NSW GOVERNMENT

Office of the Inspector of the
Independent Commission Against Corruption

Telecommunications (Interception and Access) Act 1979 (Cth) - Serious Gap in Inspector's Powers

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

27 October 2020

Our ref: AD06 2021 02

The Hon. John Ajaka MLC
President
Legislative Council
Parliament House
Sydney NSW 2000

The Hon. Jonathan O'Dea MP
Speaker
Legislative Assembly
Parliament House
Sydney NSW 2000

Dear Mr President & Mr Speaker

In accordance with sections 57B(5) and 77A of the *Independent Commission Against Corruption Act 1988* ("the *ICAC Act*"), I, as the Inspector of the Independent Commission Against Corruption, hereby furnish to each of you for presentation to the Parliament a report concerning the *Telecommunications (Interception and Access) Act 1979 (Cth) – Serious Gap in Inspector's Powers.*

Pursuant to section 78(1A) of the *ICAC Act*, I recommend that the Report be made public forthwith.

Yours sincerely,

B. R. McClintock

Bruce R McClintock SC
Inspector, Independent Commission against Corruption

Introduction

This is a Special Report prepared pursuant to s77A of the *Independent Commission Against Corruption Act 1988* (the ICAC Act). That provision enables the Inspector to make a special report to the Presiding Officer of each House of Parliament on:

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

The purpose of this report is to raise with Parliament a longstanding issue concerning the limited powers conferred on the Inspector under the *Telecommunications (Interception and Access) Act 1979 (Cth)* (TIA Act). Specifically, the TIA Act limits the purpose for which the Inspector can obtain telecommunications material intercepted by the Commission. This report highlights the deficiencies with the current statutory scheme and advocates for the inclusion of the Inspector as an eligible authority under the TIA Act for the purpose of auditing the Commission's intercepted material.

During my evidence before the Parliamentary ICAC Committee on 15 May 2020, the following dialogue took place between the Hon. Rod Roberts MLC and myself:

> *The Hon. ROD ROBERTS: My second question arises out of your verbal statement at the beginning that you are going to undertake an audit of the search warrant process at ICAC.*
> *Mr McCLINTOCK: Yes.*
> *The Hon. ROD ROBERTS: What has led you to that? Why pick search warrants as distinct from, say, telephone intercepts or whatever? What has driven you to look at that?*
> *Mr McCLINTOCK: One reason in relation to telephone intercepts is that my powers are very doubtful because it is a Commonwealth issue. There have been ongoing problems with getting the Commission and me access to telephone intercept material and I probably do not have power to actually audit it. If I did have power, I would. Search warrants I chose because there were—not by my immediate predecessors but by the second Inspector, retired Judge Harvey Cooper—a series of audits in relation to search warrants. I chose it because it had been done before, because it is a significant area, because it does involve infringement of the rights people would otherwise have and it is important to make sure that it is done right*[1].

[1] An audit of the Commission's application for and execution of search warrants has recently been completed by my Office and is available at: https://www.oiicac.nsw.gov.au/reports/

I feel it is important to explain the background to my response to Mr Roberts so that the Parliament is fully aware of the issues involved. There may be little the NSW Parliament can do to remedy the situation which is the province of the Commonwealth Parliament. But Parliament should be made aware of this significant limitation of my powers.

On 29 September 2020 I informed the Chief Commissioner of the ICAC my purpose for presenting this report to the Presiding Officers of Parliament. On 6 October 2020 the Chief Commissioner advised me that "the Commission supports amendments of the TIA Act to enable the Inspector to audit its telecommunication interception records".

The statutory framework

Section 63 of the *Telecommunications (Interception and Access) Act 1979 (Cth)* (TIA Act) contains a prohibition on communication of intercept information. It is in the following terms:

No dealing in intercepted information or interception warrant information

> *(1) Subject to this Part and section 299, a person shall not, after the commencement of this Part:*
>
> *(a) communicate to another person, make use of, or make a record of; or*
> *(b) give in evidence in a proceeding; lawfully intercepted information or information obtained by intercepting a communication in contravention of subsection 7(1).*
>
> *(2) Subject to this Part and section 299, a person must not, after the commencement of this subsection:*
>
> *(a) communicate interception warrant information to another person; or*
> *(b) make use of interception warrant information; or*
> *(c) make a record of interception warrant information; or*
> *(d) give interception warrant information in evidence in a proceeding.*

The section is followed by a series of exceptions or carveouts from the section 63 prohibition. Relevant for present purposes is section 68 which provides:

> *68. The chief officer of an agency (in this section called the originating agency) may, personally, or by an officer of the originating agency authorised by the chief officer, communicate lawfully intercepted information (other than general computer access intercept information) that was originally obtained by the originating agency or interception warrant information:*
>
> * * * *
>
> *(eb) if the information relates, or appears to relate, to a matter that may give rise to an investigation by the Inspector of the Independent Commission*

Against Corruption--to the Inspector of the Independent Commission Against Corruption;

Thus, the Commonwealth legislation restricts the Inspector's access to intercepted material to matters that may give rise to investigation by the Inspector. On its face, it is doubtful that that would permit me to access such material to carry out an audit or to determine whether the material in question had in fact been obtained in accordance with the relevant warrant.

Position of the Commonwealth to amend the legislation

The issue first arose in 2009 as a result of a request by the then Inspector for "all applications for TI warrants" in order to audit the ICAC's compliance with the ICAC Act and with the Telecommunications (Interception and Access) Act 1987 (NSW) ("the NSW TIA Act"). The Commonwealth's position is set out in an email from an acting senior legal officer in the Telecommunications and Surveillance Law Branch of the National Security Law and Policy Division of the Commonwealth Attorney General's Department dated 9 April 2009 to Mr Roy Waldon of the ICAC. The relevant parts of this email are:

> ***The ICAC Inspector's role***
>
> *The Department understands the importance of the role of the ICAC Inspector and, consequently, the ICAC Inspector's functions are supported by the powers granted under section 68 (eb) of the TIA Act.*
>
> *Section 68 of the TIA Act provides a discretion for the chief officer of an interception agency to communicate lawfully intercepted information that the agency has obtained, or interception warrant information, to another agency. Subsection 68 (eb) of the TIA Act specifically provides that the chief officer of an agency, which includes the Commission, may communicate lawfully intercepted information or interception warrant information to the ICAC Inspector provided the information relates, or appears to relate, to a matter that may give rise to investigation by the ICAC Inspector.*
>
> *The Explanatory Memorandum (the EM) to the Telecommunications (Interception) Amendment (Stored Communications and Other Measures) Bill 2005 note that the changes, which included incorporating the ICAC Inspector as an eligible authority, were to "enable more effective use of intercepted material by agencies involved in the investigation of corruption".*
>
> *The EM also stated the amendments "will enable the Inspector of ICAC to receive information obtained from the interception of telecommunications for limited purposes under the Interception Act. For Example, under Section 68 of the Interception Act, an agency such as the New South Wales Police, may communicate lawfully obtained information to the Inspector of ICAC where that information relates to investigation that the inspector is conducting a misconduct by a member of the New South Wales Police. Such information is often the only evidence of misconduct, which includes corruption, by member of*

the police force and is generally conclusive proof of the inappropriate behaviour".

Therefore, it is clear that subsection 68(eb) was not intended to enable the ICAC inspector to conduct a general audit of the Commission's telecommunications interception records for the purpose of monitoring compliance with the law of the State or to conduct a general assessment of those records to determine the legality or propriety of the Commission's activities.

Conclusion

It is our view that the TIA Act would enable the Commission to provide the ICAC Inspector with applications for telecommunications interception warrants where there is a targeted inspection into an allegation of misconduct or corruption but not for undertaking a general audit to ascertain if misconduct has occurred.

This email is Attachment A to this Report.

This issue again arose during the terms of my predecessors, Mr Harvey Cooper AM – see his letter to the Commonwealth Joint Parliamentary Committee on Intelligence and Security dated 17 July 2012 and the Hon David Levine AO RFD QC – see his letter to the Commonwealth Parliament's Legal and Constitutional Affairs References Committee dated 2 April 2014. These letters are attachments B and C respectively.

The issue arose in acute form when Mr Levine was conducting an audit into the Commission's conduct of Operation Hale and dealing with a complaint by Ms Margaret Cunneen SC about the Commission's conduct. The then Inspector obtained advice from senior and junior counsel. That advice which is dated 9 October 2015 contains the following:

> 40. *A great deal of correspondence over the years has passed in relation to the issue and advice has even been provided by various Commonwealth employed lawyers. Some of the debate seems to pay insufficient regard to the distinction between the purpose for which an originating agency may exercise its discretion under sec 68 to communicate the information to a second agency, and what the permitted purposes are for any communication of that information by the second agency pursuant to sec 67 and the definitions in sec 5. The debate is presently irrelevant to the question with which we are confronted and we do not propose to assess the merits of the various opinions expressed, but since the matter has been raised in the brief we pause only to remark that the matter appears to be a simple one in that, in requesting information from an originating agency, an Inspector need only identify for that originating agency how the information relates, or appears to relate, to a matter may give rise to an investigation by the Inspector, but once the information is in the possession of the Inspector, the Inspector may only further communicate the information for purposes that equate to the functions in sub-ss 57B(1)(b) and 57B(1)(c) of the ICAC Act.*

41. *In other words, an originating agency could provide the information to an Inspector if the information was about a matter that may give rise to an investigation, but once in receipt of that information, the Inspector could not further communicate that information for the purposes of an audit.*[2]

Thus, the advice confirmed that the Inspector may have access to telecommunications intercept material for the purpose of an "investigation" and, thus, for the purposes of section 57(1)(b) & (c) of the ICAC Act but not for performing an audit under section 57B(a) & (d).

The position is anomalous and I can see no rational reason why I, along with my predecessors, should be permitted access to telecommunications intercept material to perform one aspect of my statutory functions but not the other. There is real significance in this, because it means I am unable to perform any effective audit of the warrants obtained by the ICAC for telecommunications intercepts, which presumably make up a substantial proportion of the warrants the ICAC obtains. I say "presumably" because of the reasons expressed above, I have no actual information on the point.

I raised the matter by letter dated 18 June 2020 with Dr James Renwick CSC SC, the then Independent National Security Legislation Monitor. I said this:

> *I write to you in my capacity as the Inspector of the Independent Commission against Corruption (NSW) to request consideration of an amendment to s68 of the Telecommunications (Interception And Access) Act 1979 (the TI Act) to enable the Inspector to have access to material obtained by the ICAC pursuant to that Act. At present, the Inspector has no such access. That lack of access can seriously impede the performance of the duties imposed on the Inspector under the Independent Commission against Corruption Act (NSW) 1989. To illustrate, if I were to receive a complaint that an ICAC officer had engaged in misconduct in how that officer obtained the intercepted material, I could not access that material to determine whether the complaint was well-founded or not. The position is anomalous because ICAC has the material but I, as the integrity oversight body for that agency do not.*
>
> *Section 68 refers to the Chief Officer of a law enforcement agency communicating lawfully intercepted information that was originally obtained by the originating agency or interception warrant information. I understand that you have been tasked by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) to conduct a review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 (Cth) (TOLA Act) to report by 30 June 2020, I thought it timely to raise this important issue with you.*

[2] I should express my tentative disagreement with paragraph 33 of this advice which is attachment D to this report.

By way of background, my principal functions as Inspector under s57B(1) of the Independent Commission Against Corruption Act 1988 (NSW) (the ICAC Act) are:

(a) to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State, and
(b) to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission, and
(c) to deal with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the Commission or officers of the Commission, and
(d) to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.

Currently s68(eb) of the TI Act enables me to access lawfully intercepted information from ICAC for the purpose of investigating a matter concerning the Commission or officer of the Commission. However, I have no power to access TI material for the purposes of conducting a general audit pursuant to s57B(1)(a) and (d) of the ICAC Act. For instance, I cannot request the Commission's intercepted information to audit whether they complied with the TI Act and/or whether there was any misconduct involved on the part of the Commission or one of its officers. For that reason, I request an amendment to s68(eb) of the TI Act.

I understand that the Commonwealth Ombudsman and the NSW Inspector of the Law Enforcement Conduct Commission (LECC) have audit and inspection functions in relation to lawfully intercepted information, however their legislative functions primarily relate to record keeping and do not consider the actual material captured by the TI or what it has disclosed. Although a useful exercise, such an audit does not capture any misconduct or impropriety for which my role as Inspector of ICAC is primarily concerned with.

Also, in most cases, the person subject to the TI by the Commission is not aware of the warrant or the intercept, therefore it is unlikely that my Office will ever receive a complaint about the intrusiveness of the TI. Most of my investigations to date have been undertaken as a result of a complaint received by my Office. The use of TI on the other hand, ideally, requires my Office to proactively monitor the Commission's application and use of TI warrants and intercepted material to determine whether the Commission has both complied with the TI Act and to ensure that there has not been any misconduct or maladministration on the part of the Commission or its officers. Such an audit would obviously go beyond the scope and purpose of the Ombudsman and the Inspector of LECC's audit and inspection functions.

I am aware that this has been a longstanding issue for quite some time and has been raised by my predecessor's Mr Harvey Cooper AM, in a letter to the PJCIS dated 17 July 2012 and in a letter dated 2 April 2014 from the Hon. David Levine

AO RFD QC to the Legal and Constitutional Affairs References Committee. I was unable to locate a signed copy of Mr Levine's letter, but I have attached a copy of Mr Cooper's letter for your assistance.[3]

Conclusion

I am aware that there is nothing the Parliament of New South Wales can do, at least directly, to correct this anomaly. That can only be done by the Commonwealth Parliament. Nevertheless, I wish the NSW Parliament to understand why, as I said in answer to Mr Roberts' question, I cannot conduct an audit of the ICAC's practices in obtaining telecommunications interception warrants, despite the powers granted to me by section 57B of the ICAC Act. I should however, also mention that my Office has raised this matter with representatives from the Commonwealth Department of Home Affairs, with a view to seeking a legislative amendment to address this issue.

B. R. McClintock

Mr Bruce McClintock SC
Inspector
Independent Commission Against Corruption
27 October 2020

3 My Office has since located the signed copy of Mr Levine's letter of 2 April 2014 which is attachment C to this report.

Attachment A

Roy Waldon

From: Dean, Vicki
Sent: Thursday, 9 April 2009 11:41 AM
To: Roy Waldon
Cc: Mihalic, Susan
Subject: ICAC: Telecommunications (Interception and Access) Act 1979 - Provision of TI material to ICAC Inspector [SEC=UNCLASSIFIED]
Attachments: Letter to Commonwealth AG re ICAC Inspector.DOCX

Dear Mr Waldon

I refer to your request for advice in relation to providing the Inspector of the Independent Commission Against Corruption (the ICAC Inspector) with applications for warrants made by the Independent Commission Against Corruption (the Commission) under the *Telecommunication (Interception and Access) Act 1979* (the TIA Act).

Background

You have requested advice because the ICAC Inspector has advised the Commission that he will be seeking "all applications for TI warrants" in order to audit the Commission's compliance with the *Independent Commission Against Corruption Act 1988* (the ICAC Act) and the *Telecommunications (Interception and Access) Act 1987* (the NSW Act). The ICAC Inspector also intends to assess the effectiveness and appropriateness of the Commission's procedures in relation to applications for telecommunications interception warrants.

I note that the ICAC Inspector is seeking access to applications for telecommunication interception warrants under subsections 57B(1)(a) and 57B(1)(d) of the ICAC Act.

Disclosure of interception warrant information under the TIA Act

As you are aware, section 63 of the TIA Act prohibits the disclosure of intercepted information or interception warrant information. Interception warrant information, which is defined in section 6EA of the TIA Act, includes an application for an interception warrant. The relevant exceptions to section 63 are contained in sections 67 and 68 of the TIA Act.

Section 67 of the TIA Act allows the communication of lawfully intercepted information and/or interception warrant information for a permitted purpose in relation to the agency and for no other purpose. As you have noted, provision of information to the ICAC Inspector in these circumstances does not fall within a 'permitted purpose' as defined in section 5 of the TIA Act.

Section 68 is discussed in detail below.

The ICAC Inspector's role

The Department understands the importance of the role of the ICAC Inspector and, consequently, the ICAC Inspector's functions are supported by the powers granted under subsection 68(eb) of the TIA Act.

Section 68 of the TIA Act provides a discretion for the chief officer of an interception agency to communicate lawfully intercepted information that the agency has obtained, or interception warrant information, to another agency. Subsection 68(eb) of the TIA Act specifically provides that the chief officer of an agency, which includes the Commission, may communicate lawfully intercepted information or interception warrant information to the ICAC Inspector provided the information relates, or appears to relate, to a matter that may give rise to an investigation by the ICAC Inspector.

The Explanatory Memorandum (the EM) to the Telecommunications (Interception) Amendment (Stored Communications and Other Measures) Bill 2005 noted that the changes, which included incorporating the ICAC Inspector as an eligible authority, were to 'enable more effective use of intercepted material by agencies involved in the investigation of corruption'.

The EM also stated that the amendments 'will enable the Inspector of ICAC to receive information obtained from the interception of telecommunications for limited purposes under the Interception Act. For example, under section 68 of the Interception Act, an agency such as the New South Wales Police, may communicate lawfully obtained information

to the Inspector of ICAC where that information relates to an investigation that the Inspector is conducting into misconduct by a member of the New South Wales Police. Such information is often the only evidence of misconduct, which includes corruption, by a member of the police force and is generally conclusive proof of the inappropriate behaviour'.

Therefore, it is clear that subsection 68(eb) was not intended to enable the ICAC Inspector to conduct a general audit of the Commission's telecommunications interception records for the purpose of monitoring compliance with the law of the State or to conduct a general assessment of those records to determine the legality or propriety of the Commission's activities.

Conclusion

It is our view that the TIA Act would enable the Commission to provide the ICAC Inspector with applications for telecommunications interception warrants where there is a targeted inspection into an allegation of misconduct or corruption but not for undertaking a general audit to ascertain if misconduct has occurred.

I trust that this information is of assistance to you. Should you wish to discuss any of these issues further, please do not hesitate to contact me.

Regards

Vicki

Vicki Dean
A/g Senior Legal Officer
Telecommunications and Surveillance Law Branch
National Security Law and Policy Division
Attorney-General's Department

Phone: (
E-mail:

-----Original Message-----
From: Roy Waldon
Sent: Friday, 13 March 2009 11:46 am
To: Dean, Vicki
Subject: PROVISION OF TI MATERIAL TO ICAC INSPECTOR

Dear Ms Dean

I refer to our conversation yesterday and attach a letter seeking advice as to the Commission's ability to provide copies of applications for TI warrants to the ICAC Inspector.

Please let me know if you require any additional information.

Roy Waldon
Solicitor to the Commission
Ph: (
email:

Attachment B

Office of the Inspector
of the Independent Commission Against Corruption

GPO Box 5341
SYDNEY NSW 2001
T: 61 2 8374 5381
F: 61 2 8374 5382
inspectoricac@oiicac.nsw.gov.au

17 July 2012

The Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
CANBERRA ACT 2600

BY EMAIL AND POST

Dear Sir

Inquiry into potential reforms of national security legislation

I refer to your letter of 9 July 2012 received on 17 July and, as the Inspector of the Independent Commission against Corruption of NSW, wish to make submissions in relation to the following terms of reference:

3) The Committee should have regard to whether the proposed responses:

a) contain appropriate safeguards for protecting the human rights and privacy of individuals and are proportionate to any threat to national security and the security of the Australian private sector.

Telecommunications (Interception and Access) Act 1979

1. Strengthening the safeguards and privacy protections under the lawful access to communications regime in the *Telecommunications (Interception and Access) Act 1979* (the TIA Act).

The role of the Inspector of the Independent Commission Against Corruption of NSW (Inspector of the ICAC) was established in 2005 with the inclusion of Part 5A of the *Independent Commission Against Corruption Act 1988 (NSW)* (the ICAC Act) to provide a means of monitoring the extensive and intrusive powers of the ICAC so as to ensure that its use of those powers are appropriate for achieving its objectives.

To enable this to be done the Inspector is required under section 57B (1)(a) of the ICAC Act "to audit the operations of the Commission for the purpose of monitoring compliance with the law of the state" and, under section 57B (1)(d), "to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities".

Under section 57C the Inspector:

(a) may investigate any aspect of the Commission's operations or any conduct of officers of the Commission,

(b) is entitled to full access to the records of the Commission and to take or have copies made of any of them,

(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.

My attempt to conduct an audit of the ICAC's applications for and use of information from warrants and intercepts made under the provisions of the TIA Act were met by the justified response of the Commissioner that the TIA Act places stringent restrictions on access to material prepared for or obtained under its warrant provisions and that the provisions of such material to the Inspector for the purpose of a general audits are probably outside the scope of the exception in the TIA Act that allows access by the Inspector.

This view was confirmed by an advice received from the Senior Legal Officer, Telecommunications and Surveillance Law Branch, National Security Law and Policy Division of the Commonwealth Attorney General's Department. The officer's advice concluded that the TIA Act would enable the Commission to provide the Inspector with applications for telecommunications interception warrants where there is a targeted inspection into an allegation of misconduct or corruption but not for undertaking a general audit to ascertain if misconduct had occurred.

The difficulty that now confronts the Office of the Inspector is that it is prohibited by the current wording of paragraph (eb) of section 68 from conducting such an audit.

The obtaining of a warrant and subsequent interception pursuant to the TIA Act are normally unknown to the person(s) who is the object of the warrant and interception. It is therefore only in rare circumstances that a complaint would be received from such a person(s).

Although the TIA Act places obligations upon the NSW Ombudsman, those obligations are limited to ensuring compliance with legal requirements and the keeping of records. The NSW Ombudsman does not check to see whether those powers are being exercised appropriately.

Thus, a warrant and interception under the TIA Act could proceed for purposes not appropriate to the objectives of the ICAC but for personal purposes unrelated to those objectives. It is for this reason, among others, that the exercise by the Inspector of its powers of audit have been considered by the NSW legislature to be so important.

The ICAC Act vests in the Inspector powers which provide safeguards for protecting the human rights and privacy of individuals and strengthening the safeguards and privacy protections under the lawful access to communications regime in the *Telecommunications (Interception and Access) Act 1979* (the TIA Act) – both matters included in your Committee's Terms of Reference.

The current form of the TIA Act, however, impedes the Inspector from exercising those powers.

It is, therefore, respectfully submitted that the TIA Act be amended to enable the Inspector of the ICAC to conduct an audit of the ICAC's applications for and use of information from warrants and intercepts made under the provisions of the TIA Act. This could be achieved by amending section 68(eb) of the TIA Act to the following effect:

> (eb) if the information relates, or appears to relate, to a matter that may give rise to an investigation or audit pursuant to section 57B of the Independent Commission Against Corruption Act 1988 (NSW) by the Inspector of the Independent Commission Against Corruption - to the Inspector of the Independent Commission Against Corruption.

Please let me know if any further information is required.

Yours sincerely

Harvey Cooper AM
Inspector

Attachment C

Office of the Inspector
of the Independent Commission Against Corruption

FILE COPY

New South Wales Government

GPO Box 5341
SYDNEY NSW 2001
T: 61 2 8374 5381
F: 61 2 8374 5382
inspectoricac@oiicac.nsw.gov.au

Our Ref: G1 2014 01

2 April 2014

The Secretary
Legal and Constitutional Affairs References Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Sent by Email: legcon.sen@aph.gov.au

Dear Madam

Inquiry into comprehensive revision of the *Telecommunications (Interception and Access) Act 1979*

I refer to your letter of 16 December 2013, noting that the Committee granted me an extension of time to submit any submissions as I only commenced my term as the Inspector of the Independent Commission Against Corruption on 10 February 2014.

I make comments in relation to the following terms of reference:

- Comprehensive revision of the *Telecommunications (Interception and Access) Act 1979*, with regard to:

  (a) The recommendations of the Australian Law Reform Commission *For Your Information: Australian Privacy Law and Practice* report, dated May 2008, particularly recommendation 71.2; and

  (b) recommendations relating to the Act from the Parliamentary Joint Committee on Intelligence and Security *Inquiry into the potential reforms of Australia's National Security Legislation* report, dated May 2013.

Section 68 (eb) of the **Telecommunication (Interception and Access) Act 1979** ("TIA Act") states:

> **68 Chief Officer may communicate information obtained by the agency**
>
> The chief officer of any agency (in this section called "**originating agency**") may, personally, or by an officer of the originating agency authorised by the chief officer, communicate lawfully intercepted information that was originally obtained by the originating agency or interception warrant information:
>
> (eb) if the information relates, or appears to relate, to a matter that may give rise to an investigation by the Inspector of the Independent Commission Against Corruption – to the Inspector of the Independent Commission Against Corruption.

This section came into effect as a result of amendments pursuant to the *Telecommunications (Interception) Amendment (Stored Communications and Other Measures) Act* 2005. The explanatory memorandum to the Bill notes that this Bill will make the NSW Inspector of the Independent Commission Against Corruption an eligible authority "*for the purposes of the Interception Act thereby allowing [it] to receive lawfully obtained intercepted material for the purposes of fulfilling [its] statutory obligations to investigate misconduct including corruption.*"

Further, On 14 September 2005, in his Second Reading Speech on the Bill, Senator Ruddock noted that:

> *"To this end, the New South Wales government has created the Inspector of the Independent Commission Against Corruption to audit the commission's operations and to deal with complaints about the commission (including complaints about abuse of power, impropriety and other forms of misconduct by the commission or its officers).*
>
> *As with other bodies that are established to deal with complaints about misconduct by public officials, having access to intercepted material will greatly assist the new inspector to fulfil its statutory role.*
>
> *The bill will therefore make the inspector an eligible authority so that it may use intercepted material for the purpose of its function of dealing with complaints".*

The Inspector's principal functions are set at section 57B of the Independent Commission Against Corruption Act 1988 ("ICAC Act"):

- to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State (s.57B(1)(a))

- 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 (s.57B(1)(b))

- 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 (s.57B(1)(c)))

- to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities. (s.57B(1)(d)).

It is apparent from the Explanatory Memorandum and comments by Senator Ruddock in his second reading speech that the intention of the amendments to the TIA Act with respect to the Inspector, was to have access to intercepted material so that the Inspector could fulfil his or her statutory functions. However, a view has been taken that the Inspector is not permitted to receive lawfully intercepted information (as defined in the TIA Act) for the purpose of an audit pursuant to s.57B(1)(a) of the ICAC Act. This view was confirmed by advice dated 9 April 2009 received from the National Security Law and Policy Division of the Commonwealth Attorney-General's Department.

The current position is therefore that the Inspector is unable to fully perform his or her statutory functions. In particular, in performance of the Inspector's audit function, he or she may wish to assess the legality and propriety of the ICAC's reliance on telephone intercepts in furtherance of its investigations and in in order to do so, may need to access the intercepted information obtained under warrant. A warrant and interception under that TIA Act could proceed for purposes not appropriate to the objectives of the ICAC but rather, for improper purposes. It is for this reason that the Inspector has been given the powers of audit. However, the current form of the TIA Act is said to prevent the Inspector from accessing such lawfully obtained information and thus is precluded from fulfilling this important function.

I propose that the TIA Act be amended to enable the Inspector to receive lawfully obtained information in order to conduct an audit of the ICAC's application for and use of information from warrants and intercepts made under the provisions of the TIA Act. To this end, section 68 (eb) of the TIA Act should be amended to provide as follows:

(eb) if the information relates, or appears to relate, to a matter that may give rise to an investigation **or audit** by the Inspector of the Independent Commission Against Corruption – to the Inspector of the Independent Commission Against Corruption.

The provisions under the Police Integrity Commission Act 1996 ("PIC Act") with respect to the statutory functions of the Inspector of the Police Integrity Commission ("PIC") are in similar terms to those of the Inspector of the ICAC. The Inspector of the PIC is also prevented from having access to lawfully obtained information in order to conduct an audit pursuant to s. 89(1)(a) of the PIC Act. I submit that a similar amendment should also be made to section 68(fa) of the TIA Act namely that:

(fa) If the information relates, or appears to relate, to a matter that may give rise to an investigation **or audit** by the Inspector of the Police Integrity Commission – to the Inspector of the Police Integrity Commission.

The proposals appear to me to fall within the spirit of Recommendation 71-2 (b) of the 2008 Australian Law Reform Commission Recommendations and Recommendation 18 of 2013 Recommendations.

Yours sincerely

The Hon David Levine AO RFD QC
Inspector ICAC

Attachment D

THE INSPECTOR OF

THE INDEPENDENT COMMISSION AGAINST CORRUPTION (NSW) ("ICAC")

re

INVESTIGATION BY THE INSPECTOR OF ICAC'S OPERATION HALE

OPINION

Summary of Advice

1. We are instructed by the Inspector of the ICAC. The office of Inspector is established by Part 5A of the *Independent Commission Against Corruption Act 1988* (NSW) ("***ICAC Act***").

2. We have been briefed to provide a short written opinion summarising our oral advice given to the Inspector in conference. The questions upon which we were asked to opine were:

    a. Whether the Inspector can, by his powers contained in s 57C of the *ICAC Act* or by any other provision of that Act, require the ICAC to give him access to telecommunications interception material provided to the ICAC by the Australian Crime Commission ("**ACC**") pursuant to s 68 of the *Telecommunications (Interception and Access) Act* 1979 (Cth) ("*TIA Act*")?;

    b. Did the publication of a media release dated 27 May 2015 by ICAC concerning Operation Hale constitute a breach of s 111 of the *ICAC Act*?

3. Our advice was that the answer to each question is "No".

4. We turn to give the summary of the reasons for our opinion. We note that given the familiarity of the Inspector with the provisions of the *ICAC Act* and the relevant provisions of the *TIA Act*, and in the interests of succinctness, we will only reproduce legislative provisions in this opinion where necessary.

Introduction

5. On 29 October 2014, Ms Margaret Cunneen SC, a Deputy Senior Crown Prosecutor, her son Stephen Wyllie, and Mr Wyllie's girlfriend Ms Sophia Tilley were summoned to a public inquiry by the ICAC, in aid of a purported investigation into corrupt conduct under s 35 of the *ICAC Act*. The investigation by the ICAC concerned allegations that Ms Cunneen and Mr Wyllie, with the intention of perverting the course of justice, counselled Ms Tilley to pretend to have chest pains to divert police from conducting a blood alcohol test at the scene of an accident. The ICAC had entitled the investigation into these events as "Operation Hale".

6. The reason why the ICAC became apprised of the events that formed the substratum of the allegations is because the ACC had claimed in a letter dated 30 June 2014 to the Hon Megan Latham, the Commissioner of the ICAC, that it was "…in possession of information dated 2 June 2014 alleging that the Deputy Senior Crown Prosecutor in New South Wales is involved in possible corrupt conduct".

7. That information was said to be then provided to the ICAC pursuant to section 59AA(1) of the *Australian Crime Commission Act* 2002 (Cth). The ACC further expressed that the "product" contained information communicated pursuant to s 68 of the *TIA Act*, in other words, the ACC was providing to the ICAC telecommunications interception information in its possession. It is unclear to what extent the "product" was any different to the "information", and at the very least, if they were one and the same, it is difficult to appreciate how that information could "allege" anything as claimed in the letter. All that it is necessary to record at the moment is that the ICAC was in receipt of telecommunications interception information provided to it by the ACC under s 68 of the *TIA Act*.

8. Operation Hale did not proceed to a public inquiry. The recipients of the summonses commenced proceedings in the Supreme Court of New South Wales seeking, *inter alia*, declaratory relief that ICAC was exceeding its

jurisdiction in respect of Operation Hale as the allegations in the summonses did not fall within the definition of "corrupt conduct" in sub-s 8(2) of the *ICAC Act*, and further, that the decision of the ICAC made under s 31 of the *ICAC Act* to hold a public inquiry into the allegations was invalid and a nullity.

9. At first instance the plaintiffs were unsuccessful. By majority, an appeal to the Court of Appeal of the Supreme Court of New South Wales was allowed and the declarations were made – *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421. The ICAC sought and was granted special leave to appeal to the High Court of Australia and that Court, by majority, dismissed ICAC's appeal from the Court of Appeal's judgment – *Independent Commission Against Corruption v Cunneen* (2015) 89 ALJR 475; 318 ALR 391.

10. After the conclusion of the proceedings a Panel comprised of the Hon A M Gleeson AC QC and Mr B R McClintock SC was commissioned by his Excellency the Governor of New South Wales to conduct an Inquiry to review matters relating to the jurisdiction of the ICAC and to prepare a Report of the results of the Inquiry. For present purposes it is sufficient to note that after the conclusion of the proceedings and the commissioning of the Panel, the ICAC ceased Operation Hale and referred the matter to the NSW Director of Public Prosecutions ("**DPP**"). On 24 July 2015, the Solicitor General of New South Wales announced that no criminal proceedings would be commenced in respect of the matters referred by the ICAC to the DPP. On 30 July 2015, the Panel reported to the Governor.

11. We are instructed that prior to the termination of Operation Hale, the Inspector had, on his own initiative and pursuant to para 57B(1)(a) of the *ICAC Act*, commenced an audit of the ICAC with respect to its operations concerning Operation Hale. We are further instructed that on 29 May 2015, Ms Cunneen lodged a complaint with the Inspector in respect of the Commissioner of the ICAC, and the ICAC generally, about their conduct in respect of Operation Hale. That complaint led to the Inspector exercising his further functions under

paras 57B(1)(b) and 57B(1)(c) of the *ICAC Act* and his power under para 57C(a) of the *ICAC Act*, to investigate the operations and conduct of the ICAC in respect of Operation Hale in order to deal with the complaint and determine whether there had been any conduct amounting to maladministration.

12. When, subsequent to the media release of the ICAC, the Inspector became aware that the ICAC was in possession of telephone interception information relevant to Operation Hale, the Inspector requested in writing that the Commissioner provide him with copies of all the records of the ICAC relating to Operation Hale. That was a request which the Inspector was principally authorised to make by para 57C(b) of the *ICAC Act* as well as the complementary broad overlapping powers in paras 57C(c) and 57C(d) of that Act. It is unnecessary to chart the course of the correspondence between the Inspector and the Commissioner, but the position taken by the Commissioner was that the Inspector was entitled to copies of all the records of the ICAC save for the telecommunications interception information. The Commissioner claimed that she was prohibited by the *TIA Act* from giving the Commissioner copies of the interception information.

13. Question 1 on which our opinion was sought essentially asks whether the Commissioner was right to deny the Inspector access to that information. We are of the opinion that the *TIA Act*, a valid enactment of the Commonwealth Parliament, does indeed prohibit the ICAC from providing that information to the Inspector despite the command under para 57C(b) of the State *ICAC Act* that the ICAC must provide all its records to the Inspector upon his request. We can, in relatively brief compass, explain why that is so.

Question 1

14. In order to understand the nature of the class of information that was provided by the ACC to the ICAC it is necessary to describe in some detail the scheme set up by the *TIA Act* and the manner in which it regulates the rights, duties, obligations, privileges and immunities for which it provides.

15. It is important to recognise at the outset that the *TIA Act* is a very comprehensive law, which from its terms and subject matter appears to be intended as a complete statement of the law governing the circumstances in which communications passing over a telecommunications system may be intercepted, and how any such intercepted communications are to be dealt with, including their storage and rights and duties in respect of access to those communications. As part of that comprehensive statement, the *TIA Act* deals expressly with the powers and rights of various State bodies and agencies in respect of the subject matter and the extent to which concurrent operation of various State laws is permitted.

16. Sub-section 7(1) of the *TIA Act* contains a general prohibition on the interception of communications passing over a telecommunications system. Sub-sections 7(2), 7(4) and 7(5) of the *TIA Act* then provide for specific circumstances where such interception is authorised. One such circumstance, and presumably the method by which the ACC intercepted the presently relevant material, is where the interception occurs pursuant to a warrant: sub-s 7(2)(b).

17. Section 63 of the *TIA Act* contains a further prohibition of, relevantly, the communication to another person or the making of a record of intercepted information save as when authorised elsewhere in Part 2-6 of the *TIA Act*. Importantly, this further prohibition applies equally to lawfully intercepted information and information that was intercepted in contravention of the prohibition in sub-s 7(1) of the *TIA Act*. In other words, a person who is in possession of lawfully intercepted information is under the same restraints in communicating that information as a person who had unlawfully obtained the information in the first place.

18. A person who contravenes either sub-s 7(1) or sec 63 of the *TIA Act* is guilty of an offence against the relevant provision: sub-s 105(1) of the *TIA Act*. By sub-s 105(2) of the *TIA Act* that offence is an indictable offence punishable on conviction by imprisonment for a period not exceeding two years, subject to

the confined circumstance where, in accordance with sub-s 105(3) of the *TIA Act* a court exercising summary jurisdiction may hear and determine the charge, in which case the maximum penalty is six months imprisonment.

19. Further, Part 2-10 of the *TIA Act* gives jurisdiction to the Federal Court, or a court of a State or Territory, to grant remedial relief to an aggrieved person in respect information unlawfully intercepted or communicated in breach of sub-section 7(1) or sec 63 of the *TIA Act*, including an award of punitive damages, even if the defendant has also been convicted of an offence under the legislation. This is without limit to any liability under State or Territory law that is capable of operating concurrently with the Part: sec 107D.

20. These provisions underscore the seriousness with which the interception and communication of telecommunications information is dealt with by the legislation and why any attempt to intercept, or more relevantly for present purposes, communicate, such information must be strictly squared with the requirements of the legislation.

21. Critical to determining the present question is a proper understanding of the operation of Part 2-6 of the *TIA Act* which provides for the only authorised situations in which intercepted information may be communicated as an exception to its prohibition in sec 63.

22. Section 68 of the *TIA Act* provides for the ability of an agency that originally obtained lawfully intercepted information, called the "originating agency", to communicate that to another agency in defined circumstances, and, once again underscoring the gravity of the matter, such communication must occur through the chief officers of the agencies, or another officer authorised by the chief officer. For the purposes of Part 2-6 of the *TI Act*, by tracking through the definitions in sec 5, an agency is one of the following authorities:

    a. A Commonwealth agency, which means only the following:

        i. the Australian Federal Police; or

        ii. the Australian Commission for Law Enforcement Integrity; or

iii. the ACC; or

b. an eligible authority of a State, which means in the case of NSW:

i. the Police Force; or

ii. in the case of New South Wales – the Crime Commission, the ICAC, the Inspector of the ICAC, the Police Integrity Commission or the Inspector of the Police Integrity Commission.

23. The Police Forces of the other States are also included, as well as some analogue bodies to the NSW agencies in the case of Victoria, Queensland, Western Australia, and South Australia.

24. Therefore, an originating agency can only communicate intercepted information to another one of the defined agencies. Further, sec 68 proscribes, agency by agency, the limited circumstances in which it can be done. It is worth noting here that the *TIA Act* separates the ICAC from the Inspector of ICAC and treats them as two separate agencies. This reflects the separate treatment accorded to them by the *ICAC Act* (see eg sub-s 57B(3) of that Act), but in any event makes it clear that they are each to be judged independently for the purposes of Part 2-6 in determining what information can be communicated to them, and how and by whom it may be communicated.

25. In the case of the ICAC, para 68(ea) of the *TIA Act* provides that the chief officer of the originating agency may only communicate information obtained by the originating agency "if the information relates, or appears to relate, to a matter that may give rise to an investigation by the ICAC – to the Commissioner of the ICAC".

26. In the case of the Inspector of the ICAC, para 68(eb) of the *TIA Act* provides that the chief officer of the originating agency may only communicate information obtained by the originating agency to the Inspector "if the information relates, or appears to relate, to a matter that may give rise to an investigation by the Inspector of the ICAC".

27. If an eligible authority of a State has had information communicated to it by sec 68 of the *TIA Act*, or indeed if it obtained the information upon its own application for a warrant, then it must comply with sub-s 67(1) of the *TIA Act* in dealing with that information. Sub-section 67(1) of the *TIA Act* provides:

> An officer or staff member of an agency may, for a permitted purpose, or permitted purposes, in relation to the agency, and for no other purpose, communicate to another person, make use of, or make a record of the following:
>
> (a) lawfully intercepted information other than foreign intelligence information;
>
> (b) interception warrant information.

28. Therefore, a communication may only be made for a permitted purpose "in relation to the agency" and *for no other purpose*. Section 5 of the *TIA Act* comprehensively sets out the permitted purposes "in relation to" each agency.

29. In relation to ICAC, para 5(da) provides that a permitted purpose relevantly "…means a purpose connected with (i) an investigation under the *ICAC Act* into whether corrupt conduct (within the meaning of that Act) may have occurred, may be occurring or may be about to occur; or (ii) a report on such an investigation".

30. The ICAC may therefore only communicate the information it has received for the purposes of conducting an investigation under Part 4 of the *ICAC Act*. It may not communicate the information for any other purpose.

31. Section 5 of the *ICAC Act* also provides what a permitted purpose in relation to the Inspector is. In para 5(db) the *TIA Act* such a permitted purpose is on connected with what is effectively a restatement of the principal functions of the Inspector provided for in sub-ss 57B(1)(b) and 57B(1)(c) of the *ICAC Act*. It is tolerably plain therefore that the Commonwealth Legislature was well aware of the constituent statutes of the various State corruption authorities, and the relationship between the Inspector of the ICAC and the ICAC and other State analogues, and specifically tailored the *TIA Act* to include some of the functions of the agencies and not others. Another example of this in the

legislation is contained in Part 2-5, where detailed preconditions are proscribed for when an eligible authority of a State may be declared as an agency for the purposes of warrants and the communication of information, and some specific allowances are made to permit agencies to comply with State legislation concerning the provision of information to responsible Ministers e.g. sec 36.

32. The above establishes that:

a. there are stringent limitations on when one agency may communicate information it has intercepted to another agency; and

b. there are stringent limitations on the purpose or purposes for which the originating agency or the recipient agency may communicate the intercepted information; and

c. the *TIA Act* displays by its structure and terms an engagement with the State legislation establishing and regulating the eligible authorities upon which it is conferring various privileges or powers and imposing obligations.

33. It is not a permitted purpose under the *TIA Act* for the ICAC to communicate information to the Inspector for the purposes of the Inspector fulfilling his functions under Part 5A of the *ICAC Act*. The only permitted purpose that the ICAC may communicate the information for is in conducting its own investigations under Part 4 of the *ICAC Act*.

34. We have considered the argument that, given the relationship between the Inspector and the ICAC under the *ICAC Act*, then it is a "purpose connected" with an investigation that the Inspector be permitted to access the information in order to "investigate the investigation" but are of the view that such an argument must fail given that the *TIA Act,* in successive provisions, neatly juxtaposes the separate functions of the ICAC with those of its Inspector. The whole scheme of Part 2-6 is against the notion that the ICAC may communicate the information to its Inspector. Part 2-6 deals with a limited number of agencies, a number of whom are State Corruption or Crime

Commission bodies and their overseers and secs 67 and 68 clearly operate on the basis that it is for an originating agency to determine whether another agency is to receive the information and then that agency is to communicate the information only for the purposes of their own defined principal functions. Given that an originating agency is required to apply for the warrant, there are sound policy reasons why only that agency can determine whether another agency is to receive the information, possessed as it may be of knowledge that would inform the exercise of such a discretion, such as the potential for prejudice to an ongoing investigation.

35. The scheme set up by Part 2-6 which considers the position of the Inspector generally and the circumstances under which he may acquire and communicate any information is neatly contrasted with sub-s 57F(2) of the *ICAC Act* which provides the Inspector with an exception to the application of sec 40 of the *Surveillance Devices Act 2007* (NSW) when he is exercising his functions.

36. The Commissioner of the ICAC therefore has an obligation imposed on her by the *TIA Act* to only communicate the information for a permitted purpose under the *TIA Act* and yet the Commissioner is also prima facie subject to a duty to comply with sec 57 of the *ICAC Act*, namely to provide the Inspector with "full access to records of the ICAC and to take or have copies made of any of them" or the requirement to "produce documents or other things about any matter relating to the Commission's operations" when the Inspector so says.

37. This is one of those relatively uncommon situations when sec 109 of the Commonwealth Constitution must resolve an "operational inconsistency" between a law of the Commonwealth and a law of a State: see e.g. *Commonwealth v Western Australia* (1999) 196 CLR 392 at [61]-[62]; *Momcilovic v The Queen* (2011) 245 CLR 1 at 112-114 [247]-[251]. In any event, the label is unimportant as there is an interrelationship between the different tests of inconsistency all directed at ascertaining whether a "real conflict" exists between the two laws: *Jemena Asset Management Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at [42],[60]. In this case it is not the laws

themselves which are inconsistent but their operation in particular circumstances. The *ICAC Act* confers a broad facultative power on the Inspector and deals with a subject matter far different to the *TIA Act*. The laws themselves do nothing like create conflicting commands – there is no textual collision. It is not the conferral of power on the Inspector which is invalid due to inconsistency. It is the limited, temporal inconsistency in this instance that power conferred on the Inspector has been exercised in relation to a limited class of subject matter upon which the *TIA Act* is comprehensive, definite and which in its practical operation conflicts so that the Commissioner would be confronted with opposing duties. It is tolerably plain that by the *TIA Act* the paramount Legislature has expressed completely and exhaustively what the law shall be concerning the communication of telecommunications interception information, and by so specifically regulating conduct does not permit any other conduct inconsistent with its careful proscriptions. It is express on this point – "no other purpose" – there is no need to divine an implicit negative proposition. The purported exercise of power by the Inspector must in this case yield to the strictures of the *TIA Act*.

38. There is, of course, as we advised in conference, nothing to prevent the Inspector approaching the CEO of the ACC directly to request that the information that was communicated to the Commissioner of the ICAC also be communicated to the Inspector pursuant to sec 68 of the *TIA Act*. The purposes for which the Inspector wishes to use and communicate the information are permitted purposes under sec 5 of the *TIA Act*. We understand that such a request has now been made by the Inspector to the CEO of the ACC.

39. In passing we note that a deal of information in our brief concerns the issue that the relevant "Integrity Agencies" in New South Wales, Victoria, Queensland, and Western Australia seem to be concerned that a lacuna exists in the *TI Act* whereby "the *TI Act* does not allow for respective Inspectors to have access to TI material for the purposes of conducting an audit". In other words, there is a

belief that such information can only be provided when an Inspector is conducting an investigation.

40. A great deal of correspondence over the years has passed in relation to the issue and advice has even been provided by various Commonwealth employed lawyers. Some of the debate seems to pay insufficient regard to the distinction between the purpose for which an originating agency may exercise its discretion under sec 68 to communicate the information to a second agency, and what the permitted purposes are for any communication of that information by the second agency pursuant to sec 67 and the definitions in sec 5. The debate is presently irrelevant to the question with which we are confronted and we do not propose to assess the merits of the various opinions expressed, but since the matter has been raised in the brief we pause only to remark that the matter appears to be a simple one in that, in requesting information from an originating agency, an Inspector need only identify for that originating agency how the information relates, or appears to relate, to a matter may give rise to an investigation by the Inspector, but once the information is in the possession of the Inspector, the Inspector may only further communicate the information for purposes that equate to the functions in sub-ss 57B(1)(b) and 57B(1)(c) of the *ICAC Act*.

41. In other words, an originating agency could provide the information to an Inspector if the information was about a matter that may give rise to an investigation, but once in receipt of that information, the Inspector could not further communicate that information for the purposes of an audit.

Question 2

42. On 27 May 2015, and after its loss in the High Court, the ICAC chose to issue a media release, perhaps unusual in its content, effectively seeking to justify its conduct in commencing Operation Hale and providing an explanation of why the ICAC thought it appropriate to refer the allegations to the NSW Director of Public Prosecutions pursuant to cl 35(4) of Sch 4 to the *ICAC Act*, introduced by the *Independent Commission Against Corruption Act Amendment*

(Validation) Act 2015 (NSW), by "…providing the evidence it has obtained in Operation Hale to the DPP".

43. In explaining its decision to "…furnish the evidence to the DPP for consideration of whether charges of attempting to pervert the course of justice and giving false evidence to the Commission are available against [Cunneen, Wyllie and Tilley]", the ICAC made the following statement:

> The Commission undertook an investigation into the alleged conduct of Ms Cunneen, Mr Wyllie and Ms Tilley after it was provided with information by a Federal law enforcement agency that indicated the commission of an attempt to pervert the course of justice by Ms Cunneen, a NSW deputy senior crown prosecutor, following a motor vehicle accident on 31 May 2014. It was accepted by the courts which examined the allegation in the course of the litigation initiated by Ms Cunneen that the alleged conduct could constitute an attempt to pervert the course of justice.

44. The media release then goes on to describe how serious the alleged offence is when committed by a senior counsel and how it is in the interests of the administration of justice that the DPP be able to investigate the matter.

45. It is, on any view, a robust defence of the actions taken by the ICAC. Whether it was generally appropriate to issue the media release is not a matter on which we opine. The specific question on which we advise is whether the media release, and specifically the extracted paragraph at [42] above, constituted a breach of sec 111 of the *ICAC Act*.

46. That section relevantly provides:

> **111 Secrecy**
>
> (1) This section applies to:
> (a) a person who is or was an officer of the Commission, and
>
> (b) a person who is or was an Australian legal practitioner appointed to assist the Commission or who is or was a person who assists, or performs services for or on behalf of, such an Australian legal practitioner in the exercise of the Australian legal practitioner's functions as counsel to the Commission, and
>
> …

(2) A person to whom this section applies shall not, directly or indirectly, except for the purposes of this Act or otherwise in connection with the exercise of the person's functions under this Act:
(a) make a record of any information, or

(b) divulge or communicate to any person any information,

being information acquired by the person by reason of, or in the course of, the exercise of the person's functions under this Act.

Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.

47. For completeness, we note but do not set out the important permissive provisions in sub-s 111(4).

48. It can be readily seen that the provision was modelled on the long-standing secrecy provision contained in sec 16 of the *Income Tax Assessment Act* 1936 (Cth) which has only recently been replaced by the more comprehensive Div 355 of Sch 1 to the *Taxation Administration Act* 1953 (Cth). We need not recount the comprehensive law in relation to the old sec 16 and what constitutes communication in the exercise of the officer's functions as, in our view, the answer to the present question is tolerably clear that there was no relevant divulgence or communication.

49. In particular, we are asked to advise as to whether by referencing information provided by a "Federal law enforcement agency" and disclosing what the ICAC thought it indicated, constituted divulgence or communicating the interception information obtained under the *TIA Act* in breach of sec 111. (We note that we are not asked to advise on whether the media release constituted a contravention of sec 63 of the *TIA Act* but we should note that the same answer follows).

50. We are of the opinion that the comments in the media release did not constitute a divulgence or communication of the relevant interception information. The ICAC has not disclosed the information or any of its contents. It has stated its opinion about the conclusion it has drawn from considering the material, without disclosing or identifying the substance of any of the material.

51. The conduct of the ICAC in this regard, whatever its general propriety, is not in any way dissimilar to the Commissioner of Taxation issuing a media release stating that after considering the secret taxation files provided by Person X under compulsion, the Commissioner has formed the view that Person X has breached various provisions of the taxation legislation and has been assessed accordingly. In neither case has any of the secret information been divulged or communicated, but merely an opinion been expressed about what legal conclusions one may draw from the information. If the ICAC had recounted any of the alleged conversations, that would be a different matter.

52. On a separate matter, we note our discussion in conference that it seems that the ICAC considered itself permitted to communicate the interception information to the DPP in circumstances where it had (correctly) not considered itself able to do so to the Inspector by reason of the *TIA Act*. The ICAC does not elaborate as to why the former is permitted but the latter not. It cannot be as a result of the new Sch 4 to the *ICAC Act* that the ICAC identified, as it would also yield to the *TIA Act*. Perhaps the ICAC considered the provision of the information fell within (a)(i) of the definition of "permitted purpose" in sec 5 of the *TIA Act* or some other permitted purpose therein. We do not express any view on the matter and we simply raise it for the benefit of the Inspector.

Banco Chambers

9 October 2015

Tom Blackburn SC

Peter Kulevski