 White lever arch 'Company Register' labelled 'Writequick software Pty Ltd'
LOCATION Shelf, Mr Breen's office.

ITEM No E03/1390/3/15 MEMBER'S NAME Yota Findanis
DESCRIPTION 1 Lever arch folder labelled 'Writequick Volume 2'
LOCATION shelf, Mr Breen's office.

SIGNATURE - OFFICER [Signature] SIGNATURE - OCCUPIER [Signature]
PRINT NAME Maryanne PRINT NAME A SAMMARITANO

WHITE - COMMISSION COPY BLUE - OCCUPIER'S COPY

INDEPENDENT COMMISSION AGAINST CORRUPTION
PROPERTY SEIZURE RECORD

OPERATION Triton
ADDRESS Parliament House
DATE 3 October 2003

ITEM No E03/1390/3/16 MEMBER'S NAME Yota Findanis
DESCRIPTION 1 Lever Arch Folder labelled
'Writequick Vol. 3'
LOCATION Shelf, Mr Breen's office.

ITEM No E03/1390/3/17 MEMBER'S NAME Yota Findanis
DESCRIPTION 1 Lever Arch Folder labelled
'Lawquick Volume 2'
LOCATION Shelf, Mr Breen's office.

ITEM No E03/1390/3/18 MEMBER'S NAME Robert Graham
DESCRIPTION 1 Lever Arch Folder labelled 'Parliamentary
Allowances'
LOCATION In wall cabinet, Mr Breen's office

ITEM No E03/1390/3/19 MEMBER'S NAME Yota Findanis
DESCRIPTION 1 White lever Arch folder labelled
'Logistic Support Allowance 2001'
LOCATION Shelf, Mr Breen's office.

ITEM No E03/1390/3/20 MEMBER'S NAME Yota Findanis
DESCRIPTION 1 White lever Arch folder labelled
'Electoral Allowance 2001'
LOCATION Shelf, Mr Breen's office.

SIGNATURE - OFFICER Majak SIGNATURE - OCCUPIER A Sammartano
PRINT NAME Majak PRINT NAME A SAMMARTANO

WHITE - COMMISSION COPY BLUE - OCCUPIER'S COPY

INDEPENDENT COMMISSION AGAINST CORRUPTION
PROPERTY SEIZURE RECORD

OPERATION Triton
ADDRESS Parliament House
DATE 3 October 2003

ITEM No E03/1390/3/21 MEMBER'S NAME Yota Findanis
DESCRIPTION 1 White lever Arch folder labelled
'Electoral Allowance 2001'
LOCATION Shelf, Mr Breen's office.

ITEM No E03/1390/3/22 MEMBER'S NAME Yota Findanis
DESCRIPTION 1 White lever Arch lever folder labelled
'Motor Vehicle 2001'
LOCATION Shelf, Mr Breen's office.

ITEM No E03/1390/3/23 MEMBER'S NAME Robert Graham
DESCRIPTION 1 Yellow Manilla folder containing
miscellaneous documents
LOCATION ON Sideboard in Mr Breen's office.

ITEM No E03/1390/3/24 MEMBER'S NAME Robert Graham
DESCRIPTION 1 Manilla Folder containing
miscellaneous documents inc. interview at Goulbourn
LOCATION 9901 Shelf, Mr Breen's office.

ITEM No E03/1390/3/25 MEMBER'S NAME ~~Yota~~ Robert Graham
DESCRIPTION 1 White lever arch folder labelled
'Write quick letters'
LOCATION sideboard, Mr Breen's office.

SIGNATURE - OFFICER ngal SIGNATURE - OCCUPIER [Signature]
PRINT NAME Mayala PRINT NAME A SAMMARETANO

WHITE - COMMISSION COPY BLUE - OCCUPIER'S COPY

INDEPENDENT COMMISSION AGAINST CORRUPTION
PROPERTY SEIZURE RECORD

OPERATION TRITON
ADDRESS Parliament House
DATE 3 October 2003.

ITEM No E03/1390/3/26. MEMBER'S NAME Robert Graham
DESCRIPTION 1 White Arch lever folder containing correspondence.
LOCATION Sideboard, Mr Breen's office.

ITEM No E03/1390/3/27 MEMBER'S NAME Robert Graham
DESCRIPTION 1 white lever Arch folder containing correspondence.
LOCATION Sideboard, Mr Breen's office.

ITEM No E03/1390/3/28 MEMBER'S NAME Robert Graham
DESCRIPTION 1 Diary Legislative Diary 2002
LOCATION Drawer (top) front of desk, Mr Breen's office

ITEM No E03/1390/3/29 MEMBER'S NAME Robert Graham
DESCRIPTION Diary Blue 2000.
LOCATION Drawer in desk, Mr Breen's office

ITEM No E03/1390/3/30 MEMBER'S NAME Robert Graham
DESCRIPTION 1 Blue Diary 1999 - Collins.
LOCATION 8 Drawer, Mr Breen's office.

SIGNATURE - OFFICER [Signature] SIGNATURE - OCCUPIER [Signature]
PRINT NAME Mayer PRINT NAME A SAMMARINO

WHITE - COMMISSION COPY BLUE - OCCUPIER'S COPY

INDEPENDENT COMMISSION AGAINST CORRUPTION
PROPERTY SEIZURE RECORD

OPERATION TRITON
ADDRESS Parliament House
DATE 3 october 2003.

ITEM No E03/1390/3/31 MEMBER'S NAME Yota Find
DESCRIPTION 1 Book 'Advance Australia Fair'
LOCATION Cabinet, near door, Mr Breen's office.

ITEM No E03/1390/3/32 MEMBER'S NAME Robert Graham
DESCRIPTION 1 Bundle documents - address / name database.
LOCATION Top of Desk, Mr Breen's office.

ITEM No E03/1390/3/33 MEMBER'S NAME Robert Graham
DESCRIPTION Email re: Meeting with CEFUP. dated 24/09/2003
LOCATION Top of Mr Breen's desk.

ITEM No E03/1390/3/34 MEMBER'S NAME Robert Graham
DESCRIPTION 1 Delivery Docket from Breakout, Design & Print.
LOCATION Bottom left drawer of desk.

ITEM No E03/1390/3/35 MEMBER'S NAME Yota Findanis
DESCRIPTION 6 x Write Quick CDs.
LOCATION Left cabinet, near door, Mr Breen's office.

SIGNATURE -- OFFICER [Signature] SIGNATURE -- OCCUPIER [Signature]
PRINT NAME Maryak. PRINT NAME SAMMARTANO

WHITE - COMMISSION COPY BLUE - OCCUPIER'S COPY

INDEPENDENT COMMISSION AGAINST CORRUPTION
PROPERTY SEIZURE RECORD

OPERATION TRITON
ADDRESS Parliament House
DATE 3 October 2003

ITEM No E03/1390/3/36 MEMBER'S NAME Yota Findanis
DESCRIPTION St George deposit/cheque Books.
LOCATION Top left drawer on desk, Mr Breen's office.

ITEM No E03/1390/3/37 MEMBER'S NAME Yota Findanis
DESCRIPTION Book titled 'Book of Letters'.
LOCATION Cabinet shelf.

ITEM No E03/1390/3/38 MEMBER'S NAME Yota Findanis
DESCRIPTION 1 Legislative Council Diary 2003
LOCATION Cabinet shelf.

ITEM No E03/1390/3/39 MEMBER'S NAME Yota Findanis
DESCRIPTION Document titled 'Proposed Motions'.
LOCATION Mr Breen's desk.

ITEM No E03/1390/3/40 MEMBER'S NAME Robert Graham
DESCRIPTION 1 Diary - Law Society 2001 Diary
LOCATION Mr Breen's desk

SIGNATURE - OFFICER [Signature] SIGNATURE - OCCUPIER [Signature]
PRINT NAME MAYAL PRINT NAME A SAMMONEANO

WHITE - COMMISSION COPY BLUE - OCCUPIER'S COPY

INDEPENDENT COMMISSION AGAINST CORRUPTION
PROPERTY SEIZURE RECORD

OPERATION TRITON
ADDRESS Parliament House
DATE 3 October 2003

ITEM No E03/1390/3/40 MEMBER'S NAME Robert Graham
DESCRIPTION Letter to Irene Moss dated 9 September 2002.
LOCATION Front office, filing cabinet.

ITEM No E03/1390/3/41 MEMBER'S NAME Andrew Patterson
DESCRIPTION 1 Bundle of suspension files. - Administration H-P.
LOCATION Filing cabinet, front office.

ITEM No E03/1390/3/42 MEMBER'S NAME Robert Graham
DESCRIPTION Copy Documents - Legal documents - Valerie Armstrong
LOCATION Sofa.

ITEM No E03/1390/3/43 MEMBER'S NAME Yota Findanis
DESCRIPTION 1 Arch lever folder labelled '1 Newsletter, subscriptions & Book sales.'
LOCATION Top shelf, left of Adriana's desk.

ITEM No E03/1390/3/44 MEMBER'S NAME Yota Findanis
DESCRIPTION 1 Blue folder labelled 'The Book of Letters'
LOCATION top shelf, left of Adriana's desk.

SIGNATURE - OFFICER [Signature] SIGNATURE - OCCUPIER [Signature]
PRINT NAME Manjak PRINT NAME A. SMARANO

WHITE - COMMISSION COPY BLUE - OCCUPIER'S COPY

INDEPENDENT COMMISSION AGAINST CORRUPTION
PROPERTY SEIZURE RECORD

OPERATION TRITON

ADDRESS Parliament House

DATE 3 October 2003

ITEM No E03/1390/3/45 MEMBER'S NAME Yota Findanis
DESCRIPTION 1 Cheque Deposit, & Cheque Deposit
from Allen & Unwin.
LOCATION John Murray's desk.

ITEM No E03/1390/3/46 MEMBER'S NAME Yota Findanis
DESCRIPTION Suspension files - Administration Q-Z
LOCATION Filing cabinet in reception

ITEM No E03/1390/3/47 MEMBER'S NAME Yota Findanis
DESCRIPTION Suspension files - Administration
A - G
LOCATION Filing cabinet in reception.

ITEM No E03/1390/3/48 MEMBER'S NAME Yota Findanis
DESCRIPTION Suspension files - Administration A-G
LOCATION Filing cabinet in reception

ITEM No E03/1390/3/49 MEMBER'S NAME _____
DESCRIPTION 1 DISK - CD (recordable) containing
data provided by Angelo Montesano. - Shared Network
files on Network.
LOCATION CD.

SIGNATURE - OFFICER [Signature]

SIGNATURE - OCCUPIER [Signature]

PRINT NAME Angelo Montesano

PRINT NAME SAMMARTANO

WHITE - COMMISSION COPY BLUE - OCCUPIER'S COPY



1368/03

INDEPENDENT COMMISSION AGAINST CORRUPTION

03 February 2005

Mr P Morgan
Level 4 Downing Centre
143 - 147 Liverpool Street
SYDNEY NSW 2000

Our Ref:E03/1390

Dear Sir

RE: Search Warrant Application Number 1368 of 2003

On 3 October 2003 you considered and granted an application for a search warrant made by Commission officer Robert Graham. The search warrant application was number 1368 of 2003 and related to the parliamentary office of the Hon. Peter Breen MLC.

At that time an application was also made pursuant to Clause 10 of the Search Warrant Regulations 1999 seeking the issue of a certificate that the application for the search warrant (including the authorised justice's record of application for the search warrant) not be made available for inspection. This application was made on the basis that the documents contained information that if disclosed, would seriously compromise the investigation. The Clause 10 application was granted.

I advise that the Commission has now completed its investigation. In these circumstances the Commission no longer considers that making available the application for the search warrant or the authorised justice's record of application of the search warrant would, if disclosed, compromise the investigation. Accordingly, pursuant to Clause 10(4) of the Search Warrants Regulation the Commission submits that the certificate should be revoked and the documentation made available for inspection by Mr Breen or any other person on his behalf.

Yours sincerely

Roy Waldon
A/Solicitor to the Commission

Clause 10 Certificate is revoked

D10027544

*4-2-05
Copy of application provided
to Peter Breen on 21-2-05*

Appendix 5

SEARCH WARRANT APPLICATION OF 8 OCTOBER

2003

CERTIFICATE

RECORDS NOT AVAILABLE FOR INSPECTION

(Search Warrants Regulation 1999)

I, IAN PEEBLES
(name of authorised justice)

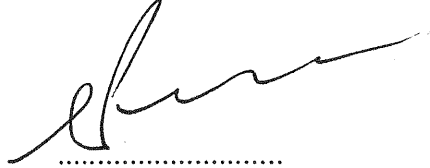
a justice authorised and empowered to issue search warrants under section 40(1) of the *Independent Commission Against Corruption Act 1988*, having on this date granted a search warrant ("the warrant") authorising the applicant Robert Anthony Graham, an officer of the Independent Commission Against Corruption, to enter and search the premises known as 3 Lucia Crescent, Lismore NSW 2480 and being a residential dwelling house ("the premises"); and being satisfied that:

- (a) the application (including the authorised justice's record of application for a search warrant) contains matter that, if disclosed, may seriously compromise the investigation of the matter the subject of the warrant;

issue this certificate pursuant to Clause 10 (1) (b) of the Search Warrants Regulation 1999 **AND ORDER THAT the abovementioned documents may not be disclosed and are not to be made available for inspection under clause 9(3) of the Search Warrant Regulation 1999.**

Signed by me)

) IAN PEEBLES
(Print name)

) 
(Signature)

Date: 8/10/03

Certificate is REVOKED
This Warrant was issued as part of an investigation by ICAC which has now been completed. Certificate in respect of a related Warrant has already been revoked at the request of ICAC (see Search Warrant No: 1368/03).
[Signature]
Authorised Justice

Search Warrants Regulation 1999
Form 2

(Clause 4(b))

**APPLICATION FOR A SEARCH WARRANT
(OTHER THAN A PART 2 SEARCH WARRANT)**

(Independent Commission Against Corruption Act 1988)
(Search Warrants Act 1985)

On 8 October 2003, I, Robert Anthony Graham, being a person with authority to apply for a search warrant under section 40(4) of the *Independent Commission Against Corruption Act 1988* ("the Act"), apply for a search warrant to enter the premises known as 3 Lucia Crescent, Lismore NSW 2480, being a residential dwelling house ("the premises").

I swear that:

1. I am an officer of the Independent Commission Against Corruption ("the Commission") and I am authorised by section 40(4) of the Act to apply for a search warrant.
2. I have reasonable grounds for believing the following matters, which justify this application for the issue of a search warrant:
 - (a) The Commission is conducting an investigation under the Act, into the use of Parliamentary resources and allowances by Mr Peter Breen MLC.
 - (b) There is in or on the premises documents or other things connected with the matter that is being investigated under the Act, or that such documents or other things may, within the next following 72 hours, be brought into or onto the premises, for the following reasons:
 - (i) Mr Peter Breen was elected as a Member of the NSW Legislative Council in March 1999. Mr Breen is also the President of a political party known as the Reform The Legal System Party.
 - (ii) Members of the NSW Legislative Council are provided with certain entitlements that are additional to their basic remuneration or salary and are for the purpose of facilitating the efficient performance of the parliamentary duties of members. These entitlements include a fixed monetary allowance for expenses incurred by Members who reside in country areas called the Sydney Allowance. The Sydney Allowance is provided to members who reside in non-Metropolitan electorates to compensate for the additional costs including commercial accommodation, meals and incidental costs associated with staying in Sydney to attend sessions of Parliament, meetings of Parliamentary committees or other Parliamentary business.
 - (iii) Terms and conditions of these additional entitlements are matters for annual determination by the Parliamentary Remuneration Tribunal (PRT), a body established by the *Parliamentary Remuneration Tribunal Act*. The

Determinations made by the PRT provide that expenditure by Members of Parliament is only to be incurred in connection with the parliamentary duties of Members.

- (iv) The PRT Guidelines and General Conditions in relation to the Sydney Allowance make it clear the allowance is only payable to Members who reside in non-metropolitan electorates. The PRT Determination provides that Members are required to maintain records, which clearly document the occasions they stayed in Sydney in connection with their parliamentary duties.
- (v) Members of Parliament are also subject to the Code of Conduct for Members. The Code provides that "Members must apply the public resources to which they are granted access according to any guidelines or rules about the use of those resources."
- (vi) On 20 August 2003, the Commission received information alleging that Peter Breen MLC has claimed his Sydney Allowance, which he was not entitled to as he was living in Sydney at the time.
- (vii) On 1 October 2003, Commission officers interviewed Ms Adriana Sammartano, currently employed as Mr Breen's parliamentary staff secretary. She provided information as to Mr Breen's ineligibility to claim the Sydney Allowance.
- (viii) Ms Sammartano stated that Mr Breen has been claiming the Sydney Allowance since he was elected in 1999, by claiming his principal place of residence was 3 Lucia Crescent, Lismore NSW, when in fact he has been living in Sydney and currently resides at Boomerang Street, Woolloomooloo NSW, and therefore not eligible to claim the allowance.
- (ix) A Sydney Allowance Election Form has been sighted that shows that Mr Breen has declared the property at 3 Lucia Crescent, Lismore to be his principle place of residence for the purpose of claiming the Sydney Allowance. The Commission has interrogated the RP Data Property System and Lawpoint databases, which provided information that Mr Breen has no interest in the property situated at 3 Lucia Crescent, Lismore, and that the property is owned by Valerie Alice Armstrong (nee Housego). Since married, Valerie Murphy currently resides at 3 Lucia Crescent, Lismore, with Alfred Murphy.
- (x) Ms Sammartano stated that since mid 2003, when the Commission's investigation into the conduct of Malcolm Jones MLC became public knowledge, Mr Breen has been visiting the Lismore property regularly, but prior to then he wasn't going so regularly. Ms Sammartano stated that on the occasions that Mr Breen travelled to Lismore, she was responsible for preparing the relevant paperwork, which Ms Sammartano stated, were stored in archive boxes in Mr Breen's office at Parliament House. Ms Sammartano

- (xi) The items to be seized (whether in original, copy or in electronic form) are: computer tapes and any magnetic, electronic or other computer storage medium, containing any information and any hard copy printout of any such information, documents, books, statements of account, accounting records, cash books, ledgers, journals, bank deposit and withdrawal slips, bank statements, cheque butts, credit card vouchers or records, receipts, documents of title and other documents evidencing interests present, future or contingent in real or personal property, diaries, telephone diaries, appointment books, note books, address books, correspondence, tax returns, photographs connected with the investigation being conducted under the *Independent Commission Against Corruption Act 1988*, into the use of parliamentary resources and allowances by Mr Peter Breen MLC.
4. Pursuant to clause 10 of the Search Warrant Regulations 1999, I seek the issue of a certificate that the application for the search warrant (including the authorised justice's record of application for the search warrant), not be made available for inspection. I make this application on the following grounds: that these documents contain information that if disclosed, will seriously compromise the investigation.
5. I and Andrew Patterson, seek to be able to perform the following specific functions on entry:
- (a) To search for the documents or things described in paragraph 2 connected with the matter that is being investigated and seize any such documents or other things found in or on the premises and deliver them to the Commission.
 - (b) Use any persons necessary to assist in the execution of this warrant.
 - (c) Use any force that is reasonably necessary to enter the premises and to open any receptacle on the premises for the purpose of a search.
 - (d) Search, if a member of the Police Service or a senior Commission investigator named in and executing the warrant, a person found in or on the premises whom the member of the Police Service or senior Commission investigator reasonably suspects of having a document or other thing mentioned in the warrant.
 - (e) Seize a document or other thing that the person executing this search warrant believes on reasonable grounds to be evidence that would be admissible in the prosecution of a person for an indictable offence against the law of the Commonwealth, a State or a Territory, and the first-mentioned person believes on reasonable grounds that it is necessary to seize the document or other thing in order to prevent its concealment, loss, mutilation or destruction, or its use in committing such an offence.
 - (f) Retain a document or other thing seized pursuant to this search warrant if, and for so long as, its retention by the Commission is reasonably necessary for the purposes of the investigation referred to in paragraph 2. If the retention of the


document or other thing by the Commission is not, or ceases to be, reasonably necessary for such purposes, the Commission shall cause it to be delivered to the person who appears to the Commission to be entitled to possession of the document or other thing, or the Attorney General or the Director of Public Prosecutions, with a recommendation as to what action should be taken in relation to the document or other thing.

- 6. (To be completed only if a previous application for the warrant has been made and refused)

The following are details of the refusal of the previous application:
.....
.....
.....

The additional information which I consider justifies the making of this further application is:.....
.....
.....

Sworn before me on the..... 8th.....day
of OCTOBER 2003
at SYDNEY
in the State of New South Wales.....
.....
Justice of the Peace


(Applicant's signature)

IT IS AN OFFENCE UNDER SECTION 12B OF THE SEARCH WARRANTS ACT 1985 TO GIVE INFORMATION IN THIS APPLICATION KNOWING IT IS FALSE OR MISLEADING IN A MATERIAL PARTICULAR. THE MAXIMUM PENALTY IS A FINE OF 100 PENALTY UNITS AND 2 YEARS IMPRISONMENT.

FOR OFFICE USE ONLY

(NOTE: In the case of an application by telephone (but not by facsimile), this form of application should be completed by the authorised justice for record purposes as if it were made in person by the applicant but not on oath.)

Authorised Justice's Record of Application for a Search Warrant

On the 8th day of October 2003 at 3.10 a.m./p.m.

I, the undersigned authorised justice received this application for a search warrant.

- 1. The application was made in person.
or
The application ~~was made by facsimile transmission/telephone and I was/was not satisfied that the warrant was required urgently and it was/was not practicable for the application to be made in person.~~

- 2. On considering the application I found/~~did not find~~ that there were reasonable grounds for issuing the warrant.

upon the information contained in the application, I have formed a reasonable belief that the statements sought are on the subject of indictable fraud offences
(If warrant is issued - continue)
will produce evidence

- 3. The relevant particulars of the grounds on which I relied to justify the issue of the warrant are as follows:

- 4. The search warrant was issued at 3:10 a.m./p.m. on Wednesday the 8th day of October 2003

Signed.....
 (Authorised Justice)

**OCCUPIER'S NOTICE
OTHERWISE THAN FOR A PART 2 WARRANT**(Independent Commission Against Corruption Act 1988)
(Search Warrants Act 1985)**IMPORTANT INFORMATION FOR OCCUPIERS CONCERNING THE
SEARCH WARRANT**

A search warrant has been issued by an authorised justice. It gives the authority and power to the persons named in the search warrant to enter and search the premises at 3 Lucia Crescent, Lismore NSW 2480, being a residential dwelling house ("the premises").

Expiry

The search warrant will expire at 3.00 a.m./p.m. on 11/10/03 (date).

Force

The persons granted the power to enter under the warrant may use such force as is reasonably necessary to gain entry to the premises and to carry out the purpose of the warrant.

YOU HAVE THE RIGHT TO INSPECT THE SEARCH WARRANT BUT YOU MUST NOT HINDER OR OBSTRUCT THE PERSONS EXECUTING IT, AS TO DO SO MAY BE A CRIMINAL OFFENCE. UNDER SECTION 84 OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988, THE MAXIMUM PENALTY FOR OBSTRUCTING OR HINDERING A SEARCH WITHOUT REASONABLE EXCUSE IS A FINE OF 20 PENALTY UNITS OR IMPRISONMENT FOR TWO YEARS, OR BOTH.

The powers given by the search warrant

The search warrant gives the power to the persons executing it to:

- (a) Enter the named premises.
- (b) Search for the following things: (whether in original, copy or in electronic form) computer tapes and any magnetic, electronic or other computer storage medium, containing any information and any hard copy printout of any such information, documents, books, statements of account, accounting records, cash books, ledgers, journals, bank deposit and withdrawal slips, bank statements, cheque butts, credit card vouchers or records, receipts, documents of title and other documents evidencing interests present, future or contingent in real or personal property, diaries, telephone

diaries, appointment books, note books, address books, correspondence, tax returns, photographs connected with the investigation being conducted under the *Independent Commission Against Corruption Act 1988*, into the use of parliamentary resources and allowances by Mr Peter Breen MLC.

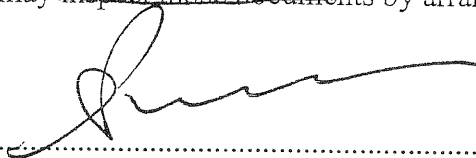
- (c) Seize any such documents or other things found in or on the premises and deliver them to the Independent Commission Against Corruption ("Commission").
- (d) Perform the following functions:
 - (i) Search, if a member of the Police Service or a senior Commission investigator named in and executing the warrant, a person found in or on the premises whom the member of the Police Service or senior Commission investigator reasonably suspects of having a document or other thing mentioned in the warrant.
 - (ii) Seize a document or other thing that the person executing this search warrant believes on reasonable grounds to be evidence that would be admissible in the prosecution of a person for an indictable offence against the law of the Commonwealth, a State or a Territory, and the first-mentioned person believes on reasonable grounds that it is necessary to seize the document or other thing in order to prevent its concealment, loss, mutilation or destruction, or its use in committing such an offence.
 - (iii) Retain a document or other thing seized pursuant to this search warrant if, and for so long as, its retention by the Commission is reasonably necessary for the purposes of the investigation referred to in paragraph 2. If the retention of the document or other thing by the Commission is not, or ceases to be, reasonably necessary for such purposes, the Commission shall cause it to be delivered to the person who appears to the Commission to be entitled to possession of the document or other thing, or the Attorney General or the Director of Public Prosecutions, with a recommendation as to what action should be taken in relation to the document or other thing.
- (e) Exercise such other powers as are specified in the *Independent Commission Against Corruption Act 1988*, including:
 - (i) to use such force as is reasonably necessary for the purpose of entering the premises;
 - (ii) to break open any receptacle in or on the premises for the purposes of the search if it reasonably necessary to do so;
 - (iii) to execute the search warrant with the aid of such assistants as the person executing the warrant considers necessary;

- 5. Only functions and powers authorised under the warrant or by the Act authorising the issue of the warrant may be performed.

Inspection

The application for the issue of the warrant, written reasons for the issue of the warrant and other associated documents are to be held at...DOWNING CENTRE Local

Court. ~~You may inspect those documents by arrangement with that Court.~~

Signed:  Date: 8/10/03
(Authorised Justice)

1373/03

Search Warrants Regulation 1999
Form 7

(Clause 8)

REPORT TO AUTHORISED JUSTICE ON THE EXECUTION OF A SEARCH WARRANT

(Independent Commission Against Corruption Act 1988)
(Search Warrants Act 1985)

This report is made to the authorised justice who issued the attached search warrant.

(If the Warrant was not executed)

1. The warrant was not executed for the following reasons:

The occupier of the premises voluntarily provided documents relevant to the investigation and willingly allowed the subject premises to be inspected by the officers named on the warrant.

2. The occupier's notice was not served.

Signed: R A Graham

Date: 14/10/2003

Name: R A Graham

Designation: Investigator

Place of Work: Independent Commission Against Corruption, level 21/133 Castlereagh Street, Sydney, New South Wales 2000.

Date of receipt of Report by Authorised Justice

20/10/03

Signed: [Signature]

(Authorised Justice)

NOTE: On completion of the Report, forward the Report and attachments to the Local Court named in the Occupier's Notice.

1373/03

Search Warrants Regulation 1999
Form 4

(Clause 5(b))

**SEARCH WARRANT
- OTHER THAN PART 2 WARRANT**

(Independent Commission Against Corruption Act 1988)
(Search Warrants Act 1985)

This search warrant expires at 3.10 a.m./p.m. on Saturday 11/10/03
(date)

, and must not be used after that time.

NOTE: If no time for expiry is specified above, pursuant to s 46 of the *Independent Commission Against Corruption Act 1988* the warrant expires one month after the time it was issued.

On 8/10/03
(date)

IAAS PEEBLES
(name of authorised justice)

a justice authorised and empowered to issue search warrants under section 40(1) of the *Independent Commission Against Corruption Act 1988* granted this search warrant authorising Robert Anthony Graham, an officer of the Independent Commission Against Corruption (the applicant), and the following officer of the Independent Commission Against Corruption (Commission), Andrew Patterson:

1. to enter between the hours of 6.00 a.m and 9.00 p.m. the premises known as 3 Lucia Crescent, Lismore NSW 2480, a residential dwelling house ("the premises"); and
2. there to search for (whether in original, copy or in electronic form) computer tapes and any magnetic, electronic or other computer storage medium, containing any information and any hard copy printout of any such information, documents, books, statements of account, accounting records, cash books, ledgers, journals, bank deposit and withdrawal slips, bank statements, cheque butts, credit card vouchers or records, receipts, documents of title and other documents evidencing interests present, future or contingent in real or personal property, diaries, telephone diaries, appointment books, note books, address books, correspondence, tax returns, photographs connected with the investigation being conducted under the *Independent Commission Against Corruption Act 1988*, into the use of parliamentary resources and allowances by Mr Peter Breen MLC; and
2. seize any such documents or other things found in or on the premises and deliver them to the Commission.

E03/1390/7/2

In executing this search warrant the applicant may exercise the powers provided by the *Search Warrants Act 1985* and the above Act. These include the power to:

- (a) Enter the premises.
- (b) Use any persons necessary to assist in the execution of this warrant.
- (c) Use any force that is reasonably necessary to enter the premises and to open any receptacle on the premises for the purpose of the search.
- (d) Search, if a member of the Police Service or a senior Commission investigator named in and executing the warrant, a person found in or on the premises whom the member of the Police Service or senior Commission investigator reasonably suspects of having a document or other thing mentioned in the warrant.
- (e) Seize a document or other thing that the person executing this search warrant believes on reasonable grounds to be evidence that would be admissible in the prosecution of a person for an indictable offence against the law of the Commonwealth, a State or a Territory, and the first-mentioned person believes on reasonable grounds that it is necessary to seize the document or other thing in order to prevent its concealment, loss, mutilation or destruction, or its use in committing such an offence.
- (f) Retain a document or other thing seized pursuant to this search warrant if, and for so long as, its retention by the Commission is reasonably necessary for the purposes of the investigation referred to in paragraph 2. If the retention of the document or other thing by the Commission is not, or ceases to be, reasonably necessary for such purposes, the Commission shall cause it to be delivered to the person who appears to the Commission to be entitled to possession of the document or other thing, or the Attorney General or the Director of Public Prosecutions, with a recommendation as to what action should be taken in relation to the document or other thing.

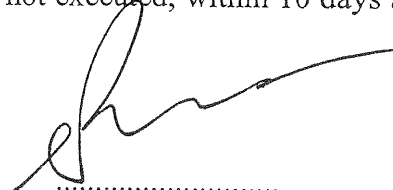
NOTE: The applicant must deliver this search warrant when reporting to the issuing justice within 10 days after the execution of the warrant, or if not executed, within 10 days after the expiry of the warrant.

Signed by me

)
)
)

IAN PEEBLES

(Print name)



(Signature)

Date: 8/10/08



New South Wales

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

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SYDNEY NSW 2001

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