THE INSPECTOR OF THE ICAC

re

INVESTIGATION BY THE INSPECTOR OF ICAC'S OPERATION HALE

SECOND JOINT OPINION

Summary of Advice

1. We are briefed by the Inspector to provide a further written opinion concerning his investigation into Operation Hale. We adopt the definitions employed in our first Opinion. The need for advice arises from another complaint made to the Inspector by Ms Cunneen SC about the conduct of the ICAC during the investigation that was determined to be beyond power by the High Court in *Independent Commission Against Corruption v Cunneen* (2015) 89 ALJR 475; 318 ALR 391. This further complaint concerns the lawfulness of the seizure of two mobile telephones from the home of Ms Cunneen by officers of the ICAC, along with attendant issues.

2. In light of the decision of the High Court, these questions can only arise because of the subsequent insertion of Part 13 of Sch 4 to the *ICAC Act*, which has the effect of validating conduct that occurred before the decision of the High Court as if the ICAC's argument had been accepted in that Court. In other words, an evaluation of the conduct of the ICAC takes place in a context where the *ICAC Act* treats Operation Hale as if it were, at the material times, an investigation within the power of the ICAC. The validity of that amendment to the *ICAC Act* was recently upheld by the High Court in *Duncan v Independent Commission Against Corruption* [2015] HCA 32.

3. The questions upon which we have been called to opine are:

    i. Was the seizure by officers of the ICAC of two mobile telephones from the home of Ms Cunneen on 31 July 2014, purportedly pursuant to a notice under sec 22 of the *ICAC Act*, lawful?

    Answer: No, the seizure was unlawful.

ii. Did the subsequent grant of a search warrant in respect of one of the mobile telephones (the other having been returned), and its execution on 7 August 2014, retrospectively legitimise the earlier unlawful seizure of the telephone?

Answer: No, the search warrant did not retrospectively validate the earlier unlawful seizure. It did, however, render the continued detention of the telephone lawful, subject to whether the application for the warrant and the grant itself were lawful. We are of the view that, on the material before us, the search warrant was issued lawfully.

iii. On the assumption that one or both seizures of the mobile telephones was unlawful, and data from the relevant telephone was illegally obtained, did this necessarily lead to the conclusion that the ICAC had no power or authority to use the data either in its own investigation or to refer the data on to any other authority, and that any such authority had no power to use the data for its consideration of criminal sanctions or disciplinary action against Ms Cunneen?

Answer: No, not necessarily. Indeed, there was no relevant restriction on the use of the material for the purpose of an investigation by the ICAC and there is a strong prospect that the evidence would be admissible in other proceedings, especially in disciplinary proceedings. There is no general exclusionary rule in Australian law operating upon illegally obtained evidence. Whether any such evidence could be used would depend upon a number of matters, including the type of evidence, the jurisdiction being exercised, the nature and powers of any authority before which it was sought to be deployed, and the manner in which, and the context within which, the evidence was proposed to be used, including whether the rules of evidence applied. In criminal or civil proceedings in a court,

> the answer would usually depend upon the outcome of a judicially exercised discretion according to well-known principles. In an inquiry or hearing before an administrative body, such as in disciplinary proceedings, the paramount consideration will be whether reception of the evidence would affect the fairness of the hearing, and the main concern will be the relevance and logical probity of the evidence.

Background

4. We are instructed that on 30 July 2014 investigators from the ICAC attended, without prior notice, the private residence of Ms Cunneen at Willoughby, NSW.

5. On that occasion the investigators, who included Mr Tim Fox, the Chief Investigator of the ICAC, personally served on Ms Cunneen a notice, purportedly pursuant to sec 22 of the *ICAC Act*, ("**the Notice**") and informed her that she was required to produce "forthwith", under compulsion of the Notice, two mobile telephones identified in the Notice. The two mobile telephones were an Apple iPhone which, although it was used with a telecommunications service subscribed to Mr Greg Wyllie, was used by Ms Cunneen for personal communications ("**the iPhone**") and a telephone manufactured by Nokia which was provided to Ms Cunneen, along with a telecommunications service, by her employer, the Director of Public Prosecutions NSW ("**the Nokia**").

6. The salient terms of the Notice, addressed to Ms Cunneen at her home, were as follows:

> **You are required to attend and produce**
>
> - to Tim Fox, Chief Investigator of the [ICAC];
> - forthwith
>
> **the document(s) and/or other thing(s) described in the Schedule to this Notice.**

> You are required to produce the document(s) and/or other thing(s) for the purposes of an investigation the ICAC is conducting.
>
> (emphasis in original)

7. The Notice was dated 23 July 2014 and signed by the Commissioner of the ICAC. The schedule to the Notice specified only the iPhone and the Nokia. Immediately under the section reproduced above was a warning that failure to comply with the Notice without reasonable excuse was an offence under sec 83 of the *ICAC Act*. The maximum penalty specified in sec 83 is 20 penalty units or a term of imprisonment for six months, or both.

8. In response to the Notice, Ms Cunneen handed over the iPhone and the Nokia to the investigators of the ICAC while they were present at her home. We are instructed that Ms Cunneen objected to production in accordance with sub-s 26(2) of the *ICAC Act,* on the ground that the telephones might incriminate her. Such objection prevents the mobile telephones being used in, essentially, any non-ICAC proceedings against her. The following day, the ICAC investigators returned the Nokia to Ms Cunneen, but they retained the iPhone.

9. We are instructed to infer that the ICAC investigators had examined the data contained on the Nokia and the iPhone and determined that the Nokia was irrelevant, and the iPhone was relevant, to their investigation.

10. At 4.25 pm on 6 August 2014, Magistrate Stephen Lister LCM appears to have granted two search warrants both entitled 1708 of 2014. One warrant was in respect of the "seizure" of the iPhone at Ms Cunneen's home, the other for the seizure of an identified mobile telephone and any other relevant mobile telephones from the home of the son of Ms Cunneen. We shall refer to the warrant in respect of Ms Cunneen as "**the Warrant**". It is unclear from the material before us why the two separate warrants appear to bear the same number. We have the warrant in respect of Ms Cunneen's premises and the occupier's notice in respect of her son's premises. Perhaps the applications, being made at the same time and presumably being considered together, led to the warrants being entitled in a similar fashion.

11. We have been instructed with a statement from Mr Fox describing the events that occurred on execution of the warrants as well as the applications in respect of both warrants. We shall briefly describe the pertinent events that took place in respect of the execution of the Warrant pursuant to sec 41 of the *ICAC Act*, as the Inspector is familiar with the material and our advice is not sought in respect of the warrant to seize the telephones from Ms Cunneen's son.

12. We shall also defer setting out some brief facts about the material the investigators included in the application for the Warrant until answering Question 2 below. Suffice to say for present purposes in relation to the execution of the Warrant that on the evidence of Mr Fox, Ms Cunneen gave "consent" to the entry to her home in the context of a warrant being executed, and the "seizure" of the iPhone took place by one of the ICAC investigators displaying the packaged iPhone, which had not left the ICAC's physical possession, to Ms Cunneen whereupon Ms Cunneen signed a field property receipt for the iPhone. Mr Fox returned the iPhone to Ms Cunneen some days later.

13. For material lawfully seized by search warrant pursuant to sec 41 of the *ICAC Act*, there is no equivalent provision to sub-s 26(2) in respect of material lawfully seized pursuant to sec 22 of the *ICAC Act*. In other words, material seized pursuant to search warrant may be used in future proceedings against the person from whom the material was seized.

14. We are instructed that Ms Cunneen has received legal advice that both the Notice and the Warrant were unlawful and any information obtained from the iPhone is inadmissible against her for any purpose.

Question 1

15. Our brief contains the observation that there are two bases upon which it may be said that the Notice is unlawful. First, it is suggested that sec 22 of the *ICAC Act* necessarily contemplates the effluxion of time between the service of a notice and the attendance at the specified time and place. The Notice served on Ms Cunnen did not specify a place or time but required production of the

iPhone and Nokia "forthwith", and was for that reason, so the argument runs, unlawful.

16. Secondly, it is suggested a notice pursuant to sec 22 of the *ICAC Act* does not authorise an officer of the ICAC to enter the home of the addressee of a notice and require the compulsory production of any specified items in the home. The contention is that the power to enter the private residence of an individual and seize her possessions can only be given to an ICAC officer by a search warrant issued pursuant to sec 41 of the *ICAC Act* and not through a sec 22 notice.

17. We are of the view that the seizure of the mobile telephones in the possession of Ms Cunneen by purported compulsion under the Notice was unlawful for the second reason above. As to the first reason, on the state of the authorities, a notice pursuant to sec 22 of the *ICAC Act* may require production "forthwith" if production is compelled in otherwise lawful circumstances.

Production "forthwith"

18. Section 22 of the *ICAC Act* provides:

> **22 Power to obtain documents etc**
>
> (1) For the purposes of an investigation, the Commission may, by notice in writing served on a person (whether or not a public authority or public official), require the person:
>
> (a) to attend, at a time and place specified in the notice, before a person (being the Commissioner, an Assistant Commissioner or any other officer of the Commission) specified in the notice, and
>
> (b) to produce at that time and place to the person so specified a document or other thing specified in the notice.
>
> (2) The notice may provide that the requirement may be satisfied by some other person acting on behalf of the person on whom it was imposed and may, but need not, specify the person or class of persons who may so act.

19. In *Egglishaw v Australian Crime Commission (No 2)* (2010) 186 FCR 393, the Full Court of the Federal Court construed sec 29 of the *Australian Crime Commission Act* 2002 (Cth) ("***ACC Act***"). That provision, as it then stood, was materially equivalent to sec 22 of the *ICAC Act*.

20. The Full Court determined (at 407 [85], [87]) that there was no statutory requirement in sec 29 that the time given in a notice be a specified time, rather than "forthwith".

21. It is useful, for more than one reason, to set out some of the facts. In that case, the appellant had been compelled to attend an examination pursuant to sub-sec 28(1) of the *ACC Act*. During a break in the appellant's examination, a notice to produce was issued by the Examiner and served on the appellant by an officer of the ACC while the appellant sat in a waiting room with his legal advisers. The notice called for the attendance of the appellant before an officer of the ACC (not the officer who had served the notice) and specified the place as the building address and floor at which the appellant and officer were located. The notice required attendance "forthwith" and production of specified items, which were DVDs. The appellant had the DVDs called for by the notice in his possession and, after conferring with his counsel, he handed them over to the ACC officer who had served him with the notice.

22. The reason why the DVDs were in the physical possession of the appellant is because immediately before serving him with the sec 29 notice, the ACC officer handed the DVDs to the appellant. Some five days earlier, the appellant had arrived from overseas and went to a hotel in Melbourne. Members of the ACC arrived at the hotel with a search warrant which had been issued pursuant to sec 3E of the *Crimes Act* 1914 (Cth). The ACC officers made forensic image DVDs of the hard disk drive of a laptop in the appellant's possession. Over the next few days the ACC officers suspected that there was information on the forensic image DVDs that would be relevant to their investigation, but which did not fall within the terms of their search warrant. A decision was made to acquire the DVDs pursuant to the notice to produce at the examination of the appellant.

23. The appellant made a series of challenges to the sec 29 notice before the primary judge and on appeal, most of which are presently irrelevant, and all of

which failed. We turn to the challenge concerning the specification of the time required for production as "forthwith".

24. The Full Court dismissed the issue in the briefest of terms by pronouncing that there was nothing in the *ACC Act* which required that a sec 29 notice specify a time for production, rather than require production "forthwith": at 407 [83]-[87].

25. Two subsidiary challenges concerning the "forthwith" issue were then dismissed by the Full Court. The first was that it is "unreasonable" to issue a notice requiring production "forthwith" and therefore such a notice must be invalid. The second was that a notice that specified compliance be done "forthwith" was invalid as it does not allow a recipient of a notice proper time to obtain legal advice.

26. The Court concluded that in the absence of any evidence as to why production forthwith was unreasonable, the complaint must fail. It did not address the question as to whether a proven unreasonable time for production would invalidate a notice. The primary judge did, however, address the question. In *Egglishaw v Australian Crime Commission (No 3)* (2009) 259 ALR 458 at 482 [89] his Honour said:

> The *ACC Act* gives the examiner the power to fix the time for production and this is not a case in which an Act is silent on the time within which a statutory obligation must be performed. In other words, this is a not a case in which the law must imply a requirement that the performance of a statutory obligation must take place within a reasonable time because, under the ACC Act, the examiner has the power to fix the time for performance. However, … that does not mean that the examiner's decision as to the time within which documents or things must be produced is unexaminable. I do not need to examine in detail the grounds upon which an examiner's decision as to the time for production may be successfully challenged because I am satisfied that "forthwith" was a reasonable time in the circumstances of this case, or at least that the applicant has not established that an examiner could not reasonably take the view that it was a reasonable time.

27. On the second issue, the Full Court decided that production that must be complied with forthwith did not necessarily preclude the opportunity for the recipient to obtain legal advice, and in fact, the appellant availed himself of that opportunity where his counsel was sitting with him. The Full Court did not examine the issue any further.

28. It should also be noted that the Full Court rejected a challenge that the ACC officers were abusing their power because they had no idea whether the DVDs were relevant to their investigation. Their Honours decided that even if the ACC officers did not know what was on the DVDs, the appellant, by accepting the statement of the officers that the DVDs were forensic images of his hard drive and then handing back the DVDs in response to the notice without leading any evidence that he did not know what was on his hard drive, effectively determined the question that the DVDs were relevant.

29. It can therefore be seen that the fact that the Notice issued to Ms Cunneen required production "forthwith" was not necessarily an integer fatal to its validity. To the extent that reasonableness is a relevant criterion (and, for the reasons given below, we consider it to be determinative), the ability of Ms Cunneen to promptly produce the mobile telephones indicated that the time allowed was reasonable. Also, if the question of opportunity to obtain legal advice was relevant, (which we consider part of the reasonableness inquiry), in accordance with the observations of the Full Court in *Egglishaw v ACC*, it is relevant that Ms Cunneen is a Senior Counsel who did not object to the Notice on the grounds that she needed more time for production because she wished to be given the opportunity to obtain legal advice.

30. Before leaving this question we pause to remark only that when one looks at the statutory history of notice to produce provisions, which did not seem to be brought to the attention of the Full Court or the primary judge, the question of whether "forthwith" production is permitted, or whether at least whether it is permitted only where the time given to produce is an objectively reasonable one, may not be as simple a question as the Full Court thought it. For instance, Part 3, Div 3 of the *Australian Securities and Investments Commission Act* 2001 (Cth) ("***ASIC Act***"), which contains provisions which give the right to ASIC officers to require the production of books, and are similar to sec 22 of the *ICAC Act*, must be read with sec 87 of the *ASIC Act* which specifically provides that the time for production must be reasonable in all the

circumstances, and forthwith production may be required if it is reasonable. The reasons in *Egglishaw v ACC* might tend to suggest that sec 87 is imposing a constraint that would not otherwise be there.

31. We are not so sure that would be a correct statement of the law, and given the factual findings in that case, it is difficult to identify what the Full Court's ultimate position was on that question. Other historical provisions, such as sec 12 of the *Companies Act* 1981 (Cth) and its State companion Acts, might suggest a course of legislative practice that indicate notions of a limit on the power to allow forthwith production. These provisions tended to juxtapose circumstances where forthwith production might be required with circumstances where the normal "time and place" provisions applied. That legislation seemed to neatly indicate that there was a distinction between "time and place" provisions and "forthwith" provisions. After all, production forthwith tends to suggest not only a contrast to an effluxion of time, but also a contrast to the recipient's future attendance at a "place" in order to give production, where production forthwith would tend to result from an officer's attendance on the recipient. Therefore, provisions like sec 87 of the *ICAC Act* might be alternatively seen as *granting* a power to order forthwith production, rather than constraining an already unlimited power.

32. We do not stay to consider the question any further given the intermediate appellate authority of *Egglishaw v ACC* on a relevantly identical provision to sec 22 of the *ICAC Act*, and where, had the Notice otherwise been lawful, Ms Cunneen was probably given a reasonable amount of time in the circumstances to produce the mobile telephones.

33. In our view, it might be sensibly thought that sec 87 of the *ASIC Act* is an express interpretative direction that would otherwise be implied in a provision like sec 22 of the *ICAC Act*. If a line was drawn between forthwith production and an allowance for the effluxion of time, arbitrary distinctions would need to be made between, for example, production forthwith and attendance at another place five minutes later to produce. Given the criminal penalty for non-

compliance with sec 22, the reasonableness, in all the circumstances, of the time allowed, and place specified, for production should be the determinative standard for whether a person has discharged their obligation to comply with a sec 22 notice.

34. There is also no need to further consider the question when the Notice was unlawful for a more fundamental reason.

Was a search warrant required?

35. Before proceeding we note that we have no information about what occurred on the evening of 31 July 2014 at the home of Ms Cunneen, other than the officers of the ICAC arrived with the notice and ultimately left with the iPhone and Nokia with Ms Cunneen asserting her privilege of self-incrimination. We do not know, for instance, whether and to what extent any consent was given to the ICAC officers to remain on the premises, what was said by the any of the persons present, and whether any objection was made about the Notice.

36. It is passing strange to us however that any person involved in the planning and execution of the Notice could reasonably have thought that it was lawful to, uninvited and without prior notice, attend the home of a recipient of a sec 22 notice and seek to immediately seize items from the home of the recipient under asserted compulsion of the notice.

37. The law on the general issue has been settled for far too long to permit any suggestion that such conduct would be lawful. As the High Court said in its unanimous judgment in *George v Rockett* (1990) 170 CLR 104 at 110-111:

> A search warrant … authorises an invasion of premises without the consent of person in lawful possession or occupation thereof. … The common law has long been jealous of the prima facie immunity from seizure of papers or possessions. Except in the case of a warrant issued for the purpose of searching a place for stolen goods, the common law refused to countenance the issue of search warrants at all and refused to permit a constable or government official to enter private property without the permission of the occupier. Historically, the justification for these limitations on the power of entry and search was based on the rights of private property. In modern times, the justification has shifted increasingly to the protection of privacy. (citations omitted)
>
> State and Commonwealth statutes have made many exceptions to the common law position … Nevertheless, in construing and applying such statutes, it needs to be kept in mind that they authorise the invasion of interests which the common law has

> always valued highly and which, through the writ of trespass, it went to great lengths to protect. Against that background, the enactment of conditions which must be fulfilled before a search warrant can lawfully be issued and executed is to be seen as a reflection of the legislature's concern to give a measure of protection to these interests. To insist on strict compliance with the statutory conditions governing the issue of search warrants is simply to give effect to the purpose of the legislation.

38. In *Coco v The Queen* (1994) 179 CLR 427, when dealing with the question of whether a particular provision of a Queensland statute authorised entry on to premises for the purposes of installing and maintaining listening devices in circumstances where that entry otherwise would have constituted an unlawful trespass, Mason CJ, Brennan, Gaudron, and McHugh JJ (with the agreement on this point of the rest of the Court) said at 435-436:

> Every unauthorized entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right. In accordance with that principle, a police officer who enters or remains on private property without the leave or licence of the person in possession or entitled to possession commits a trespass unless the entry or presence on the premises is authorized or excused by law. Statutory authority to engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language. Indeed, it has been said that the presumption is that, in the absence of express provision to the contrary, the legislature did not intend to authorize what would otherwise have been tortious conduct. But the presumption is rebuttable and will be displaced if there is a clear implication that authority to enter or remain upon private property was intended. Such an implication may be made, in some circumstances, if it is necessary to prevent the statutory provisions from becoming inoperative or meaningless. However, as Gaudron and McHugh JJ observed in *Plenty v Dillon*:
>
> > [I]nconvenience in carrying out an object authorised by legislation is not a ground for eroding fundamental common law rights.
>
> (citations omitted)

39. In a similar vein, see also *New South Wales v Corbett* (2007) 230 CLR 606 at 626 [81], 627-630 [87]-[98], 632 [104] per Callinan and Bell JJ (with whom Gleeson CJ and Gummow J generally agreed).

40. There is no doubt in our view that, whatever their intention, the effect of the actions of the ICAC officers was to impermissibly use the Notice as a surrogate or substitute for a search warrant.

41. Division 4 of Part 4 of the *ICAC Act* sets out a procedure by which search warrants may be issued so that officers of the ICAC may obtain things connected with matters being investigated under the *ICAC Act*. Any search

warrant issued confers, by sec 41, the authority to enter premises, search premises for documents or other things connected with any matter being investigated, and to seize such things.

42. When the *ICAC Act* grants that (extraordinary) ability for ICAC officers to avail themselves of the principal recognised statutory exception to the general law limitations on the power of entry and search of government officials it is difficult to envisage what might be the argument in support of the proposition that sec 22 also grants that power. Certainly, the presence of the search warrant power tells conclusively against it but even in the absence of the search warrant power, it is impossible to discern anything in sec 22 that gives authority to engage in what would otherwise be unlawful conduct. Were there any skerrick of doubt (which there is not), one need only compare sec 23 of the *ICAC Act* which grants a specific power to enter premises occupied or used by a public authority or public official in order to inspect documents or things and take copies of documents. It is inconceivable to think that sec 22, in view of history and the authorities, could, by its silence, authorise a more extensive invasion into private premises than sec 23 does expressly for public premises. In our view, sec 22 does not even confer authority to enter private premises in order to serve a notice that requires production at a later time and at a different place: cf *Plenty v Dillon* (1991) 171 CLR 635. The fact that, under colour of legal authority and threat of criminal sanctions, an ICAC officer enters private premises and requires the occupier to "produce" a thing forthwith, which the officer then removes from the premises, rather than the officer searching the premises and seizing the thing, does not, in our view, affect the answer to the question.

43. The detention of the mobile telephones pursuant to the Notice was unlawful.

Question 2

44. We are instructed to advise whether the execution of the warrant was in effect a sham and an attempt by the ICAC to retrospectively legitimise an unlawful seizure of the iPhone on 31 July. We are also instructed to consider the peculiar

nature of the execution of the Warrant in that the iPhone "…was brought onto the premises by the very persons executing the Warrant, who then purported to seize it under the powers granted to them by the Warrant". We are instructed that the fact that the Warrant issued when it was known that the iPhone was still in the possession of ICAC raises questions about its validity.

45. We have earlier opined that we thought it peculiar that any person at the ICAC involved in the seizure by the Notice could have reasonably thought that the process undertaken was lawful. We do not, however, know anything about the actual state of mind of any relevant officers of the ICAC both at that time or at the time of the application for the Warrant or its execution. It may or may not be that between the first seizure and the application for the Warrant that somebody at the ICAC recognised that seizure pursuant to the Notice was unlawful. That state of mind or knowledge of that fact may be relevant to what was disclosed to the magistrate in the application for the Warrant. In the reverse situation, namely warrant first and notice later, the facts in *Egglishaw v ACC* show the not terribly unusual nor necessarily objectionable situation whereby officials seek to lawfully seize what they know, suspect, or fear may have been earlier seized unlawfully.

46. It should be noted that there are other reasons why a government official may wish to seize something pursuant to a search warrant even if she or he believes an earlier seizure by other means was lawful. One significant example is that, under the *ICAC Act*, seizure pursuant to a search warrant would displace the privilege against self-incrimination: see e.g. *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385 at 393-393; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 517-518, 556. As we have earlier said, when a person produces pursuant to a sec 22 notice, the privilege against self-incrimination is expressly preserved by sub-s 26(2) of the *ICAC Act*.

47. We proceed on the instructed assumption that the officers of the ICAC were attempting to retrospectively legitimise earlier unlawful conduct.

48. A search warrant under the *ICAC Act* does not retrospectively authorise an earlier unlawful seizure. For the reasons earlier given, search warrants are prospective – they authorise the future invasion of rights and interests heavily protected by the common law. We are not aware of any Commonwealth or State legislation that purports to allow search warrants to operate retrospectively. There are examples of search warrants where the person granted authority under the search warrant does not need to disclose that fact to the occupier of the premises and may covertly exercise their authority,[1] but the authority is nonetheless granted prospectively. In any event, the *ICAC Act* does not purport in any way to grant any retrospectively operating search warrants, indeed sec 42 of the *ICAC Act* includes a requirement to show the warrant to the occupier if requested to do so, eliminating even the possibility for prospective covert warrants.

49. The Warrant did not retrospectively authorise the unlawful seizure pursuant to the Notice.

50. There remains however an important question as to whether the continued detention of the iPhone was made lawful by the execution of the Warrant. That question is answered by examining the operation of the authority conferred by statute, and in the process of construing any statute, paying due attention to the legitimate use of the principle of legality in the manner described by the High Court.

51. The power to issue and execute search warrants for a purpose connected with an ICAC investigation, and the authority conferred by any warrant, is determined by Div 4 of Part 4 of the *ICAC Act*. By sub-s 48(1) of the *ICAC Act*, Div 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act*

[1] Such search warrants have various names e.g. "covert search warrants" (*Law Enforcement (Powers and Responsibilities Act 2002* (NSW), Part 5, Div 2) or "delayed notification search warrants" (*Crimes Act* 1914 (Cth), Part IAAA). Such delayed notification search warrants as introduced by, for instance, the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act* 2014 (Cth) have been criticised as providing for "retrospective search warrants", but such criticism, however well-intentioned, is usually uninformed as the authority is not retrospective – notification occurs after the fact, but authority is conferred prospectively. Also, sometimes, legislation will give search and seizure powers in emergency situations in the absence of a warrant – e.g. sec 3UEA of the *Crimes Act* 1914 (Cth) in relation to terrorism offences.

2002 (NSW) ("***LEPR Act***"), other than secs 69 to 73A, applies to a search warrant issued under the *ICAC Act*. There being no relevant provision of the Commonwealth or New South Wales Constitutions bearing on the issue, the validity and operation of the Warrant is to be determined by the identified statutory provisions.

52. Sub-section 40(4) of the *ICAC Act* provides:

> An officer of the Commission may apply to an authorised officer 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.

53. In this case there is no question that Mr Paul Grainger, the officer of the ICAC who made the application for the Warrant gave a detailed account of the reasons why the iPhone was connected with a matter being investigated under the *ICAC Act*[2]. The iPhone was the only item sought in the application. We are of the view that, in accordance with sub-s 62(3) of the *LEPR Act*, the magistrate was right to be satisfied of the connection between the iPhone and the investigation[3], even as the *ICAC Act* creates the higher standard of belief rather than suspicion.

54. Further, Mr Grainger satisfied sub-s 62(1) of the *LEPR Act*, by including the information therein required, and did so pursuant to the form required by the *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW).

55. Section 63 of the *LEPR Act* makes it an offence for a person applying for a search warrant to knowingly give to an eligible issuing officer information that is false or misleading in a material particular. Section 76 of the *LEPR Act* provides that "*[a] warrant is not invalidated by any defect, other than a defect that affects the substance of the warrant in a material particular*".

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[2] Again, because of the insertion of Part 13 of Sch 4 to the *ICAC Act*, the conduct is taken to have occurred in pursuit of an investigation within power.

[3] As a matter of statutory interpretation, the references to connection with an "offence" in the *LEPR Act* must be read as referring to an investigation for the purposes of the *ICAC Act*.

56. In the application for the Warrant, Mr Grainger disclosed to the magistrate that the ICAC had required Ms Cunneen to produce the iPhone on 31 June 2014. He proceeded to set out text messages that the ICAC had retrieved from the iPhone. He accurately narrated that Ms Cunneen had objected to production on the basis of her privilege against self-incrimination. He also explained that the ICAC officers intended, on the following day, to attend the premises with the iPhone and seize the iPhone by virtue of the Warrant for which Mr Grainger was applying.

57. Therefore, sub-s 40(4) of the *ICAC Act* was satisfied in that Mr Grainger explained why the iPhone would be at the home of Ms Cunneen within the next 72 hours *viz* he would take it there with other ICAC investigators. We see no principle of interpretation that would limit the operation of that timeframe by reference to the occupier or some third party bringing the iPhone on to the premises.

58. The magistrate was under no misapprehension that the ICAC had been in possession of the iPhone since its seizure and that it was to be the ICAC that would return the iPhone to the identified premises for seizure in accordance with the Warrant. We also do not think that the iPhone had to be physically handed to Ms Cunneen and then "re-seized" in order for the execution of the Warrant to be valid. The circumstances are definitely odd, but the iPhone was returned to the premises, and it is the unlawful entry onto, search of, and seizure from private premises that the common law right is concerned with, and which statutory search warrants intrude upon.

59. There was however some information that Mr Grainger did not include in the application for the Warrant. First, he makes no reference to the fact that the ICAC also seized the Nokia on 31 July 2014. We do not consider that material in the circumstances.

60. Secondly, while he says that production of the iPhone occurred pursuant to a notice under s 22 of the *ICAC Act*, Mr Grainger makes no reference to the fact that the iPhone was produced in the circumstances of ICAC officers attending

the home of Ms Cunneen and requiring production from her forthwith. The significance of this omission is that Magistrate Lister was left in the position whereby he had no reason to doubt the validity of the production pursuant to the Notice. He was left in the dark about facts that may have put him on inquiry about the lawfulness of the earlier seizure.

61. Mr Grainger implied in his application that the reason for the Warrant was to overcome Ms Cunneen's reliance on the privilege against self-incrimination. There is nothing inappropriate in that in and of itself, as we have already indicated.

62. Thirdly, in the application for the Warrant, Mr Grainger included text messages that had been retrieved from the iPhone. Those messages were used as part of the suite of material to convince the magistrate of the proper statutory basis for the Warrant. Therefore, following on from the second point, the magistrate was not told, and had no way of knowing, that those messages were unlawfully obtained from the iPhone as a result of a trespass.

63. To put the worst possible complexion on the facts would be to suggest that the ICAC officers knew that the seizure pursuant to the Notice had been unlawful and omitted those facts from the Magistrate. We stress that we do not know that was the case. It may be that everything is as it appeared in the application for the Warrant, and the reason for the application was to overcome the privilege. We do not have any material that would disprove that version, other than we would have thought that, at least with the benefit of reflection over time, officers of the ICAC would have realised that there were serious doubts about the seizure pursuant to the Notice.

64. The questions then are whether the statutory criteria for the issuing of the warrant were satisfied, and what, if any, impact there would be on the first question if the information, material or not, was omitted by design rather than error.

65. There is no general duty of disclosure when applying for a search warrant: *Lego Australia Pty Ltd v Paraggio* (1994) 52 FCR 542 at 555; *Majzoub v*

Kepreotis [2009] NSWSC 1498 at [68]-[69], [73]. The question is whether the information provided was sufficient to satisfy sub-s 40(2) of the *ICAC Act* and sub-s 62(1) of the *LEPR Act*. The manner of achieving strict compliance in the sense described in *George v Rockett* is achieved if the Mr Grainger stated reasonable grounds for believing in the connection between the Operation Hale and material that would be on the premises so that the magistrate could know the specific object of the search warrant and limit its scope: *Corbett v NSW* at 632 [105]. Notwithstanding speculation about the motives of Mr Grainger, the application for the Warrant complied in all respects with those statutory criteria. In our view, on the material presented to him, the magistrate was, with respect, right to issue the Warrant.

66. What then of the missing information? The judicial review authorities, both under the *ADJR Act* at a federal level or where relief in the nature of the prerogative writs is sought, including in relation to warrants issued under the *LEPR Act*, have maintained that search warrants cannot be quashed on the basis of even material misrepresentations (which include half-truths), when those misrepresentations were unintentional: see *Lego* at 555; *Majzoub v Kepreotis* at [69], [73]; *Seven West Media v Commissioner, Australian Federal Police* (2014) 223 FCR 234 at 257-258 [108]-[110]. As the last cited case suggests by analogy, that appears to conform with secs 63 and 76 of the *LEPR Act* – namely, that the misrepresentation needs to be both fraudulent and material.

67. Perhaps a construction of the *LEPR Act* is open that a fraudulent misrepresentation that was not material would enliven a jurisdiction to quash a search warrant. Based on the authorities, and the presence of sec 76 of the *LEPR Act*, we do not think it is.. Whatever be the position, there is no proof of fraud before us and the onus would be on Ms Cunneen to establish fraud in any application for judicial review. That would be a difficult task.

68. Further, and in any event, we do not think on balance that the missing information was material in that it should have had some influence or effect on the administrative decision made by the magistrate. The missing information

were not facts that changed a proper assessment of the connection between the iPhone and Operation Hale. Put another way, the missing facts were not exculpatory and nor would they have detracted from the ICAC's claimed need for the Warrant. In fact, if anything, the magistrate would have known that the ICAC officers were in a similar position to the ACC officers in *Egglishaw v ACC* in that they entertained doubts about the validity of the earlier seizure, or even knew about its invalidity, and wanted to legitimise the seizure of the iPhone for use in their investigation. Put at its worst, it would have been an attempt to deliberately hide from the magistrate that the ICAC officers had engaged in unlawful conduct and that some of the material placed before him was obtained by that unlawful conduct. As unsavoury as that would be, it would not have been a misrepresentation of the truth of the material factual particulars that formed the basis for the grant of the Warrant. The grant of the Warrant would not have been induced by any material misrepresentation. The statutory criterion would still have been made out. Further, overcoming the privilege against self-incrimination would have been a legitimate ground for which to seek the Warrant even if the earlier seizure pursuant to the Notice had been lawful.

69. What we have concluded is our opinion, on balance, about whether sufficient grounds would exist to quash the Warrant. It is obviously an unusual factual scenario with no ready analogue in the authorities, and there is much we do not know, including Ms Cunneen's version of events about what occurred on either date. Essentially, our reasoning is that a proper basis existed under the legislation for the grant of the Warrant, and nothing that was withheld from the magistrate should have materially affected that fact. Our opinion does not represent a view about the conduct of the ICAC officers. Put neutrally, in a context of an otherwise detailed application for the Warrant, the recitation concerning the seizure of the iPhone purportedly pursuant to the Notice seems to be conveniently selective and terse. We say nothing about the propriety of the actions of the officers of the ICAC, particularly in regard to the missing information. That is a matter properly for the Inspector.

Question 3

70. In answering the question of whether any evidence obtained from the iPhone could be used against Ms Cunneen in proceedings against her, we proceed on the basis that our answer to question 2 is incorrect, and that both seizures were unlawful.

71. There is no general exclusionary rule in Australian law that relevant evidence must be excluded because it was obtained illegally. In the United States, the Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures and requires any warrant to be judicially sanctioned and supported by probable cause. It was partly a response to the English law pertaining at its adoption, namely the still extant common law concept of a general warrant. The Fourth Amendment is partly protected and enforced through the fairly rigid application of an exclusionary rule, adopted in 1914 in *Weeks v United States* 232 US 383 (1914), which provided that evidence obtained through a violation of the Fourth Amendment is generally not admissible by the prosecution against the defendant during a criminal trial. Subsequently, the Supreme Court of the United States ruled that derivative information, such as leads or other evidence resulting from illegally obtained evidence, was also inadmissible: *Silverthorne Lumber Co v United States* 251 US 385 (1920). This secondary evidence was described as the "fruit of the poisonous tree": *Nardone v United States* 251 US 385 (1920). The exclusionary rule reached its apogee in *Mapp v Ohio* 367 US 643 (1961) when the Supreme Court determined that the Fourth Amendment, including the exclusionary rule which supports it, was applicable to State proceedings.

72. We entertain this diversion to make a few salient points, and in light of the fact that we have been asked to consider the asserted conclusion reached by the legal advisers to Ms Cunneen that if the Warrant was unlawful then any evidence obtained pursuant to it *must* be inadmissible.

73. First, there is no such constitutional provision and rule supporting it in Australia. In this country, the issue of whether evidence is admissible depends

on any applicable statutory provisions or common law rules. Secondly, even the United States experience shows that the rule in that country is not universal and is riddled with exceptions, including both as to the proceedings in which it will apply and carve outs from the rule in proceedings where it does apply. For instance, the "independent source" and "inevitable discovery" doctrines allow evidence to be admitted where it proven, respectively, that the evidence was subsequently found based on information independent of the illegal search (where, for example, a second warrant is sought based on information available prior to the execution of an invalid first search warrant or from sources not derived from or connected to the first search) or when the authorities can demonstrate that it would have been the inevitable discovery of a legitimate investigation. In the present case, for an interesting comparison, the iPhone was always sought by the ICAC, based on information they had been given by the ACC and from other sources. The ICAC was attempting to seize, pursuant to the Warrant, the very thing that they had sought on their first attempt.

74. Thirdly, misguided notions about the admissibility of illegally obtained evidence in Australia can often result from a misreading of the authorities. A singular example is *Coco v The Queen.* The evidence in that case was inadmissible against Mr Coco not simply because it was illegally obtained, but because sub-s 46(1) of the *Invasion of Privacy Act 1971* (Q), the statute under consideration by the Court, rendered inadmissible in any civil or criminal proceedings evidence of a private conversation which came to the knowledge of a person as a result of the use of a listening device in contravention of the provision that the Court determined did not grant the authority claimed by the authorities. There is nothing in the *ICAC* Act, the *LEPR Act* or any other applicable statute which rules any evidence obtained from the iPhone through an illegal seizure automatically inadmissible.

75. The position in Australia is that, in civil or criminal proceedings in a court where the rules of evidence apply, evidence of relevant facts or things ascertained or procured by means of unlawful or unfair acts is not, for that

reason alone, inadmissible, whether the unlawfulness derives from common law or statute: *R v Ireland* (1970) 126 CLR 321 at 334-335; *Bunning v Cross* (1978) 141 CLR 54 at 72. If the proceedings take place in a context where the Uniform Evidence Law applies, and in respect of Ms Cunneen they would likely take place in a court of New South Wales, then sec 138 of the *Evidence Act 1995* (NSW) would govern the issue.

76. The question of whether evidence could be used is therefore a matter of discretion for the judge, ascertained either by reference to the criteria outlined in sec 138 where it applies or by reference to the matters identified as relevant in *Bunning v Cross*, a significant difference between the two being whether the starting position is that the relevant evidence is excluded (sec 138) or included (common law). That question of onus aside, it has been held from soon after the passage of the *Evidence Act* that the principles identified in *Bunning v Cross* are a useful articulation of the principal public interests which must be balanced pursuant to sec 138: e.g. *R v Rooke* (unreported, NSW CCA, Newman, Levine, and Barr JJ, 2 September 1997).

77. In our first Opinion we described our instructions that the DPP in NSW will not be pursuing criminal charges against Ms Cunneen. Therefore, there is no utility in going through the numerous matters that would need to be considered by a trial judge, especially in a context where we are not apprised of the particular charge and the manner in which the evidence would be sought to be deployed. We do note however that the reliability or cogency of the evidence was not affected by the nature of the illegality (in contrast to an involuntary confession), that the information on the iPhone would be highly probative, and it cannot be said that the nature of the impropriety of the ICAC officers was particularly grave (in the absence of proof of fraud in the application for the Warrant). Prima facie, there is a strong prospect that the evidence would be admitted in a criminal proceeding. As the learned author of the ninth Australian edition of *Cross on Evidence* (LexisNexis Butterworths, 2013) says at [27295] "*[t]he authorities on the admissibility of evidence procured in*

consequence of an illegal search or other unlawful act are uniformly in favour of its reception".

78. On the briefed assumption that the most likely vehicle for the proposed deployment of the evidence from the iPhone is disciplinary proceedings against Ms Cunneen, specifically proceedings for professional misconduct, then the position is that it is even more likely that the evidence would be admitted. In New South Wales, the rules of evidence have not applied to professional misconduct proceedings against a legal practitioner in the then Administrative Decisions Tribunal, now NCAT, since 2013. Item 21 of clause 2.88 of Sch 2 to the *Civil and Administrative Legislation (Repeal and Amendment) Act 2013* (NSW) repealed sec 558 of the *Legal Profession Act 2004* (NSW) which had provided that the rules of evidence applied in such proceedings. Under the new regime, sec 301 of the *Legal Profession Uniform Law (NSW)* provides that proceedings initiated under the relevant Chapter of the Law are to be dealt with in accordance with the procedures of the designated tribunal, and while the tribunal will be bound by procedural fairness, in matters pertaining to professional misconduct the rules of evidence only apply if the jurisdictional legislation of the designated tribunal provides that they do.

79. In NSW, the Occupational Division of NCAT determines matters concerning claims of professional misconduct against legal practitioners. Subject to some presently irrelevant exceptions, sub-s 38(2) of the *Civil and Administrative Tribunal Act 2013* (NSW) ("***CAT Act***") provides that NCAT is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice. Further, para 38(6)(a) provides that NCAT is to ensure that all relevant material is disclosed to it so as to determine all of the relevant facts in issue in any proceedings. Sub-section 38(4) provides that NCAT is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.

80. Pursuant to sub-s 36(1) of the *CAT Act* the guiding principle to be applied to practice and procedure "*…is to facilitate the just, quick and cheap resolution of the real issues in the proceedings*".

81. The legal principles governing the admissibility of evidence in circumstances where a tribunal is not bound by the rules of evidence demonstrate that the tribunal may have regard to evidence which is logically probative regardless of whether or not it is legally admissible: see e.g. *The King v War Pensions Entitlements Appeals Tribunal ex parte Bott* (1933) 50 CLR 228; *Casey v Repatriation Commission* (1995) 60 FCR 510 at 514 (FCAFC); *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666 at 688-689 per Deane J. Rules of evidence remain a useful guide to assessing the weight and probity of a particular piece of evidence, but the ultimate question is one of fairness, and whether, within the informal context of the tribunal, a person is given a proper opportunity to test the evidence. Where legislation has sought to extend the range of material available to a tribunal, it is not for the tribunal to defeat that legislative choice by leaving room for an exclusionary discretion: *Cross on Evidence* at [11120].

82. Further, a powerful consideration in whether to admit evidence in professional misconduct proceedings will be an appreciation of the protective jurisdiction that NCAT would be exercising. Although such proceedings have the prospect of occasioning substantial detriment to Ms Cunneen, the object would not be to punish her, but to maintain proper standards for legal practitioners and protect the public: *New South Wales Bar Association v Evatt* (1968) 117 CLR 177 at 183-184; *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 286, 289; *NSW Bar Association v Meakes* [2006] NSWCA 340 at [114].

83. The evidence from the iPhone would no doubt be of significant probative value in any disciplinary proceedings and would be of substantial importance to determining the "substantial merits" of the facts in proceedings which are protective in nature, and not adversarial in the traditional sense. So long as Ms

Cunneen had the proper opportunity to test the cogency of the evidence, and given the source of the evidence, it is difficult to see why that should take any significant time or have much utility, then it is difficult to envisage a scenario in NCAT where the information from the iPhone would not have a very strong likelihood of being admitted into evidence.

84. The position is even stronger in respect of the ICAC using evidence from the iPhone in its own investigation and in proceedings before it. Sub-section 17(1) of the *ICAC Act* provides that the ICAC "*…is not bound by rules or practice of evidence and can inform itself on any matter in such manner as it considers appropriate.*" Further, it is crucial to note three observations contained in the Report of the Independent Panel which reviewed the jurisdiction of the ICAC. First, the ICAC is an arm of the Executive created to investigate certain kinds of conduct.[4] Secondly, what occurs at a public inquiry is in no respect a judicial process, either adversarial or inquisitorial.[5] Thirdly, although they may have far reaching practical consequences, including the obvious potential for significant reputational damage and other types of harm, conclusions about corrupt conduct from a report delivered by the ICAC do not affect legal rights and obligations.[6]

85. There would have been no relevant restriction on the ICAC using the evidence from the iPhone for the purposes of its own investigation.

86. Finally, we briefly mention that, in the absence of existing or pending proceedings against Ms Cunneen, if she were to obtain a declaration in the Supreme Court of New South Wales that the seizure pursuant to the Warrant was unlawful, there is a jurisdiction for the court to exercise, including in the nature of prerogative relief, for any material seized from the iPhone to be returned to her: see e.g. *Ozzie Discount Software (Aust) Pty Ltd v Muling* (1996) 86 A Crim R 387. Being outside the remit of our brief, we do not

[4] 9.5.3
[5] 3.3.7(c)
[6] 3.1.6, 3.2.2

canvass the prospects of any such relief being successful including as against the use by the ICAC, and the consequences if it were.

22 October 2015

Tom Blackburn SC

Peter Kulevski