JOINT STANDING COMMITTEE ON THE CORRUPTION AND CRIME COMMISSION

PARLIAMENTARY INSPECTOR'S REPORT CONCERNING TELECOMMUNICATION INTERCEPTIONS AND LEGAL PROFESSIONAL PRIVILEGE

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Joint Standing Committee on the Corruption and Crime Commission

Parliamentary Inspector's Report Concerning Telecommunication Interceptions and Legal Professional Privilege

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Report No. 21

Presented by:
Hon Nick Goiran, MLC and John Hyde, MLA
Laid on the Table of the Legislative Council and Legislative Assembly
on 24 November 2011

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COMMITTEE'S FUNCTIONS AND POWERS

On 25 November 2008 the Legislative Council concurred with a resolution of the Legislative Assembly to establish the Joint Standing Committee on the Corruption and Crime Commission.

The Joint Standing Committee's functions and powers are defined in the Legislative Assembly's Standing Orders 289-293 and other Assembly Standing Orders relating to standing and select committees, as far as they can be applied. Certain standing orders of the Legislative Council also apply.

It is the function of the Joint Standing Committee to -

(a) monitor and report to Parliament on the exercise of the functions of the Corruption and Crime Commission and the Parliamentary Inspector of the Corruption and Crime Commission;

(b) inquire into, and report to Parliament on the means by which corruption prevention practices may be enhanced within the public sector; and

(c) carry out any other functions conferred on the Committee under the *Corruption and Crime Commission Act 2003*.

The Committee consists of four members, two from the Legislative Assembly and two from the Legislative Council.

CHAIRMAN'S FOREWORD

In accordance with the convention established following the tabling of this Committee's second report to Parliament, on Thursday 6 August 2011 the Parliamentary Inspector of the Corruption and Crime Commission, the Honourable Chris Steytler QC, tabled a report with the Committee entitled *Telecommunication Interceptions and Legal Professional Privilege*.

The report arose out of an inquiry commenced by the Parliamentary Inspector in March 2010. On 4 March 2010 an article published in *The West Australian* newspaper referred to evidence given in the Perth Magistrates Court by a CCC investigator in criminal proceedings against Mr Brian Burke. The article reported that the CCC investigator had given evidence that the CCC had intercepted and listened to telephone conversations between Mr Burke and his lawyer, Mr Grant Donaldson. After reading the article, the Parliamentary Inspector obtained a copy of the transcript of evidence of the proceedings, and confirmed that the article was broadly accurate.

This gave the Parliamentary Inspector cause for concern about the procedures adopted by the CCC in dealing with intercepted telephone conversations that are the subject of legal professional privilege, and he duly launched his inquiry.[1]

Legal professional privilege (LPP) protects two kinds of confidential communications between a client and her or his lawyer: where the communications are confidential and made for the purposes of seeking or being provided with legal advice, and where the communications are made for the purpose of existing or reasonably contemplated judicial or quasi-judicial proceedings.[2] As the Parliamentary Inspector states in his report, "LPP has been described as 'a fundamental and general principle of the common law,' and it exists to protect 'a very important entitlement in our society by which anyone may seek, and obtain, legal counsel in the confidence that communications with a lawyer, and documents produced for or in consequence of such communications, will not· normally be disclosed without the affected client's consent.'"[3]

Notwithstanding the importance of LPP, the *Telecommunications (Interception and Access) Act 1979* (Cth) allows Commission officers executing a warrant to make a record of, communicate to another person and make use of any lawfully intercepted information for a permitted purpose, including the investigation of misconduct. This power extends to conversations that may attract LPP. As such, the CCC state that:

> *A permitted purpose includes an investigation of misconduct under our Act. Thus, if we intercept material that might be protected by legal professional privilege, that material can be listened to, recorded, transcribed and communicated to an officer of the Commission*

[1] The Parliamentary Inspector also received a complaint from Mr Donaldson subsequent to initiating his inquiry.

[2] Desiatnik, R. J. (1999). *Legal professional privilege in Australia*. Sydney: Prospect Media pp 19-20

[3] Page 25 of this report.

> *(including an investigator). However, we may not be able to use it in evidence during court proceedings.*[4]

In his report, however, the Parliamentary Inspector contends that while the use of such information may be lawful, the CCC has not in the past properly considered the appropriateness of using privileged material in its investigations:

> *This shows a serious misconception by the Commission of its responsibilities concerning privileged material. That interception of information subject to LPP is lawful, and that its communication to someone other than an authorised recipient is lawful if made for a permitted purpose, does not answer the question whether the use is appropriate in the circumstances.*[5]

Accordingly, in his report the Parliamentary Inspector essentially recommends that the CCC take a more measured approach to dealing with material that may be covered by LPP than has up until now been the case.

Though it is no doubt well understood by a number of the citizens of Western Australia, it bears mentioning that not every conversation between a lawyer and her or his client will necessarily attract LPP. As such, this is an extremely complex issue: put simply, it is impossible for the CCC to determine whether or not intercepted material would be covered by LPP without a CCC officer first having listened to it in order to make this determination. This fact is perhaps best encapsulated by Mr Peter Hastings QC in the Memorandum of Advice he prepared for the CCC on 9 August 2011 at the CCC's request:

> *It should not be overlooked that is not always clear that legal professional privilege is applicable, even though communications may be between a person and his or her lawyer. As the Federal Court pointed out in* Carmody v MacKellar*, one of the reasons for concluding that telephone interception warrants were not limited by legal professional privilege was that it will often be impossible to ascertain· with any degree of assurance whether a particular conversation is or is not privileged while it is taking place, because even a conversation which bears the appearance of a privileged communication may not be privileged. If the lawyer is engaged in a criminal enterprise, the communication may not be privileged because it is made in furtherance of an illegal purpose.*
>
> *The same position may exist while a matter is still being investigated, and it may not be until the investigation is complete that it becomes clear whether the communication was privileged. That is a further reason why it seems to me that there is no restriction upon using information in an investigation by providing summaries of intercepted telecommunications to Counsel Assisting. Whether the information can then be used in the examination will depend whether it can be demonstrated that the communication was in furtherance of a crime of fraud or dishonesty.*[6]

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[4] Page 15 of this report.

[5] Page 36 of this report.

[6] Page 69 of this report.

In this respect, the CCC's investigation into the City of Stirling is instructive: as a derivative to that investigation, an intercepted conversation between a lawyer and his client saw criminal charges being laid against the lawyer.

Importantly, the Parliamentary Inspector found that there was no misconduct by any officer of the CCC as a result of his inquiry into this issue. Rather, he identified ways that the CCC might enhance its future handling of intercepted material that may be the subject of LPP. The Committee notes that the CCC have already taken steps to improve its processes in this regard, and regards this as an excellent outcome of the Parliamentary Inspector's inquiry.

The Committee understands the frustration expressed by the Parliamentary Inspector with respect to the delays he experienced in receiving responses from the CCC during the inquiry process. In many respects, these delays were an unfortunate consequence of there being no full-time CCC Commissioner through the large part of 2011. Although the Committee is pleased that a full-time Commissioner will soon be appointed and has every expectation that the delays experience by the Parliamentary Inspector in this inquiry will not recur, the Committee re-iterates its support of the recommendation of Ms Gail Archer SC that the *Corruption and Crime Commission Act 2003* be amended to allow for the appointment of deputy and/or assistant commissioners, to whom specific functions may be delegated by the Commissioner, and who are able to act as the Commissioner in the Commissioner's absence.[7]

I would like to take this opportunity to thank the Parliamentary Inspector and the Assistant to the Parliamentary Inspector, Mr Murray Alder, for their work in bringing this matter to the attention of the Committee.

HON NICK GOIRAN, MLC
CHAIRMAN

[7] The Committee supported this recommendation in its thirteenth report, entitled *Analysis of Recommended Reforms to the Corruption and Crime Commission Act 2003*; support for this recommendation can be found on page 9 of that report.

RECOMMENDATION

Recommendation 1

The *Corruption and Crime Commission Act 2003* should be amended to allow for the appointment of deputy and/or assistant commissioners, to whom specific functions may be delegated by the Commissioner, and who are able to act as the Commissioner in the Commissioner's absence.

MINISTERIAL RESPONSE

In accordance with Standing Order 277(1) of the Standing Orders of the Legislative Assembly, the Committee directs that the Attorney General report to the Assembly as to the action, if any, proposed to be taken by the Government with respect to the recommendation of the Committee.

CHAPTER 1 ADVICE TO PARLIAMENT

The Parliamentary Inspector's recommendations

In his report to the Committee, the Parliamentary Inspector makes a series of recommendations aimed at enhancing the manner in which the CCC deals with material that may be subject to LPP. As these recommendations are explicitly for the CCC, the Committee has chosen not to reproduce them as recommendations for reform to the *Corruption and Crime Commission Act 2003*.

The Parliamentary Inspector's recommendations can be found on pages 41-43 of this report.

The current practices of the CCC

After the issue of LPP was raised by the Parliamentary Inspector, the CCC amended its procedures so that when an intercepted call is identified as being between lawyer and client, the call is immediately locked down and the Director of Operations is notified. An assessment and determination is then made by the Director (sometimes in consultation with Commission lawyers), as to whether LPP is applicable and whether the information is of value to the investigation. In the event that the information is of operational or strategic value but still subject to LPP, then it can still be released for that purpose.[1]

The CCC asserts that this process offers adequate protection and that it is enough that their use of the information is lawful. The Parliamentary Inspector disagrees with this assertion: according to the Parliamentary Inspector, not only should the assessment be made by a senior Commission lawyer, but a conscious assessment that the communication of the intercepted material is for a permitted purpose needs to be made.[2] In response, the Commission has agreed to adjust its procedures so that a lawyer from the CCC's legal services directorate will provide the initial advice as to whether the material attracts LPP.[3]

The Parliamentary Inspector argues that "appropriateness" is a practical requirement of any legislation, especially given that section 144 of the *Corruption and Crime Commission Act 2003*, specifically establishes that LPP overrides the exceptional powers of the Commission with respect to persons who are not public servants. The Commission argues that if communication of the material is permitted under the CCC Act then it is also appropriate. Under the provisions of the *Telecommunications Interception and Access Western Australia Act 1996*, the test is whether the information may assist in connection with an investigation, and that it be communicated for a purpose connected with the investigation. This includes the gathering and dissemination of supporting and supplementary information, as well as evidential material. Case law may abrogate

[1] Page 37 of this report.

[2] Page 30 of this report.

[3] Page 94 of this report.

legal professional privilege under the TIA Act and anticipates that protection is only afforded under the rules of evidence.[4] This means that the CCC can gather and use any information internally (for a permitted purpose) that may normally be subject to LPP. If LPP does apply, however, this information cannot be used in any legal proceedings.

The CCC assert that information deemed to be subject to LPP but still of investigative value can legitimately be provided to the counsel assisting the CCC. In response to this assertion, the Parliamentary Inspector states that

> *the Commission should still evaluate the worth of that information against the important public policy underpinning LPP, taking into account the importance accorded by the* CCC Act *to the protection of other forms of information subject to LPP. That is to say, the Commission is still able to make a discretionary judgment, even when the communication would be for a permitted purpose…*[5]

Since the commencement of this inquiry, the Parliamentary Inspector and the CCC have reached some consensus on a number of issues. As the Parliamentary Inspector states:

> *…the Commission's current practices largely accord with those recommended, subject to some differences which I have incorporated into my final recommendations.*[6]

The Parliamentary Inspector would like to see that all intercepted material be consciously assessed to ensure that any communication of this material is for a "permitted purpose". If the communication is lawful in this respect, he argues that a further assessment should be made as to whether or not it is appropriate.

The format of this report

After resolving to table this report, the Committee repeated its usual practise of preparing this report in a consistent style throughout. Sections attributed to the Parliamentary Inspector, the CCC, the WA Bar Association, the Law Society of WA and the Criminal Lawyer's Association of Western Australia are delineated by their respective page headers.

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4 Federal Court of Australia *Cannady v Mackellar* (1997) 76 FCR 115

5 Parliamentary Inspector of the Corruption and Crime Commission, 6 October 2011. *Telecommunications and Legal Professional Privilege* p 19.

6 *Op. cit*., p 26.

CHAPTER 2 CHRONOLOGY LEADING TO THIS REPORT

Chronology leading to this report

Receipt of the Parliamentary Inspector's report

The Parliamentary Inspector tabled his report with the Committee on 6 October 2011. To this report, he annexed a number of letters from the CCC pertaining to his report, along with submissions from the WA Bar Association, the Law Society of WA and the Criminal Lawyer's Association of Western Australia pertaining to LPP.

Closed hearing with the Parliamentary Inspector

The Committee convened a closed hearing with the Parliamentary Inspector and his Assistant on 19 October 2011 in order to discuss the report. At the conclusion of this hearing, the Committee resolved to prepare and table this report. The transcript of this hearing appears as Appendix XX to this report.

The Committee seeks feedback

At a meeting on 2 November 2011, the Committee considered and resolved a draft version of this report, to which the Parliamentary Inspector's report (including its schedules) were annexed. This draft Committee report was then provided to both the CCC and the Parliamentary Inspector, for final comment prior to tabling.

Hon Nick Goiran, MLC
CHAIRMAN

APPENDIX ONE

REPORT OF THE PARLIAMENTARY INSPECTOR OF THE CORRUPTION AND CRIME COMMISSION

TELECOMMUNICATION INTERCEPTIONS AND LEGAL PROFESSIONAL PRIVILEGE

S 201 of the *Corruption and Crime Commission Act 2003 (WA)*

6 October 2011

CHAPTER 1 PURPOSE OF THIS REPORT

The purpose of this report is to inform the Parliament of my assessment concerning:

(a) the procedures used by the Commission when dealing with telecommunication interception information ('TI information'), obtained under a warrant issued pursuant to the *Telecommunications (Interception and Access) Act 1979 (Com)* ('*TI Act*'), in circumstances in which that TI information might be protected by legal professional privilege ('LPP');

(b) whether there has been any misconduct by the Commission, or any of its officers, in the course of implementing those procedures, and

(c) the procedures used generally by the Commission when dealing with information which may be protected by LPP.

The assessment is made in the exercise of my jurisdiction under sections 195(1)(b) and (c) and s 197(1) of the *Corruption and Crime Commission Act 2003 WA* ('*CCC Act*').

CHAPTER 2 EXECUTIVE SUMMARY

In September 2006, the Commission obtained a warrant under the *TI Act* ('TI warrant') authorising it to intercept calls made to and from telephones used by Mr Brian Burke. The warrant was obtained for the purposes of an investigation into possible misconduct by members of the Busselton Shire Council (Smiths Beach investigation).

Between 2 November 2006 and 15 May 2007, acting pursuant to the TI warrant, Commission monitors intercepted 10 telephone calls between Mr Burke and his counsel, Mr Grant Donaldson SC. At the time, the Commission knew that Mr Donaldson was representing Mr Burke in respect of the Smiths Beach investigation.

The monitors who intercepted the telephone calls made written summaries of them available to a Commission investigator. In November 2006, typed summaries of two of the calls were provided by the Commission investigator to Mr Stephen Hall SC. A summary of one of the calls was provided by the investigator to Mr Philip Urquhart. The two men were respectively the senior and junior counsel assisting the Commission in its private and public examinations concerning the Smiths Beach investigation. Neither of the two men read the summary or summaries provided.

The *TI Act* authorised the communication of the TI information to Messrs Hall and Urquhart only if it was communicated for a permitted purpose, being a purpose connected with an investigation into whether misconduct under the *CCC Act* had or may have occurred, or was or might be about to occur or was likely to occur, or for the purpose of a report on such an investigation. No assessment was made whether the communication was for any such purpose. In fact the communication was not for a permitted purpose. Nor was any assessment made by any person whether or not the communication might be inappropriate in the circumstances. In fact it was inappropriate.

Notwithstanding this, I have concluded that there was no misconduct by any Commission officer under s 4 of the *CCC Act.* The officers concerned acted in accordance with their understanding of advice given by then Commission lawyers. However, I have concluded that the procedures used by the Commission concerning the use of TI information protected by LPP were, and in some respects still are, inappropriate. This has been contributed to by what seems to me to be a serious misunderstanding by the Commission of its obligations in respect of TI information that is subject to LPP. That misunderstanding still persists.

I have recommended a number of changes to the Commission's procedures concerning TI information that might be subject to LPP and also to those concerning broader issues of LPP.

CHAPTER 3 BACKGROUND

On Thursday 4 March 2010, the *West Australian* newspaper published an article referring to evidence given on the previous day by a then Commission investigator in criminal proceedings involving Mr Burke at the Perth Magistrates Court. Mr Burke was represented in those proceedings by Mr Donaldson.

The article reported that, when questioned by Mr Donaldson, the investigator acknowledged that the Commission, acting under a TI warrant, had intercepted, recorded and listened to telephone conversations between Mr Burke and Mr Donaldson in 2006.

I obtained a copy of the transcript of evidence of the criminal proceedings. This revealed that the newspaper article was accurate in the respect indicated (although my inquiries have revealed that the calls were only ever listened to by Commission monitors and not by investigators). The transcript also revealed that the investigator who had given evidence had said that another Commission investigator may have given transcripts of these calls to counsel assisting the Commission in 2006 (in fact, no transcriptions were ever made and summaries of particular calls, and not transcripts, were made available to counsel assisting).

I accordingly commenced the inquiry which has led to this report. Mr Donaldson subsequently lodged a complaint with me concerning the use that was made by the Commission of the intercepted information.

CHAPTER 4 THE DELAY IN THE COMMISSION'S RESPONSES TO MY QUESTIONS

The preparation of this report has been substantially delayed by the Commission's slowness in providing me with information needed by me to finalise my Inquiry. Some of that slowness is attributable to events beyond the Commission's control.

Events transpired in the following way.

On 27 April 2010, I wrote to the Acting Commissioner asking a series of questions concerning the interception of the telephone calls in question and the management and use of the information obtained. Having by then received no response (the Acting Commissioner having been substantially engaged with another matter raised by my office), on 10 June 2010 I wrote to the former Commissioner, Commissioner Roberts-Smith RFD QC, asking when I would receive the information sought. I subsequently met with the Commissioner on 15 June 2010. He informed me that the Commission's response would be finalised shortly.

On 13 July 2010, I again wrote to the Commissioner asking for a response. I received it on 20 July 2010, some three months after requesting the information. This delay was contributed to by staffing problems experienced by the Commission.

On 5 August 2010, I wrote to the Commissioner asking for additional information. The Commissioner provided that information on the same day. However, because some clarification was required, I wrote to the Commissioner again on 10 August 2010. Having not received a reply, I wrote again on 1 September 2010. Still not having received a reply, I wrote again on 8 October 2010 asking for the information as a matter of priority.

On 14 October 2010, the Commissioner responded, more than two months after the additional information had been sought. Once again, the delay was contributed to by resourcing issues, of which I had been made aware by the Commissioner.

On 27 January 2011, I wrote to the Commissioner, raising a number of legal issues for his consideration and asking for additional information. Having received no response, I wrote to the Commission again on 16 March 2011 requesting a response to my letter dated 27 January 2011 and asking for additional information. Having still received no response, I wrote to the Commission on 1 April 2011, complaining about its unresponsiveness in respect of correspondence, and again on 19 May 2011.

By 7 June 2011 the information sought had still not been received by me. On that day, I again wrote to the Commission, pointing out that persons who complain to me become disillusioned with the complaint process, including my role in it, when delays of this magnitude occur.

I eventually received a reply to my letter on 28 June 2011, some five months after it had been sought. In his reply, the Acting Commissioner ascribed the delay to a combination of staffing problems and the transition period following the retirement of Commissioner Roberts-Smith.

CHAPTER 5 THE ACTIONS OF THE COMMISSION

Internal legal advice concerning the interception and use of information subject to LPP

In August 2004, a lawyer then employed by the Commission was called upon to give advice concerning the interaction between LPP and the operation of the *TI Act*. His written advice was considered and agreed with by a second Commission lawyer in July 2006.

In a memorandum dated 25 July 2006 (addressed to, amongst others, 'Operation Lawyers' and 'Legal Services'), the second lawyer referred to the advice of the first and to the judgment of the Full Court of the Federal Court in *Carmody v MacKellar* (1997) FCR 115, before expressing the following conclusion:

> 'Accordingly, if the CCC is lawfully intercepting communications under warrant, officers of the Commission can (a) made a record of; (b) communicate to another person and; (c) make use of lawfully intercepted information for a permitted purpose (TI … Act s67). A permitted purpose includes an investigation of misconduct under our Act. Thus, if we intercept material that might be protected by legal professional privilege, that material can be listened to, recorded, transcribed and communicated to an officer of the Commission (including an investigator). However, we may not be able to use it in evidence during court proceedings.'

The advice given by the two lawyers seemingly reflects the understanding of the Commission, from at least 2006 until the present, concerning the use that might be made of TI information which attracts LPP. As I shall later explain, this advice was broadly accurate, so far as it went.

The TI warrants obtained in respect of Mr Burke

On 29 September 2006, a member of the Administrative Appeals Tribunal in Perth, on application from the Commission, issued four TI warrants ('warrants') under s 46 of the *TI Act*. These authorised the Commission to intercept and record calls made to and from telephones used by Mr Burke. The application followed the issue of similar warrants in response to a series of applications by the Commission which commenced on 13 January 2006. Each application relied upon an allegation by the Commission that Mr Burke may have counselled, or procured and might be continuing to counsel, or procure, local government councillors in Busselton Shire Council to commit corruption under s 83(c) of the *Criminal Code (WA) 1913* in relation to a development described as the Smiths Beach development.

What the Commission did

Information provided to me by Commissioner Roberts-Smith reveals the following.

Between 2 November 2006 and 15 May 2007, the Commission intercepted 10 telephone calls between Messrs Burke and Donaldson. It did so with knowledge of the fact that Mr Donaldson was representing Mr Burke in respect of the Smiths Beach investigation.

At that time, when the Commission intercepted calls the interceptor (a monitor in the Commission's Electronic Collection Unit ('ECU')) would initially determine whether or not a call was relevant to an investigation. The monitor would, for this purpose, rely upon affidavit material and investigation briefings and updates. If a call contained what was believed to be privileged information, the monitor would mark the electronic file 'sensitive'. I was told by Commissioner Roberts-Smith[1] that:

> "Once the summary [of an intercepted call] is done, the session is saved and locked as 'produced' and released for reviewing by investigators. The investigators have access to ECU terminals on their own floor, to enable them to review the TI summaries and product. They may decide that some content considered 'not relevant' by the [intercepting officer] is, in fact 'relevant', or whether or not it is the subject of LPP or otherwise properly classified as 'sensitive'. If there is uncertainty about that, they may seek legal advice."

The Commissioner also told me that transcripts of such calls were typed for investigators, if requested.[2]

The Commission has since provided me with a summary of its current procedures for dealing with calls that are potentially subject to LPP. These are addressed later in this report.

None of the 10 intercepted calls made between Messrs Burke and Donaldson was marked 'sensitive', nor were full transcripts made of any of them. However, a typed summary of what was said in the course of each call was created and these, along with the audio recording of the intercepted calls, were made electronically available to a Commission investigator. None of the audio recordings was listened to by any investigator.

During the Commission's investigation, Mr Hall asked to be given all relevant summaries of intercepted calls. The investigator acceded to this request under the direction of the then Deputy Director of Operations. Mr Hall later asked the investigator to send summaries of all intercepted calls to Mr Urquhart.

Typed summaries of telephone calls made between Messrs Burke and Donaldson on 2 November 2006 and 6 November 2006 respectively were emailed to the investigator by an officer of the

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[1] The Commissioner's letter to me dated 9 April 2010, page 4.

[2] The Commissioner's letter to me dated 9 April 2010, page 5.

ECU. The summary of the first call was then emailed by the investigator to each of Messrs Hall and Urquhart on 3 November 2006. The summary of the second call was emailed by the investigator to Mr Hall on 7 November 2006.

The then Deputy Director has said that, at the time, Commission officers differed in their views as to whether these summaries attracted LPP. He believed that they did not, but saw no need to come to a firm view in that respect 'because for investigative purposes, at that stage, it made no difference'.[3]

Commissioner Roberts-Smith initially informed me that the investigator had emailed the relevant summaries to Messrs Hall and Urquhart because of a belief that they, as counsel assisting, were best placed to determine whether or not the summarised discussions attracted LPP.[4] However, when later asked who held that belief and when it was formed, the Commissioner informed me that his earlier response 'perhaps suffers from brevity' and added the following: [5]

> 'The investigators were obviously aware the two subject conversations were between Mr Burke and his lawyer. But given the legal advice upon which they were acting, they did not need to turn their minds to the question whether the calls were "the subject of" or "protected by" LPP. Insofar as whether or not they could or should (lawfully or properly) pass those summaries to Counsel Assisting, that question did not arise. The question of LPP would only arise if Counsel Assisting wished to use them in some way in an examination before the Commission, or if the Commission were to use them in a prosecution. And in either of those events, the questions whether or not they were subject to LPP, and if so, how they should properly be dealt with, would be matters for Counsel Assisting or other legal advice.'

No one appears to have considered whether or not it was appropriate to provide Messrs Hall and Urquhart with information that might have attracted LPP. This was so notwithstanding that it concerned matters in which the two counsel were assisting the Commission and notwithstanding that Mr Hall might cross-examine Mr Burke in the course of public hearings concerning the Smiths Beach investigation if he should be recalled as a witness (he had already given evidence).

No formal policy existed in the Commission concerning the provision to counsel assisting of TI information which might attract LPP. Because the Commission considered that counsel assisting were members of the investigation team, there was believed to be no reason why they should not be provided with privileged information.

Information provided to me by His Honour Justice Hall (as he now is) reveals that the following is the best he is now able to recollect (after the passing of about four years).

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[3] The Commissioner's letter to me dated 20 July 2010, page 7.

[4] The Commissioner's letter to me dated 9 April 2010, page 8.

[5] The Commissioner's letter to me dated 20 July 2010, page 7.

1. He had direct access to audio recordings of intercepted calls which had been loaded onto the Commission's hearing's database and he received transcripts of them from investigators.

2. He has a clear recollection that at no time did he ever hear a recording, or see a transcript, of any conversation to which Mr Donaldson was a party.

3. He received summaries of intercepted calls and may well have asked to be provided with all summaries after a certain point of time in the investigation.

4. He relied on Commission investigators to advise him (usually by email) of any summaries that were worthy of his consideration.

5. He cannot recall any issue of privileged information having arisen and he was not asked for any advice in that regard.

6. Although he can recall that he received summaries of intercepted calls by email, he cannot recall having read the relevant summaries.

Mr Urquhart informed me that to the best of his recollection:

1. He received audio recordings, summaries and transcripts of intercepted calls relevant to Commission examinations held between 23 October 2006 and 8 November 2006, including recordings, summaries and transcripts of calls intercepted after the commencement of those examinations.

2. This information was sent to him by Commission investigators by email.

3. He paid more attention to the calls which had been transcribed than to the summaries, as the transcribed calls were considered by the investigators to be more relevant.

4. He has no recollection of having seen the summary of the call between Messrs Burke and Donaldson that was intercepted on 2 November 2006.

5. If he had received a summary, or transcript, of an intercepted call containing privileged information, he would have paid little attention to it, as it could not be played during the Commission's examinations and no questions could be asked in respect of the information. He considered privileged information to be irrelevant to his role as counsel assisting. Had he read a summary containing privileged material concerning a communication between a witness and his lawyer he 'would not have felt at all comfortable'.

6. He has no recollection of any discussions with Commission officers concerning the use of privileged information, or concerning the existence of any Commission procedures used to manage privileged information.

The nature of the intercepted calls between Messrs Burke and Donaldson on 2 and 6 November 2006

The summary of the intercepted telephone call between Messrs Burke and Donaldson on 2 November 2006 covered the following broad topics:

- comments by Mr Donaldson concerning the motivation behind the Smiths Beach investigation examinations conducted by the Commission and concerning perceived shortcomings of those running the proceedings;
- the identification by Mr Donaldson of three issues arising from the examinations that needed to be addressed;
- information given by Mr Donaldson concerning the identity of persons in respect of whom questions that had been put to one of the witnesses in the examinations had been directed;
- discussion and advice concerning evidence that might be given by Mr Burke in relation to a specific issue in the examinations;
- information provided by Mr Burke to Mr Donaldson for the purpose of obtaining advice, including his prediction concerning the nature of evidence likely to be given by a witness to be called by counsel assisting;
- advice from Mr Donaldson concerning a tactic likely to be adopted by counsel assisting the Commission in respect of one of the witnesses at the examination; and
- discussion concerning the question whether any offence had been disclosed in respect of the three issues identified by Mr Donaldson.

Most of this information (if not all of it) was plainly subject to LPP. It consists of:

- information given for the dominant purpose of enabling Mr Burke, as the client, to obtain, or Mr Donaldson, as the counsel, to provide, legal advice or assistance; and/or
- advice given by counsel solely for the purposes of the hearings.[6]

LPP is afforded not only to advice concerning the law, but also to professional legal advice concerning 'what should prudently and sensibly be done in the relevant legal context'.[7] It also attaches to information exchanged between lawyer and client, in the context of a hearing in which

[6] Heydon D, *Cross on Evidence* (Lawbook Co, subscription service) [25210]; *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610, 642.

[7] *DSE (Holdings) Pty Ltd v InterTAN Inc* (2003) 135 FCR 151, 165 [45] (Allsop J); *Balabel v Air India* [1988] 1 Ch 317, 330; *Seven Network Ltd v News Ltd* [2005] FCA 1342, [34]; *AWB Ltd v Cole* (2006) 152 FCR 382, 406 [86] – [88].

the lawyer is representing the client, for the dominant purpose of keeping both informed so that advice can be sought and given in relation to the hearing whenever called for.[8]

The summary of the intercepted telephone call between Messrs Burke and Donaldson on 6 November 2006 covered the following broad topics:

- discussion about the effect of evidence given by a witness in the hearings and about how that evidence might affect Mr Burke;
- discussion of aspects of the witness's evidence with which Mr Burke disagreed;
- discussion concerning an email that had been sent by Mr Burke;
- Mr Donaldson's expression of his opinion concerning Commissioner Hammond's approach to the investigation;
- Mr Donaldson's intimation of how he intended to respond should the Commission try to recall Mr Burke; and
- Mr Donaldson's assessment of the strength of the evidence available to the Commission in respect of Mr Burke.

All of these topics attracted LPP.

[8] *AWB Ltd v Cole* (2006) 152 FCR 382, 406 [86] (citing *Balabel v Air India* [1988] 1 Ch 317, 330).

CHAPTER 6 THE COMMISSION'S PROCEDURES RELATING TO LPP

How the Commission ordinarily dealt with TI information that might be subject to LPP at the material time

Information provided to me by the Commission is as follows.

ECU monitors intercepted telecommunications and then listened to, interpreted and summarised the TI information. Monitors are not legally trained.

A summary of an intercepted call could be read, and a recording could be listened to, by Commission investigators. The fact that summaries of calls which could include privileged information were marked as 'sensitive' by the monitor (where the possible existence of LPP is recognised) did not prevent Commission investigators from reading those summaries, or listening to the calls.

ECU Team Leaders were responsible for providing a daily, or twice daily, update of TI information to Commission investigators by email. Commission investigators determined whether TI information was relevant to their investigation and whether it consisted of privileged information. If they were unsure about the question of LPP, they could have sought legal advice.

I was initially told by the Commission[1] that if the investigators concluded that TI information was relevant to the investigation – whether or not the information was subject to LPP – ECU would provide them with a disk or thumb drive containing recordings of the calls, along with full transcripts. I have since been told by the Commission[2] that this was inaccurate and that, if an investigator needed to utilise TI information, a request would be made to ECU for an audio copy (only produced for use during an interview, a Commission examination or a prosecution brief) or transcript of the call, or both. The copy, once made, would be provided on a disk or thumb drive and a receipt would be signed for it. No such request was made concerning any of the subject calls.

How the Commission now deals with TI information that might be subject to LPP

Since June 2010, the following procedure has been in place.

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[1] The Commissioner's letter to me dated 9 April 2010, page 5.

[2] Letter to me dated 22 September 2011, page 2.

When a Commission monitor identifies a call between lawyer and client, the call is immediately locked down and the Acting Director of Operations is notified. A summary of the call is provided to him for assessment and determination (at times in consultation with Commission lawyers). In the event that a call which attracts LPP has operational value, in the sense that it would be likely to assist in connection with an investigation, it might be released for that purpose. (The Commission informs me that this situation has never occurred (presumably since June 2010), but envisages that this could occur at some future time.)

The procedures presently adopted by the Commission concerning the determination of claims of LPP generally

The Commission's existing procedures concerning the determination of claims of LPP generally are that:

'A If the person or body claiming [LPP] does not wish to pursue their claim judicially, the Commission should write to the claimant seeking express authorisation to inspect the documents for the purpose of deciding the claim;

B On obtaining such authorisation, the Commission will conduct a private examination to enable it to make a decision about the claim;

C The Commission will make procedural orders that the claimant file written submissions with the Commission. Such submissions will set out the nature of the claim and refer to relevant authorities. The Commission will also order that the claimant file evidentiary materials by way of statutory declarations in support of the claim at least 4 working days before the [LPP] private examination. If such evidentiary material is in writing and is sufficient to demonstrate the privilege without further examination, the Commission may uphold the claim "on the papers";

D Upon making its decision the Commission will order:

(a) that such part of the documents which are protected by the immunity under [LPP] be returned to the claimant, and

(b) that such part of the documents which are not protected by the immunity under [LPP] be retained by the Commission, and

E The Commission will then deliver the decision made in respect to the claim and may provide a copy of any written ruling evidencing this decision to the parties concerned.'

These procedures do not apply to the use of TI information for purely internal investigatory purposes, that is to say, where the information is not to be tendered or relied upon in the course of any form of hearing.

CHAPTER 7 THE IMPORTANCE OF LPP

LPP has been described as 'a fundamental and general principle of the common law'.[1] It exists to protect 'a very important entitlement in our society by which anyone may seek, and obtain, legal counsel in the confidence that communications with a lawyer, and documents produced for or in consequence of such communications, will not normally be disclosed without the affected client's consent'.[2] LPP 'upholds the facility of candid confidential exchanges, essential to the provision of accurate and effective legal counsel'.[3]

The High Court has confirmed that LPP 'is an important civic right'.[4] That is reflected in the fact that it is a substantive right 'and not simply the consequence of a rule of evidence law'.[5] In the case of natural persons, LPP has been described as 'a basic human right'.[6]

The Australian Law Reform Commission (ALRC), in its report titled '*A Review of Legal Professional Privilege and Federal Investigatory Bodies* dated 21 December 2007 ('ALRC Report'), expressed the following conclusions concerning LPP:[7]

> 'It is the ALRC's view that the doctrine of client legal privilege is a fundamental principle of the common law providing an essential protection to clients – both individual and corporate, enabling them to communicate fully and frankly with their lawyers and those who may lawfully provide legal advice. The protection of the confidentiality of such communications facilitates compliance with the law and access to a fair hearing in curial and non-curial contexts, thereby serving the broad public interest in the effective administration of justice.
>
> The ALRC considers that, rather than characterising client legal privilege as a right in and of itself, it is better seen as part of the right of access to a fair hearing. Its 'rights' character may be considered, therefore, as a right more generally described – of access to a fair hearing or trial and, as a corollary, access to a legal advice. In this character, the doctrine serves the administration of justice in a broad sense and protects the rights of citizens against the state. Client legal privilege then may be seen to be facilitative of rights – and an

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1 *Baker v Campbell* (1983) 153 CLR 52, 116-117 (Deane J).

2 *Osland v Secretary, Department of Justice* (2008) 234 CLR 275, 307 [81] (Kirby J).

3 Ibid, 307 [83] (Kirby J).

4 Ibid, 307 [81] (Kirby J).

5 Ibid. See also *Daniels Corporation* 553 [11], 575-576 [85].

6 *Osland*, 307 [82] (Kirby J); *Campbell v United Kingdom* (1992) 15 EHRR 137; *Foxley v United Kingdom* (2001) EHRR 25.

7 Paragraphs 2.118 and 2.119 of the ALRC Report.

> aspect of the protection of rights recognised as human rights under international conventions.'

The ALRC also said that it:[8]

> 'supports the doctrine of client legal privilege as a fundamental principle of common law that facilitates compliance with the law.'

Section 144 of the *CCC Act*

Section 144 of the *CCC Act* provides that:

> (1) Subject to subsection (2), nothing in this Act prevents a person who is required under this Act to answer questions, give evidence, produce records, things or information or make facilities available from claiming legal professional privilege as a reason for not complying with that requirement.
>
> (2) Subsection (1) does not apply to any privilege of a public authority or public officer in that capacity.

This section makes it plain that, other than in the case of public authorities, or public officers acting as such, LPP is a sufficient excuse for declining to provide any information to the Commission in the course of an investigation by it, whether involving a hearing or not. In other words, it preserves the substantive right afforded to natural persons by the common law, so long as they are not public officers acting in that capacity.

[8] Paragraph 6.133 of the ALRC Report.

CHAPTER 8 THE RELEVANT PROVISIONS OF THE TI ACT AND STEPS TAKEN BY THE COMMISSION IN RESPECT OF THEM

Section 55 of the *TI Act* provides that the authority conferred by a warrant may only be exercised by an officer or staff member of an agency in relation to whom an approval has been issued by the chief officer of an agency or someone appointed by him or her in writing for that purpose. Consequently, only a person so approved ('approved person') could exercise the authority to listen to and record communications made over a telecommunications service (s 55 read with s 46 and s 6(1) of the *TI Act*).

Approval under s 55 had been given by then Commissioner Hammond, by an instrument dated 12 July 2006, to officers of the ECU and officers in the Commission's Operations Directorate. However, the interception and recording of telephone calls was in fact done only by officers of the ECU.

S 66(1) provides that a person who has intercepted a communication under a warrant issued to an agency may communicate TI information to the officer of the agency who applied for the warrant on the agency's behalf ('applying officer') or to an officer of the agency in relation to whom an authorisation by the chief officer under s 66(2) is in force in relation to the warrant ('authorised recipient'). Section 66(1) of the *TI Act* does not limit the purposes for which TI information may be communicated to an applying officer or authorised recipient.

S 66(2) provides that the chief officer of the agency may authorise in writing officers, or classes of officers, of the agency to receive TI information under warrants, or under warrants of the kind in question. The word 'officer', for the purposes of the *TI Act*, includes suitably qualified persons engaged by the Commission to provide it with services information or advice (s 5 of the *TI Act*, read with s 3 and s 182(1) of the *CCC Act*).

By the instrument dated 12 July 2006, the then Commissioner, acting as chief officer of the Commission, *inter alia*, authorised under s 66(2) only the class of Commission officers 'performing duties in the Electronic Collection Unit' as authorised recipients. Since then, by an instrument dated 12 August 2011, all officers performing duties in the Commission's Operations Directorate and in its Legal Services Directorate and the Commission's Executive Director have been authorised under s 66(2).

Section 67(1) of the *TI Act* provides that an officer or staff member of an agency may, for a permitted purpose or purposes in relation to that agency, and for no other purpose, communicate to another person, make use of or make a record of TI information. In the case of the Commission, a permitted purpose is defined by s 5(1) as a purpose connected with an investigation under the *CCC Act* 'into whether misconduct (within the meaning of that Act) has or may have occurred, is

or may be occurring, is or may be about to occur, or is likely to occur' or 'a report on such an investigation'.

Section 5A of the Act relevantly provides that:

> 'For the purposes of this Act, a person who gives to another person ... [or] makes use of … a record [defined in s 5 to mean, in relation to information, 'a record or copy, whether in writing or otherwise, of the whole or part of the information'] … obtained by interception … of a communication shall be taken to communicate to the other person .. [or] make use of … so much of the information obtained by the interception as can be derived from the relevant record.'

The Commission's use of the two summaries

The emailing of the two summaries to Messrs Hall and Urquhart amounted to the 'use' of TI information for the purposes of the *TI Act*: s 5A. This was so regardless of whether or not they read the summaries.

At the time of preparing the draft of this report that was sent to the Commission for comment, I had been informed by the Commission that a Commission officer 'had communicated relevant information from the intercepts to Counsel Assisting the Commission pursuant to section 67'.[1] I inferred from this that this should be taken to mean that the officer had made the assessment required by s 67 and I commented accordingly in the draft.

When responding to the draft report, the Commission said[2], concerning my comment:

> 'This is not the Commission's position. The Commission investigator received the summaries and passed them on to Counsel Assisting in their role as part of the Commission's investigation. The investigator made no assessment. The Commission's earlier correspondence has previously addressed this. This approach accords with the law and relevant authorities.'

In its most recent submission,[3] the Commission has said, in this respect, the following:

> 'You state that Messrs Hall and Urquhart were not authorised recipients of telecommunications interception material. This is correct, but there is no requirement for them to be as the Commission was passing summaries of information to them during the course of the investigation and the Commission viewed this as a permitted purpose connected with a Commission's [sic] investigation.

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1 Commission letter dated 28 June 2011, page 2.

2 Appendix 1 to its letter dated 6 September 2011.

3 Attached to the Commission's letter dated 22 September 2011.

> You have said … that in your view as the communication was not for a permitted purpose for the reasons … that the communication was unlawful and that the case of *Carmody* has no bearing on this topic.
>
> … [Y]ou say that nothing in either summary was relevant to the Smiths Beach investigation or any other investigation being conducted by the Commission.
>
> This is an assessment made well after the investigation has concluded, which, with respect, differs from the assessment that occurred when the investigation was on foot.
>
> At that time it was the view of the Commission that the information met the threshold that was required, in that it was telecommunications interception material that could be conveyed for a permitted purpose, being connected with the investigation. The Commission relied on the authority of *Carmody v Mackellar*, in that it was lawful to handle potentially privileged material for a permitted purpose.'

My understanding of the effect of the relevant legislative provisions

It seems to me from the correspondence with the Commission (contained in Schedule 1 to this report) that there was, at least initially, some misunderstanding by the Commission as regards my concerns at the use made of the summaries. It might consequently be helpful for me to make my understanding plain.

The issues upon which the Commission and I appear to agree are these:

1. The *TI Act* authorises the interception of material subject to LPP.

2. The legislative intention underpinning the relevant provisions of the *TI Act* is that LPP is preserved only as regards the law of evidence concerning the use of the material in court or (relevantly) other proceedings before a body having power to hear or examine evidence.

3. Nothing in the *CCC Act* detracts from this (and nor could it lawfully do so). The relevant provisions of the *CCC Act* have only the effect that LPP applies (in the case of a person who is not a public servant) to prevent the use of TI information subject to it in the course of an examination before the Commission, unless no objection is made to that use.

4. TI information (whether subject to LPP or not) can only be communicated to a person who is not an authorised recipient or the applying officer if the communication is for a purpose connected with a Commission investigation 'into whether misconduct (within the meaning of [the *CCC*] *Act*) has or may have occurred, is or may be occurring, is or may be about to occur, or is likely to occur' or for the purpose of 'a report on such an investigation'.

5. In considering whether the purpose in question is permitted, regard must be had for the nature of an investigation as 'the act or process of searching or enquiring to ascertain facts' (*Day v Commissioner, Australian Federal Police* (2000) 116 A Crim R 453, 455), or as 'a process … which has the objective of discovering, collecting, organising and analysing (against specific criteria) information about facts and circumstances, or the relationship between them not previously known or sufficiently understood' (*Samsonidis v Commissioner, Australian Federal Police* [2007] FCAFC 159 [16]). The purpose of a communication would, by way of example, have a connection with an investigation 'if the communication … was intended or calculated to affect or influence the investigation considered as such a process (*Samsonides*, [16]).

Consequently, there appears to be agreement that TI information that would otherwise be protected by LPP can be lawfully intercepted by officers of the Commission's ECU and communicated by them to any authorised recipient for any purpose. There seems also to be agreement that the TI information can be further communicated by a Commission officer to any other officer or person who is not an authorised recipient, but only if the communication is for a permitted purpose in the sense identified in paragraphs 4 and 5 above.

Was the use for a permitted purpose?

It seems to me that the *TI Act* quite plainly requires the Commission, before communicating TI information (whether subject to LPP or not) to someone other than an authorised recipient, whether part of the investigating team or not, to consciously form an assessment that the communication is for a permitted purpose. This test is not satisfied merely by an assessment that the TI information was obtained during the course of an investigation.

It is not clear to me whether the Commission shares this understanding.

The Commission's responses to my draft report are, with respect, not as clear as they might be. The first response makes plain that no assessment was made by the investigator who passed the summaries to Counsel Assisting. The second response is less clear. It suggests, in part, that an assessment was made (it says that my assessment differs from that made at the time). However, it also says that the summaries were passed to Counsel Assisting 'during the course of the investigation and the Commission viewed this as a permitted purpose connected with [the] investigation'. Moreover, the reliance on *Carmody v Mackellar* in this regard is puzzling.

However, it seems to me that what happened is that the Commission officers have consistently assumed that *all* information intercepted during an investigation that is subsequently communicated to *any* investigator on the relevant investigation team, or to Counsel Assisting in that investigation, is communicated for a purpose connected with the investigation. In other words, they assumed that the mere fact that the information was intercepted during an investigation is enough to make lawful its communication to members of the investigation team, including

Counsel Assisting. That seems to me to be borne out, not only by the first of the Commission's responses identified above, but by the nature of the information that was communicated.

There was nothing in either summary that could have been communicated for any purpose connected with the Smiths Beach investigation, or any other investigation being conducted by the Commission.

Because the TI information was protected by LPP, Messrs Hall and Urquhart were precluded from using the substance of the TI information in the Commission's examinations by s 78 of the *TI Act*, s 144 of the *CCC Act* and the law relating to LPP, unless no objection was made to the use of that material (which was highly unlikely). In its submissions, the Commission has argued that s 78 of the *TI Act* has no bearing, given that a Commission hearing is an exempt proceeding under s 5B of that Act. However, status as an exempt proceeding allows TI information to be tendered (s 74). It does not authorise the tender of material subject to LPP. Section 78 expressly provides that nothing in Part 2-6 (in which s 74 appears) renders admissible in evidence information that would otherwise have been inadmissible if that Part had not been enacted.

Moreover, the information in question was unconnected with any investigatory purpose (in the sense described in par 5 on page 17, above). The summaries of the calls emailed to Counsel Assisting by the Commission investigator were useful, if at all, only for the purpose of alerting them to tactical planning by Mr Burke and his counsel or for the purpose of arming them for cross-examination by learning the evidence that was likely to be given by Mr Burke (if he was recalled as a witness) and, perhaps, others. Neither of these uses could properly be categorised as being for a purpose connected with the Smiths Beach investigation. Nor was either use appropriate.

The Commission says that neither of these potential uses was contemplated. However, despite having been invited by me to do so, it has not suggested any alternative use which it contemplated at the time. Rather, as I have said, it has consistently relied upon the fact that the information was obtained during the course of the investigation and communicated to members of the investigation team. This supports the conclusion that it did not make the required assessment at all.

The question whether, if permitted, the use was appropriate

There is another issue that arises, even if the TI information might have been communicated for a permitted purpose.

The fact that the *TI Act* permits use to be made of TI information which is subject to LPP does not have the consequence that use of this material is required. Rather, the Commission should still evaluate the worth of that information against the important public policy underpinning LPP, taking into account the importance accorded by the *CCC Act* to the protection of other forms of information subject to LPP. That is to say, the Commission is still able to make a discretionary judgment, even when the communication would be for a permitted purpose, whether its importance is sufficient to justify use being made of information having that character. This is an issue that might be thought especially to arise in the case of information subject to LPP that is

communicated to Counsel Assisting, who might be tactically assisted by such material, even if the communication is for some other, permitted, purpose.

Whatever else may be the position, it seems to me to be quite plain that no such assessment was made, or thought necessary, in the case of the summaries in question.

CHAPTER 9 SUBMISSIONS FROM THE BAR ASSOCIATION, THE LAW SOCIETY AND THE CRIMINAL LAWYERS' ASSOCIATION

By letter dated 3 February 2011, I received a submission from the Western Australian Bar Association ('WABA'). It was motivated by what the WABA describes as controversy that has arisen from time to time concerning use by the Commission of TI information that is subject to LPP. The submission is included as Schedule 2 to this report. It sets out what the WABA describes as 'its serious concern as to the permissibility and appropriateness of [the Commission's] practice' of considering and using TI information that is subject to LPP.

The WABA has made recommendations as follows:

- It is appropriate for the Commission to consider material for the purpose of determining whether material is subject to LPP but, once it is determined to be so, the use of that material should cease.

- In the majority of cases it would be obvious whether or not material is subject to LPP. Commission officers monitoring intercepted communications should therefore be trained as regards matters likely to be subject to LPP. In those cases the communications should be excluded from material provided to Commission investigators or lawyers.

- In cases where it is unclear whether or not material is subject to LPP, the communication should be referred to the Commissioner or an Acting Commissioner for determination. Where it is determined to be subject to LPP, the communication should be excluded from information provided to investigators or Commission lawyers and retained only by the Commissioner.

- The operation of these procedures could be audited by the Parliamentary Inspector under Part 13 of the *CCC Act*.

- These measures are necessary for the proper administration of justice, of which LPP plays no small part, and to give the public confidence in the operation and integrity of the Commission. They ought to be implemented by the Commission of its own initiative so as to comply with the high standards of propriety that are expected of it.

- In the absence of the Commission undertaking to implement these measures, the *CCC Act* should be amended to limit the Commission's functions and the scope of its investigations in relation to matters that are properly the subject of LPP. The WABA recognises that it would not be possible for constitutional reasons for the State to limit the operation of the *TI Act* itself, but submits that the Commission, being a creature of the State Parliament, may nevertheless have its functions limited as a matter of State law.

By letter dated 10 February 2011 (Schedule 3 to this report), the Law Society of Western Australia informed me that, having reviewed the WABA submission, it 'endorses the submission and fully supports the recommendations made'. The Society said that it proposed to recommend to the Attorney General that the *CCC Act* 'should be amended to limit the Commission's functions and the scope of its investigations in relation to matters that are properly the subject of legal professional privilege'.

By letter dated 15 February 2011 (Schedule 4 to this report) the Criminal Lawyers' Association of Western Australia Inc informed me that, having read the WABA submission, it 'fully supports the position taken by the WABA and endorses the measures proposed … as a means to ensure that privileged communications are protected'.

CHAPTER 10 MY CONCLUSIONS

Misconduct by an officer or officers of the Commission

There was no misconduct by any officer of the Commission.

The actions taken by the Commission officers regarding material subject to LPP were in accordance with the legal advice by Commission lawyers, save that no-one appears to have turned his or her attention to the question whether the use to which the privileged information was put was for a permitted purpose and, if so whether that use was appropriate in the circumstances. Rather, there appears to have been a mistaken assumption (perhaps contributed to by the broad language in which the legal advice was expressed) that *any* TI information that was lawfully obtained in the course of a Commission investigation might be made use of without further enquiry by passing it on to other Commission officers or to Counsel Assisting for review, even if they were not authorised recipients.

While the omission to make the necessary assessments might have resulted in the misuse of information acquired by an officer in connection with the performance of that officer's function as such (for the purposes of the definition of 'misconduct' in s 4 of the *CCC Act*), in the circumstances there was no conduct 'providing reasonable grounds for the termination of … employment' (s 4(d)(vi) of the *CCC Act*). The omission appears to me to reflect inadequate training and processes rather than misconduct by any Commission officer.

I have mentioned that each of the counsel to whom the privileged information was sent has no recollection of having read that information. There is consequently no basis for concluding that either of them was aware of the fact that privileged information had been sent to him.

The Commission's processes concerning LPP

My conclusion that no assessment appears to have been made whether or not the communication of the relevant summaries was for a permitted purpose is based upon:

- the Commission's response, in its submission dated 6 September 2011, that the investigator who passed the summaries on to Counsel Assisting 'made no assessment' under s 67 of the *TI Act* (I have mentioned that, although in a later submission the Commission appears to be saying that some assessment was made at the time, it is not clear upon what basis that statement is made);

- the repetition, in the Commission's submission dated 22 September 2011 of what had been said by it earlier (on 10 July 2010) to the effect that 'Insofar as whether or not [the investigators] could or should (lawfully and properly) pass those call summaries to Counsel Assisting, the question did not arise'; and

- the nature of the information in the summaries, which was not useful for any investigatory purpose in the sense described above.

Whatever might have been the position in this last respect, it is plain beyond argument that no assessment was made whether the communication was appropriate, if permissible. That is so for a number of reasons:

- there is no suggestion in any of the Commission's responses that any such assessment was made;

- given the nature of the information it is inconceivable that any such assessment could have been made;

- the then Deputy Director of Operations is said by the Commission to have regarded it as irrelevant whether or not the information was subject to LPP, 'because for investigative purposes, at that stage, it made no difference';

- the information provided to me by the Commission, in its letter dated 20 July 2010, is to the effect that, 'given the legal advice upon which they were acting, [the investigators] did not need to turn their minds to the question whether the calls were "the subject of" or "protected by" LPP'; and

- in the Commission's submission dated 22 September 2011, it repeats what had been said by it earlier (on 10 July 2010) to the effect that 'Insofar as whether or not [the investigators] could or should (lawfully and properly) pass those call summaries to Counsel Assisting, the question did not arise'.

This shows a serious misconception by the Commission of its responsibilities concerning privileged material. That interception of information subject to LPP is lawful, and that its communication to someone other than an authorised recipient is lawful if made for a permitted purpose, does not answer the question whether the use is appropriate in the circumstances.

Although s 144 has to give way, in the case of conflict, to a Commonwealth statute,[1] s 67(1) of the *TI Act* is permissive and does not relieve the agency in question of the responsibility of determining, in the light of its governing statute, whether the use in question is appropriate. That assessment should be made after taking into account all relevant considerations, including the existence of s 144.

In my opinion, use of information attracting LPP will seldom be appropriate in the case of someone who is not a public officer. The 'very important entitlement'[2] or 'basic human right'[3] afforded

[1] Section 109 of the Commonwealth *Constitution.*

[2] *Osland v Secretary, Department of Justice* (2008) 234 CLR 275, 307 [81] (Kirby J).

by LPP is fundamental. Moreover, the appropriateness of the use to which TI information can be put must be considered in the context that Parliament has decreed that, in the case of someone who is not a public officer, the assertion of the right should prevent access to, and use of, information subject to LPP that has been obtained by other means, for example by means of a search warrant. It could scarcely be assumed that it is always appropriate for what might be precisely similar information to be made use of, no matter how limited its value might be for any proper investigatory purpose, merely because it had been obtained by intercepting a telephone line.

The shortcomings that existed in the Commission's procedures are graphically illustrated by the issue that gave rise to this report. Mr Burke, who was not a public officer, was effectively denied the right to keep confidential candid exchanges of a highly sensitive nature between him and his counsel. This was so notwithstanding that those exchanges were essential to the provision of effective legal advice in the very proceedings that the Commission was conducting and in which his reputation (at the very least) was plainly at risk, and notwithstanding also that they were of no value to any ongoing investigation.

I have said that, in June 2010 (after this issue was first raised with the Commission), the Commission changed its procedures for dealing with calls made between lawyer and client. Now, when a Commission monitor identifies a call between lawyer and client, the call is immediately locked down and the Acting Director of Operations is notified. A summary of the call is provided to him for assessment and determination (at times in consultation with Commission lawyers). In the event that a call which attracts LPP has operational value, in the sense that it would be likely to assist in connection with an investigation, it might be released for that purpose.

The Commission argues that this process provides sufficient protection. I cannot agree. There is a threshold question whether the information is subject to LPP and that requires a legal assessment. The need for this is apparent from the fact that the then Deputy Director of Operations (now the Acting Director) believed that the information in the relevant summaries was not subject to LPP. He was mistaken in that belief. Moreover, it seems to me to be preferable that, as far as reasonably possible, the assessments concerning permitted purpose and appropriateness of further communication should be made by the Director, Legal Services or another senior Commission lawyer who is unconnected with the relevant investigation.

The Commission should consequently have in place a procedure whereby any information derived from intercepted telecommunications between lawyer and client should be made available by the ECU monitors to the Director, Legal Services, or a senior Commission lawyer who is unconnected with the relevant investigation, before any Commission investigator is afforded access to it. The Director or senior lawyer should then assess whether:

(a) the information is subject to LPP;

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[3] Ibid, 307 [82] (Kirby J); *Campbell v United Kingdom* (1992) 15 EHRR 137; *Foxley v United Kingdom* (2001) EHRR 25.

(b) the information is relevant (in the sense earlier described) to a Commission investigation (this might require the lawyer to make enquiries of the investigators concerning the nature of matters being investigated by them and might require disclosure of the nature of the information in question to the Acting Director of Operations); and

(c) if yes to (a) and (b), whether use by the Commission is appropriate having regard for the importance of the information to the investigation in question and taking into account the provisions of s 144 of the *CCC Act*.

If the answer to either of (b) or (c) is no, the Director or senior lawyer should ensure that access is not afforded to any Commission investigator.

In its submissions concerning this recommendation, the Commission argued that question (c) is unnecessary. This was said to follow from the fact that, 'if the answer to … (b) is yes … it follows use of the information is by law permissible and appropriate'. That might be true as regards lawfulness but, as I have explained, the issue of appropriateness raises separate questions to that of lawfulness. Moreover, the legislative intention revealed by s 144 of the *CCC Act* is a material consideration when considering the appropriateness of a proposed use.

The Commission has indicated a willingness largely to adopt my recommendation. However, it contends that a Commission lawyer should decide only the question of LPP and, if he or she concludes that the information is subject to LPP, the lawyer will then consult with the Acting Director of Operations concerning the issue of communication to other Commission staff 'on the basis the information is likely to assist in connection with the investigation'. As I hope will be apparent, this suffers from the shortcoming that it fails to address the issue of appropriateness (as opposed to lawfulness) of further communication. Also, while I recognise that it will often be necessary to disclose the information to the Acting Director of Operations, it is not inevitable that this will always be so.

It also seems to me that the recommended procedure should form part of a wider process addressing issues of LPP which should replace that currently in place.[4]

In my opinion, the WABA's recommendations in this respect (which, as I have said, are supported by the Law Society and the Criminal Lawyers' Association) are sensible and largely apposite (subject to my own analysis of the legal position, which is set out earlier in this report so far as it is relevant). The WABA's recommendations are less onerous than some of the provisions found in other jurisdictions that address similar circumstances. They are also less onerous than the provisions of s 151 of the *Criminal Investigation Act* 2004, referred to in the WABA submission. Those recommendations should consequently be adopted so far as they are applicable, subject to one exception. Because the question whether information is or is not subject to LPP is a legal

[4] Pertinent recommendations made in the Archer Report are included as Schedule 5 to this report.

question, the answer to it should not, in my opinion, be assessed by an ECU monitor but by a Commission lawyer who is not himself or herself involved with the relevant investigation.

In the draft sent to the Commission I had recommended a second exception. This was that more general issues of privilege should not be decided by the Commissioner, who will often (indeed usually) have some involvement in the issue under investigation, and that it should be decided by an Acting Commissioner having no such involvement. However the Commission has submitted that this will result in delay and will often prove difficult to implement because Acting Commissioners (and there is presently only one) anyway have some connection with investigations, being regularly briefed in respect of them.

This last circumstance seems to me to present no real difficulty, as the Acting Commissioner would not ordinarily be the decision maker in the matter under investigation. However, I have thought it appropriate to vary the original recommendation so as to recommend that the issue of privilege be decided, whenever reasonably practicable, by an Acting Commissioner having no direct involvement in the issue under investigation. This would, as the Commission has pointed out, still leave it open to a person affected to assert the claim to LPP in a court (although this is an expensive and slow process).

The Commission has also said that, as is the case with trial judges, a Commissioner can be trusted to disregard evidence found to be inadmissible. That may be so, but the perception is very different in the case of a Commissioner. A trial judge is and is seen to be a disinterested party. A Commissioner overseeing an investigation is not seen to be so; and in this kind of circumstance perception is important to public confidence that proper processes are being observed. Moreover, the ALRC has said that:[5]

> 'While it may be appropriate for Royal Commissioners – who are usually retired judges – to assess whether or not a document is privileged in the context of an independent inquiry to discover the truth – it is not, in the ALRC's view, appropriate for members of other federal bodies or government departments to make such an assessment – particularly where those bodies have enforcement functions.'

Otherwise, the Commission's current practices largely accord with those recommended, subject to some differences which I have incorporated into my final recommendations.

[5] Paragraph 8.296 of the ALRC Report.

CHAPTER 11 MY RECOMMENDATIONS

I recommend that the Commission forthwith put in place the following procedures:

Recommendation 1

All information derived from intercepted telecommunications between lawyer and client should be made available by the ECU monitors to the Director, Legal Services or another senior Commission lawyer who is unconnected with the investigation before any Commission investigator is afforded access to it. The Director or lawyer should then assess whether:

(a) the information is subject to LPP;

(b) the information is relevant to a Commission investigation, in the sense described earlier in this report (this might, where necessary, be assessed by the Director or lawyer in conjunction with the Director of Operations or an Acting Director of Operations); and

(c) if yes to (a) and (b), whether use by the Commission is appropriate, having regard for the degree of importance of the information to the investigation in question and taking into account the provisions of s 144 of the *CCC Act*.

Recommendation 2

If the answer to either of (b) or (c) is no, the Director or lawyer should ensure that access is not afforded to any Commission investigator.

Recommendation 3

Where claims of LPP arise in any other context:

(a) A person or body claiming LPP (claimant), where the existence of that right is denied by the Commission, should be afforded a reasonable opportunity to bring that claim in the Supreme Court.

(b) If the claimant claims LPP but does not wish to pursue the claim judicially, and the claim is one in respect of the contents of a document or documents that cannot adequately be determined without inspecting the documents, then, unless the claimant agrees otherwise, the claim must be determined, whenever reasonably practicable, by an Acting Commissioner having no direct connection with the investigation in the course of which the claim arises.

(c) Where the Commission has in its possession a document or documents that might give rise to a claim for LPP, the Commission must, before making use of that document or those documents (other than for the purpose of assessing whether a claim of LPP does or might arise), ensure that the prospective claimant is or has been afforded a reasonable opportunity of asserting the claim and, where the claim is asserted, the Commission should seek express authorisation for an Acting Commissioner (or, if necessary, the Commissioner) to inspect the documents for the purpose of deciding the claim.

(d) If that authorisation is not provided, the Commission is not to make any use of the document before affording the claimant a reasonable opportunity to assert the claim in the Supreme Court.

(e) If the authorisation is provided, an Acting Commissioner (or, if necessary, the Commissioner) must conduct a private examination in order to make a decision in respect of the claim.

1.

upon making a decision the Acting Commissioner or Commissioner will order:

Recommendation 3 (continued)

(f) In this last event and in any case in which a decision concerning LPP is required to be made by an Acting Commissioner (or, if necessary, the Commissioner):

1. the Acting Commissioner or Commissioner is to make procedural orders that the claimant file written submissions with him or her setting out the nature of the claim and referring to relevant authorities;

2. the Acting Commissioner or Commissioner may also order that the claimant file evidentiary materials by way of statutory declaration(s) in support of the claim at least 4 working days before the private examination;

3. if written evidentiary material is sufficient to demonstrate LPP without further examination, the Acting Commissioner or Commissioner may uphold the claim "on the papers" but, in any other case, should afford the claimant an opportunity, if desired, to make oral submissions; and

4. upon making a decision the Acting Commissioner or Commissioner will order:

   - that those documents or parts of documents that are protected by LPP be returned to the claimant, and

   - that the documents will otherwise be retained by the Commission.

Recommendation 4

These procedures should be reviewed after they have been in operation for 12 months

C D STEYTLER QC
PARLIAMENTARY INSPECTOR

SCHEDULE 1

RELEVANT CORRESPONDENCE WITH THE COMMISSION

CORRUPTION AND CRIME COMMISSION

22 September 2011

Mr Christopher Steytler QC
Parliamentary Inspector of the
Corruption and Crime Commission
Level 12, Westralia Square
141 St Georges Tce
PERTH WA 6000

Dear Parliamentary Inspector

DRAFT REPORT CONCERNING ALLEGATIONS OF TELEPHONE INTERCEPTIONS - MR BRIAN BURKE

I refer to your letters dated 8 and 13 September 2011, giving the Commission opportunity to respond further in respect to your draft report on legal professional privilege and telecommunications interception.

As you are aware Acting Commissioner Herron declared a conflict of interest in this matter and as such the handling of the representations went to Mr Silverstone. At the time of the due date for representations Mr Silverstone was extensively engaged in a number of significant operational matters and was .dealing with a number of competing priorities that he wished to finalise prior to travelling interstate for business. As a result of these combined factors the representations that were sent did not include the level of detail that was originally intended.

Whilst some of the matters may fall outside the process contemplated by s200 of the *Corruption and Crime Commission Act 2003* the Commission appreciates the opportunity to address the issues and potential misconceptions.

In your letter dated 8 September 2011, you refer to conversations you had with Acting Commissioner Archer and Acting Commissioner Hullett regarding your views on the Western Australian Bar Association ('WABA') submission and the provision of external legal advice. Unfortunately both staff members have now left and the Commission is not aware of the content of these discussions. Further the Director of Legal Services who had carriage at the time of attaining the external legal advice has also left the Commission.

It is correct that other counsel was briefed to provide an opinion in respect to legal professional privilege, but this advice concentrated solely on the Commission's handling of telecommunications interception material and the provision of summaries to Counsel Assisting. Peter Hastings QC provided this advice and the Commission provides a copy of it to you with these submissions

I have spoken to Acting Commissioner Herron regarding your reference to an opinion from overseas counsel. He believes this must have been a misunderstanding as an opinion was sought interstate rather than overseas.

Wide consultation has occurred on this matter and none of the staff who have been involved in this matter were aware that you were of the view that *Carmody v Mackellar* might not have been sufficiently considered in the Bar Association's submission.

At page 16 of your draft report you outline WABA's recommendations in regards to the Commission's practice in handling telecommunications interception material that may be privileged. With respect it is not possible to ascertain from the manner in which it is presented in your draft report that you believe the submission might not have sufficiently considered *Carmody*.

Considering the strong views that are presented by WABA, the Law Society and Criminal Lawyers' Association and their subsequent recommendations, which are made without any knowledge of the Commission's processes and procedures in handling telecommunications interception material, the Commission respectfully requests that your views in respect to the WABA submission be enunciated in the final report.

Please find attached the Commission's responses to the matters raised in your letter dated 8 September 2011, and its submissions in response to your draft report.

Yours faithfully

Rabia Siddique
ACTING DIRECTOR LEGAL SERVICES

RESPONSES TO THE 8 SEPTEMBER 2011 LETTER

The consideration of Carmody and Mackellar

In reference to the potential misconception you have highlighted in respect to the decision of the Full Court in *Carmody v Mackellar* you have stated that this case represents the law as it presently stands and that your draft report does not suggest that the legal position is any different from that stated in *Carmody*, in that the *Telecommunications (Interception and Access) Act 1979* ('TI&A Act') permits the interception of telecommunications subject to legal professional privilege and that it can be communicated to another person for a permitted purpose.

You state that Messrs Hall and Urquhart were not authorised recipients of telecommunications interception material. This is correct, but there is no requirement for them to be as the Commission was passing summaries of information to them during the course of the investigation and the Commission viewed this as a permitted purpose connected with a Commission's investigation.

You have said at page 2 of your letter that in your view as the communication was not for a permitted purpose for the reasons expressed on page 15 of your draft report that the communication was unlawful and that the case of Carmody has no bearing on this topic.

At page 15 of your draft report you say that nothing in either summary was relevant to a purpose connected with the Smiths Beach investigation or any other investigation being conducted by the Commission.

This is an assessment that is being made well after the investigation has concluded, which, with respect, differs from the assessment that occurred when the investigation was on foot.

At that time it was the view of the Commission that the information met the threshold that was required, in that it was telecommunications interception material that could be conveyed for a permitted purpose, being connected with the investigation. The Commission relied on the authority of *Carmody v Mackellar*, in that it was lawful to handle potentially privileged material for this permitted purpose. As acknowledged in your draft report section 67(1) of the TI&A Act is very permissive.

The transfer of TI material to Messrs Hall and Urquhart

At page 15 you have concluded that Messrs Hall and Urquhart were precluded from using the substance of the TI information in the Commission's examinations by section 78 of the TI Act.

The Commission assesses this differently. As outlined in the attached submissions, it is the Commission's view that section 78 has the effect of preserving LPP to the extent that LPP survives so as to render the intercepted communications inadmissible in evidence in a proceeding.

A proceeding of the Commission however is an exempt proceeding in which TI information can lawfully be utilised: section 5B.

While the Commission is entitled to use interception information in private or public examinations as they are 'exempt proceedings' under the TI&A Act, if it were ever contemplated that potentially privileged material be put to a witness in an examination the Commission would clearly be mindful of the requirements of section 144 of the CCC Act and the need to allow the individual concerned to make a claim for privilege.

The summaries of the TI information were provided to Counsel Assisting together with other investigative holdings to assist them in their preparation for examinations that were being conducted as part of the investigation. They were not sent the summaries of these calls with the expectation that they would rely on each of them for use in examinations. The assessment of the investigative material they wished to rely upon and use as exhibits in the examinations was a matter for Counsel, assisted by the Commission Investigators.

It was not for the purpose of alerting Counsel to the tactical planning of Mr Burke or for arming them for cross-examination by learning of the evidence that was likely to be given by Mr Burke, as is stated at page 15 of the draft report.

The Commission acknowledges that you will add to your draft report that none of the subject calls were transcribed.

Commission processes regarding the provision of TI summaries

The Commission's processes themselves have not changed in respect to the provision of Tl summaries and 'producing' of calls. Changes have been implemented insofar as where the summaries are electronically stored and new procedures have been adopted in respect to the handling of calls between lawyers and their clients. These processes are outlined in the attached submissions.

In regards to the provision of disks or thumb drives the information provided by the Commission in its letter dated 9 April 2010 is not inaccurate. This specific portion of the letter dated 9 April 2010 was provided by [the] then Manager of the ECU.

To clarify the situation further the following context is provided. If during an investigation members of the investigation team need to utilise telecommunications intercept material for any reason, such as during an interview, for a Commission examination or for a prosecution brief, they send a request to ECU for either an audio copy of the call or a transcript of the call, or both as required. In other instances a audio version of the call is never produced.

Once the copy of the material has been made it is provided to the investigator on a disk or thumb drive and they sign a receipt for the provision of the material.

The Commission has a master list of all of the calls that were transcribed in this manner for Operation Tiberias. A check of this list has shown that no requests were ever made in respect to these particular calls, nor has it been established that any of the investigators listened to the particular calls.

It is not every call that is sent in summary form for the purposes of assisting the investigation that is provided on a disk or thumb drive by ECU.

An assessment of the communications for a permitted purpose is outlined further in the submissions.

In reference to the letter dated 9 April 2010, where it was stated that investigators may decide whether or not telecommunications interception information may be subject to LPP and they may seek legal advice is not incorrect. Commission investigators are well aware of the principles of LPP and will, if they come across material they think may be privileged, before they seek to rely on it as evidence in anyway or use in a Commission examination, consult with Commission lawyers as to its use.

COMMISSION'S SUBMISSIONS IN RESPONSE TO THE PARLIAMENTARY INSPECTOR'S DRAFT REPORT- ALLEGATIONS OF TELEPHONE INTERCEPTION - MR BRIAN BURKE

Background

In the section headed "Background" a brief summation of the background to the Inquiry is outlined.

The Commission submits that fairness requires a more complete representation as to what occurred in the Magistrates Court while the Commission officer was being questioned by Mr Donaldson.

On 8 March 2010 an article on AAP Newswire contained quotes from Mr Burke speaking outside court:

> *…he repeated his call for legislation to limit the CCC's capability to tap lawyer-client phone calls. "I remain absolutely appalled at the evidence that was led that showed that the CCC actually listened to my senior counsel's advice to me two or three days before the hearing" he said.*
>
> *When the matter was raised by Burke's lawyer Grant Donaldson in his summing up on Tuesday, Magistrate Richard Bayley asked him how the intercepted conversations related to the court hearing Mr Burke:. "The magistrate may have said what's it got to do with him but this is something that's got to do with the whole state, and to every citizen, particularly you people (the media)."*

It was only Commission monitors who listened to these calls.

Mr Burke and Mr Donaldson first became aware of the existence of the interception of calls when they received the disclosure brief in relation to Mr Burke's prosecution for false testimony.

No complaint or issue was raised by either party prior to the trial.

During cross-examination Mr Donaldson questioned a Commission officer who had not dealt with telephone interception material. This Commission officer stated another investigator 'may have given transcripts of these calls to counsel assisting'.

As is evident from the material that the Commission has provided to the Parliamentary Inspector in previous correspondence, transcripts were <u>never</u> produced in relation to these calls.

To quote Mr Donaldson at trial on 8 March 2010: *'Next your Honour, as emerged in this trial, leading up to the CCC examination of Mr Burke on 6 November the CCC were, in fact, bugging and listening to Mr Burke's conversations with me. Not only were they- were investigators and lawyers employed by the CCC and counsel assisting the CCC in that examination, listening to*

those telephone calls, according to Mr Ingham, regard was being had as to the substance of those telephone calfs when framing questions that would be asked of Mr Burke…'

The comments made by Mr Donaldson in court were factually incorrect.

Only summaries by a monitor of two of the calls were provided to Counsel Assisting the Commission. Counsel Assisting have since confirmed that they did not, or could not recollect reading the summaries, and that the summaries did not form the basis for any questioning during examinations.

The officer that was being cross examined by Mr Donaldson correctly pointed out that another officer of the Commission, who was being called later that day, could provide the information.

Mr Donaldson stood this later witness down saying he no longer required him.

As a result of this witness not being called the extent of the Commission's utilisation of TI and potentially privileged calls has never been accurately described.

The Delay in the Commission's Responses to Questions

The Commission acknowledges that there has been a delay in providing material in respect to this particular Inquiry, but believes that representing this delay in this manner as at page 4 of the draft report does not adequately represent the true position. The following is the Commission's chronology of events:

There has been extensive correspondence on this matter that commenced between the Parliamentary Inspector and the Commission in March 2010.

On 22 March 2010, Commissioner Roberts-Smith advised that he intended to provide a substantive reply to the issues raised on 16 March 2010 at a later stage.

On 30 March 2010, Commissioner Roberts-Smith further advised:

> *…You should know that I have previously issued a standing direction that correspondence or requests from the Parliamentary Inspector are to be accorded the highest priority. Consistent with that direction Commission officers have been working to provide the detailed information requested in your letter dated 16 March 2010 since it was received.*

Commissioner Roberts-Smith commenced leave shortly thereafter and the response to the initial questions, which took significant time to collate by the Commission, was sent on 9 April 2010.

On 27 April 2010, a further letter with a considerable number of questions was sent to the Commission (to Acting Commissioner Gail Archer).

At this time Acting Commissioner Archer's time was devoted solely to progressing another significant Parliamentary Inspector matter.

As a result of this other matter, the response to the letter dated 27 April 2010 was delayed significantly due to a staffing issue that the Parliamentary Inspector is aware of, and which was discussed in various meetings and conversations with the Parliamentary Inspector.

On 4 May 201 0, Acting Commissioner Archer discussed the matter with the Parliamentary Inspector specifically detailing why delays were occurring.

In July 2010, a staffing change occurred and carriage of matter was allocated to another Commission lawyer. A significant amount of work occurred within the Commission at this time to gather material as to the specific dealings with telecommunications interception material in 2006.

The significant response was provided to the Parliamentary Inspector on 20 July 2010.

A further request came from the Parliamentary Inspector on 5 August 201 0, which was answered by the Commission on the same day.

On 10 August 2010, further information was requested by the Parliamentary Inspector.

At this time, due to staff shortages, one Commission officer was working on five separate significant Parliamentary Inspector matters in addition to being out-posted to support legal work in another area of the Commission.

Commissioner Roberts-Smith kept the Parliamentary Inspector aware of these issues and in a letter dated 14 October 2010:

> *…1 refer to your letter dated 8 October 2010 relating to the LPP/TI issue. I note that you acknowledge the Commission's resourcing issues and I refer to our discussions about this matter, and the reasons behind the Commission's delay in responding to this matter in particular.*

This letter then detailed the significant activities the three relevant officers who were responsible for progressing the Commission's response were involved in, additional to their everyday operational requirements. This letter provided the substantive response to the queries raised on 10 August 2010.

Another letter was not received until 27 January 2011, three days before Commissioner Roberts-Smith retired.

The corporate knowledge of the matter was significantly affected by the Commissioner's departure and there was then a requirement for an Acting Commissioner to be fully briefed on the matter.

This presented difficulties for the Commission as one Acting Commissioner had declared a conflict in respect to a portion of this matter.

On 28 June 2011, Acting Commissioner Herron sent a letter specifically apologising for the extended delay in responding due to the transition to Acting Commissioners and to senior legal staff vacancies, especially in regards to the Director of Legal Services and Principal Lawyer as this *'…placed intolerable pressure on the Commission's legal staff.'*

In any case, the Commission submits that this issue is not germane to the matter being inquired into and that it should therefore be extracted from the report.

Telecommunications Interception and LPP

While the *Telecommunications (Interception & Access) Act 1979* ('TI&A Act') does not expressly abrogate or expressly preserve LPP, it has been held that the TI&A Act by necessary implication abrogates LPP: *Carmody v Mackellar* (1997) 76 FCR 115.

The Full Court in *Carmody v Mackellar* (1997) 76 FCR 115 at 139 referred to relevant Parliamentary debates, noting that the Federal Parliament had specifically rejected a recommendation to provide protection to legal professional privilege in the TI&A Act on the basis that sufficient protection was already provided by the laws of evidence.

The issue that is clearly raised is the further use that may be made of the material obtained from telecommunication interception material that may potentially be privileged.

In November 1986, the Tl Act as it then was, was reviewed by a Joint Select Committee. Specifically, at this time, the Committee proposed that legal professional privilege be protected.[1]

The Attorney-General's second reading speech included a schedule specifying the Committee's recommendations, with the Government's response.

The Government at the time did not accept the recommendation in relation to LPP as *'…legal professional privilege is already sufficiently protected under the laws of evidence.'*

<u>Consideration of Carmody v Mackellar</u>

The draft report makes limited reference to the Commission's interpretation of *Carmody v Mackellar*, but does not address this authority any further throughout the report.

Carmody v Mackellar is the leading authority in respect to potentially privileged telecommunications intercept material that guides investigative agencies as to their handling of telecommunications material. Any consideration of the Commission's position in respect of that type of material should include a consideration of that authority.

In previous correspondence with the Parliamentary Inspector the Commission has asserted that Tl material which may be potentially privileged continues to be properly and lawfully handled

[1] Report on the Joint Select Committee on Telecommunications Interception, Parliamentary Paper No 306/1986

pursuant to the provisions of the *Telecommunications (Interception & Access) Act* (1979) ('TI &A Act') and the authority of *Carmody v Mackellar*.

The Commission believes that it's current procedure whereby a telephone call between lawyer and client is locked down and the relevant monitor contacts the A/Director Operations immediately, is appropriate, and ensures the material is handled with proper care.

Legal advice received from external Senior Counsel (NSW) confirms the Commission's view that information may be passed to Commission staff involved in an investigation for a 'permitted purpose' connected with a Commission investigation and that *Carmody v Mackellar* is authority for the proposition that the TI Act, by necessary implication, abrogates legal professional privilege on the basis that the Act would be unworkable if it were to be construed as not authorising the interception of communications subject to LPP and that *'…the principle does not seem to have been called into question since.'*

Senior Counsel further advised that whilst the Court did not specifically rule that use of intercepted material after initial interception was similarly unrestricted by issues of LPP, it is:

> *…clear that the Court contemplated that because s78 of the TI Act provides for the possibility that communications would not be admissible in evidence that might be intercepted pursuant to a TI warrant, the intention was that legal professional privilege should not be protected, otherwise than by the law of evidence, that is, only at the point where the evidence is tendered in court proceedings. The inference from that proposition is that intermediate steps involving the use of the information for a permitted purpose, would be unaffected by legal professional privilege. I am unaware of any authority which casts doubt upon that position.*

<u>To assist in connection with an investigation</u>

The conclusion is reached in the draft report that the TI&A Act did not authorise the communication of the intercepted information because that information was not relevant to a purpose connected with the Smiths Beach Investigation.

The Commission is concerned that a determination as to 'relevance' of the material to the investigation during the initial investigative stages imports an unnecessary test not required by the legislation. Setting the threshold for TI information by reference to the evidential test of 'relevance' is much higher than that which is required. The ECU monitors initially mark all calls as 'relevant' or 'not relevant' simply because these are the markers embedded in the TI system.

The test under the TI&A Act is whether the information may assist in connection with the investigation and that it be communicated for a purpose connected with the investigation.

When an interception agency applies for a telecommunications warrant pursuant to section 46 (service warrant) or 46A (named person warrant) of the TI&A Act it is necessary for the agency to satisfy the eligible Judge or nominated AAT member that the information that would be likely to be obtained by intercepting under a warrant communications made to or from the service would be

likely to assist in connection with the investigation by the agency of a serious offence, or serious offence in which the particular person is involved: section 46(1)(d).

Likely to assist in connection with the investigation of an offence is not and should not be taken as a reference relating to the collection of evidential material alone. For example: a call may be useful to assist investigators to establish the whereabouts of a person of interest, and it may be that they make a phone call that indicates they are attending their lawyers office at a particular time. Telephone interception is also used extensively for intelligence gathering purposes during an investigation.

If a warrant is granted the information may be communicated within the agency for a permitted purpose, being a purpose connected with an investigation under the CCC Act into whether misconduct has or may have occurred, is or may be occurring, is or may be about to occur or is likely to occur, or a report on such an investigation.

The Federal Court in *Day v Commissioner, Australian Federal Police* (2000) 116 A Crim R 453 at 455 referred to the ordinary meaning of the term "investigation" as '*the act or process of searching or inquiring in order to ascertain certain facts.'*

The Federal Court in *Samsondis v Commissioner, Australian Federal Police* (2007) FCAFC 159 at [16] considered the meaning of 'permitted purpose' in relation to telecommunications interception material being 'connected with' an investigation in the following terms:

> *An investigation… is a process, normally carried out over a period of time, which has the objective of discovering, collecting, organising and analysing (against specific criteria) information about facts and circumstances, or the relationship between them not previously known or sufficiently understood. Although there is a danger in viewing the intended meaning of a statutory term through the prism of a particular controversy, we consider that the purpose of some communication or other action would have a connection with such an investigation normally, and certainly most obviously, if the communication or action was intended, or calculated, to affect or influence the investigation considered as such a process.*

In *MF1 & Ors v National Crime Authority* (1991) 105 ALR 1 Jenkins on J said at 16:

> *The word "relevance" suggests to a lawyer that connection between evidence and an issue of fact for determination by a court which the law of evidence requires, and for that reason may be thought an inappropriate term by which to signify the required· connection between documents or testimony and an investigative process, which for much of its course is devoid of anything resembling a curial issue of fact.*
>
> *As a precept of the law of evidence "relevance" connotes a connection between the evidence and a fact in issue for determination by a court. It is largely an inappropriate term by which to signify the required connection between evidence and an investigative process, the purpose of which is not to determine issues of fact, but to discover them.*

As was stated in the Commission's letter dated 20 July 2010 no use was made of the subject calls during the Commission's examinations and there was no other derivative use of these calls.

In the letter to the Commission dated 8 September 2011, the Parliamentary Inspector has stated that the detail of *Carmody* was not included as it did not bear on the conclusions.

It is the Commission's opinion that as it was the authority that guided the Commission's use of the telecommunications material and that as the Parliamentary Inspector is drawing conclusions on the appropriateness of this use it is only fair to include further details of the consideration of *Carmody*.

With respect the Commission believes that the Parliamentary Inspector is importing an assessment of the material that was not available to the Commission at the time the material was passed to Counsel Assisting.

At page 6 of the draft report it states:

> *Commissioner Roberts-Smith initially informed me that the investigator had emailed the relevant summaries to Messrs Hall and Urquhart because of the belief that they, as Counsel Assisting, were best placed to determine whether or not the summarised discussions attracted LPP. However, the Commission later corrected this and informed me that the investigator emailed the relevant summaries to Messrs Hall and Urquhart because they formed part of the investigative team.*

The Commission submits that this is not a correction as both points are correct and applicable, as outlined in the Commission's letter dated 20 July 2010.

If the Commission was seeking to rely on as evidence, or specifically use the telecommunications intercept material in an examination (neither of which were applicable in relation to these particular calls) then a full legal assessment of the calls would be conducted.

Section 78

Section 78 of the TI&A Act has the effect of preserving LPP to the extent that LPP survives so as to render the intercepted communications inadmissible in evidence in a proceeding.

A proceeding of the Commission however is an exempt proceeding in which TI information can lawfully be utilised: section 5B.

While the Commission is entitled to use interception information in a public or private examination as they are 'exempt proceedings' under the TI&A Act, if it were ever contemplated that potentially privileged material be put to a witness in an examination, the Commission would be clearly be mindful of the requirements of s144 and s 78 of the TI&A Act and the need to give the individual and opportunity to make a claim for privilege.

Section 144

It is stated on page 13 of the draft report that section 144 *'makes it plain that LPP is a sufficient excuse for declining to provide any information to the Commission in the course of an investigation by it, whether involving a hearing or not.'*

Section 144 of the CCC Act provides an illustration of the express preservation of legal professional privilege, and its limited abrogation.

Section 144(1) preserves LPP where a person is required under the Act to answer questions, to give evidence or to produce records, things or information, thus when the Commission is exercising its powers of compulsion.

As noted in the draft report, law enforcement agencies and law societies have cooperated to develop guidelines to deal with LPP and search warrants, although it must be highlighted that these procedures deal exclusively with search warrants conducted on legal or law society offices and are not necessarily comprehensive in relation to every investigative body.

Irrespective of this, the Commission ensures that individuals are alerted to their relevant rights in respect to privilege and specific detail is included in all ss.94, 95 and 96 notices served by the Commission. Copies of these were attached to Acting Commission Herron's response to the recommendations.

While the A/Director Operations and the Commission's legal staff contemplate the relevance of s144 of the CCC Act when considering any possible privileged material in relation to TI, it is the Commission's view that this consideration is limited at the early information gathering stages of an investigation and that it specifically applies to compulsive power use.

As highlighted in Senior Counsel's advice, section 144 indicated a legislative intent that legal professional privilege isn't abrogated in relation to witnesses giving evidence in the course of an examination, and as such a witness would not be obliged to answer questions with regard to recorded privileged communications. In Senior Counsel's view, it follows that the effect of those provisions is not to limit the internal use the Commission can otherwise make of the intercepted communications in order to facilitate the investigation and that that position is regulated by the TI Act, and includes briefing Counsel on the content of intercepted telecommunications.

Assessment of the calls

At page 18 of the draft report asserts that:

> *No adequate assessment whether or not the information attracted LPP could have been made by the Commission's ECU monitors who lacked the necessary skills. They are not legally trained and could, at best, have only had a rudimentary knowledge of the potential complexities of LPP.*

This is a very disparaging comment that is without merit. Senior Monitors and Team Leaders within the ECU are very experienced in the handling of telecommunications interception, are versed in the relevant provisions of the TI&A Act and certainly possess the relevant skill to effectively handle TI material and recognise calls between a lawyer and client.

There would never be a requirement for them to have the legal knowledge to assess whether a call is privileged, as they are listening to and providing the initial assessment (which is open to review) of the calls.

As was stated in the Commission's letter to the Parliamentary Inspector on 9 April 2010:

> *The intercepting officer initially determines whether the call is 'relevant' or 'not relevant' to the investigation, based on affidavit material and investigation briefings and updates. Depending on the content they may indicate it appears to be 'sensitive'. Once the summary is done, the session is saved and locked as 'produced' and released for reviewing by investigators. The investigator may decide that some content considered 'not relevant' is, or whether or not it is the subject of LPP or otherwise properly classified as 'sensitive'. It there is uncertainty they may seek legal advice.*

The relevant investigator did not form any opinion as whether the summary of these two calls were possibly subject to LPP.

At the relevant time in response to a request from Mr Hall 'summaries of information' in relation to telecommunications interception was forwarded as it was the most practical procedure for providing a bulk of investigative material.

In its letter dated 10 July 2010 the Commission noted that:

> *The investigators were obviously aware that the two subject conversations were between Mr Burke and his lawyer. But given the legal advice upon which they were acting they did not need to turn their minds to the question of whether the calls were 'the subject of' or 'protected by' LPP. Insofar as whether or not they could or should (lawfully and properly) pass those call summaries to Counsel Assisting, the question did not arise. The question of LPP would only arise if Counsel Assisting wished to use them in some way in an examination before the Commission, or if the Commission were to use them in a prosecution. And in either of those events, the questions whether or not they were the subject of LPP, and if so, how they should properly be dealt with, would be matters for Counsel Assisting or other legal advice.*

The Commission does not dispute that if the two calls were to be utilised in any way and a legal assessment of them was carried out, that they may have been assessed as privileged.

In the Commission's letter to the Parliamentary Inspector dated 20 July 2011, the Commission outlined that the view of the Commission is not strictly that the calls were not 'protected by LPP' but that even if the calls were held to contain privileged information they could be utilised for a permitted purpose connected with the investigation as per *Carmody v Mackellar.*

Irrespective of this view, it is the procedure within the Commission's Investigations Unit that specific legal advice is sought in respect of potentially privileged investigative material before it is sought to be used in an examination, in a criminal prosecution or disclosed in a prosecution brief.

As to an assessment of the summaries of the two calls, it is stated at page 15 of the draft report that the summaries of the calls emailed to Counsel Assisting by the Commission investigator was useful only for the purpose of alerting them to tactical planning by Mr Burke and his counsel, or for the purpose of arming them for cross-examining by learning the evidence that was likely to be given by Mr Burke. It is noted in the draft report that Mr Burke had already appeared as a witness when these calls occurred.

The Parliamentary Inspector states that these uses could not be properly categorised as a purpose connected with the Smiths Beach Investigation.

The Commission submits that it is not possible to adequately assess what may assist in connection with an investigation from outside of the investigation, and certainly not with hindsight at the end of the investigation.

Irrespective of this it is not why the summaries were provided to Counsel Assisting and it would be highly improper for them to use these calls to gain any tactical advantage.

It was established in *Mann v Carnell* (1999) 168 ALR 86 that the client will be deemed to have waived the privilege if the client does, or authorises something which is inconsistent with the confidentiality which the privilege is intended to protect.

The Commission is aware that it appears in relation to this matter that Mr Burke may have effectively waived his privilege in respect to the calls by discussing them with third parties.

<u>Procedure for dealing with potentially privileged calls</u>

The description of Commission procedures at page 10 of the draft report contains a number of inaccuracies.

In respect to LPP the Commission already has in place procedures[2] to govern the handling of potential LPP material that it believes is sufficient for the lawful handling of the material, and which is not dissimilar to the recommendations.

Currently, if a monitor or senior monitor identifies a call between a legal practitioner and their client, the call is immediately locked down and a summary is provided to the Acting Director Operations for determination.

[2] Process last amended in mid 2010

If the contents are possibly subject to legal professional privilege, but of minimal operational value, the call, out of an abundance of caution, remains locked down and is not released to the Investigations Unit.

If the contents of the conversation are possibly subject to legal professional privilege and may be of operational value the Acting Director Operations seeks legal advice from a Commission lawyer.

If the lawyer determines that the contents of the call may be subject to legal professional privilege that call remains locked down and not released to the Investigations Unit. If the lawyer determines that the call is not subject to legal professional privilege it is released.

The Commission's procedures concerning the determination of claims of LPP

The procedure detailed at page 10 of the draft report specifically deals with claims that are made in respect to potentially privileged material that is provided to the Commission.

This differs significantly from the procedures in relation to the handling of telecommunications interception material and the Commission questions the utility of outlining these procedures here.

The Commission's use of the two summaries

The conclusion in the draft report is that nothing in either summary was relevant to a purpose connected with the Smiths Beach investigation or any other investigation by the Commission and that this has been acknowledged by Mr Urquhart.

With respect this determination as to 'relevance' is made after the conclusion of the investigation. All that was required at the time was that the information was seen to potentially assist in connection with the investigation and is not limited to use of material for an examination.

No further information is contained within the draft report as to Mr Urquhart's position, a position that he might adopt several years after the event and which he has acknowledged in other forums he does not have clear recollection of.

The draft report outlines that whilst Mr Urquhart cannot recall reading the summaries he feels that if he did read the relevant summaries he "would not have felt at all comfortable".

This is possibly an expected reaction from Mr Urquhart, or any other legal practitioner, but it does not mean that the procedure followed by the Commission was improper.

The Commission submits that the comments made by Mr Urquhart add no forensic value to the Inquiry or the draft report.

Conclusion: the assessment concerning LPP

It is concluded that no adequate assessment could be made by the monitors of the calls and potential privilege.

It is noted that no assessment of the monitors skills or experience has been undertaken prior to this comment being made.

At page 18 of the draft report it is stated that the supply of summaries to the investigations unit occurred regardless of whether or not they are related to any 'legitimate investigatory purpose'.

The Commission submits that the Parliamentary Inspector is not truly in a position to identify every investigative purpose of a very complex and protracted investigation that had a very large number of different investigative limbs.

At page 20 of the report is a paragraph referring to 'other problems concerning the processes adopted by the Commission in respect to TI information'.

The Commission submits that this paragraph should not be included in the report as it is unrelated to the subject of the report and does not include enough detail to be a fair.

Schedule 1 - submission by WABA

The Commission is concerned that much of the submission by WABA at pages 2 - 4 is lifted directly from the Commission's submission to the Archer Review sent on 10 August 2007.

At page 5 of the WABA submission is the following:

> *Nevertheless, the observations in* Carmody v Mackellar *should not be overstated, nor should the case be relied upon for practices that are clearly not supported by it. That decision is not authority for any proposition that the Commission has the power or discretion to override the protection given by the legal professional privilege. It is clear that it does not have any such power or discretion. In particular, it is important to note that the decision in* Carmody v Mackellar *concerned the validity and the issuance of the warrants, and not the particular use made of the communications otherwise the subject of legal professional privilege.*

These observations as stated are clearly incorrect. As previously referred to in the joint judgment of the Full Court in *Carmody* at 144:

> *This is not to understate the use that can be made of privileged communications that have been intercepted pursuant to a TI warrant. Information obtained in this manner can be communicated, used or recorded by an officer of the AFP for any 'permitted purpose': see TI Act, section 67 and the definition of 'permitted purpose' in section 5(1). In addition, the information may be passed on to other officials and authorities in accordance with ss68 and 69 of the TI Act.*

PETER HASTINGS QC

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CORRUPTION AND CRIME COMMISSION: USE OF TELEPHONE INTERCEPT INFORMATION SUBJECT TO LEGAL PROFESSIONAL PRIVILEGE

MEMORANDUM OF ADVICE

Paul O'Connor,
Director
Legal Services
Corruption and Crime Commission
PO Box 7667, Cloisters Square
Perth WA 6850
[00685/2010 PO]

9 August 2011

CORRUPTION AND CRIME COMMISSION

CORRUPTION AND CRIME COMMISSION: USE OF TELEPHONE INTERCEPT INFORMATION SUBJECT TO LEGAL PROFESSIONAL PRIVILEGE

MEMORANDUM OF ADVICE

Introduction

1. I have been asked to advise on the use that may be made by the Corruption and Crime Commission (Commission) of material subject to Legal Professional Privilege (LPP) obtained by means of telecommunications interceptions in accordance with warrants issued pursuant to the *Telecommunications (Interception and Access) Act 1979 (the TI Act)* and the *Telecommunications (Interception) Western Australia Act 1996.* Specifically I have been asked whether providing summaries of intercepted telephone conversations attracting legal professional privilege to Counsel Assisting the Commission for the purposes of the conduct of public examinations in the course of an investigation, constitutes a "permitted purpose" under the *TI Act.*

2. The facts upon which I. have been asked to advise are not specific. An example has been given, but generally I am proceeding on the assumption that officers of the Commission have intercepted telephone communications pursuant to a lawful warrant, and have recorded conversations between persons of interest and their lawyers, which in turn have been reduced to summaries for the benefit of Counsel Assisting involved .in the public examination of the person of interest.

3. I have had the benefit of considerable assistance in the detailed observations relating to the relevant provisions of the *TI Act* and the Corruption and Crime Commission Act 2003, and various authorities relevant to those provisions. In the end result, I agree with most of the views expressed concerning the effect of the provisions and the authorities. Except for reasons of the emphasis, I will not repeat in detail the references to them, but instead refer to them shortly.

Telecommunications (Interception and Access) Act 1979

4. Relevantly, ss.63 and 67 of the *TI Act* limit the communication of lawfully intercepted information to circumstances of a permitted purpose. The definition of "permitted purpose" in s.5(1)(g), in the case of the Corruption and Crime Commission, includes a purpose connected with an investigation by the Commission into whether misconduct has or may have occurred, or a report into such an investigation. I assume for the purposes of this advice that any proceeding of the Commission for which summaries of intercepted material are to be provided to ·Counsel Assisting, are of such a character. The relevant question is whether the provision of a summary to Counsel of intercepted information may constitute "a purpose connected with" the investigation by the Commission for the purposes of constituting a

"permitted purpose" to allow the intercepted information to be lawfully communicated to Counsel.

5. In the observations reference is made to the decision of the Federal Court in *Day v Commissioner Australian Federal Police* ((2000) 116 A Crim R 453 at 455) in which the Court referred to the ordinary meaning of the term "investigation" as "the act or process of searching or inquiring in order to ascertain facts" [10]. To that I would add reference to a more recent decision of the Federal Court in *Samsonidis v Commissioner Australian Federal Police* ([2007] FCAFC 159). The proceedings were concerned with the legality of the provision of intercepted information to Greek law enforcement authorities to assist in the investigation of a crime in that country. The issue was whether such a use was "connected with" a prescribed investigation in order to constitute a permitted purpose under the *TI Act*. The Court referred to an investigation in the following terms: [16]

> *…An investigation, in the sense made relevant by para (a)(i) of the definition, is a process, normally carried out over a period of time, which has the objective of discovering, collecting, organising and analysing (against specific criteria) information about facts and circumstances, or the relationship between them not previously known or sufficiently understood. Although there is a danger in viewing the intended meaning of a statutory term through the prism of a particular controversy, we consider that the purpose of some communication or other· action would have a connection with such an investigation normally, and certainly most obviously, if the communication or action was intended, or calculated, to affect or influence the investigation, considered as such a process.*

6. In my view, there is little doubt that providing Counsel Assisting with a summary of intercepted telephone communications would come within that description of an investigation on the basis that it was intended to affect or influence the investigation in that Counsel is thereby better able to examine the person of interest in order to establish relevant facts. Accordingly, I am of the view that the provision of summaries in the manner described is a permitted purpose under the *TI Act*.

Legal Professional Privilege

7. In the observations, reference is made to the leading decision of the Federal Court of *Carmody v Mackellar* (1997) 76 FCR 115 as authority for the proposition that the *TI Act*, by necessary implication, abrogates legal professional privilege· on the basis that the Act would be unworkable if it were to be construed as not authorising the interception of communications subject to legal professional privilege. That principle does not seem to have been called into question since.

8. The Court did not rule specifically that use of the intercepted material after initial interception was similarly unrestricted by issues of legal professional privilege. However, it is clear from the passage quoted in the observations that the Court contemplated that because s. 78 of the *TI Act* provides for the possibility that communications would not be admissible in evidence that might be intercepted pursuant to a TI warrant, the intention was that legal

professional privilege should not be protected, otherwise than by the law of evidence, that is, only at the point where the evidence is tendered in court proceedings. The inference from that proposition is that intermediate steps involving the use of the information for a permitted purpose, would be unaffected by legal professional privilege. I am unaware of any authority which casts doubt I upon that position.

9. Accordingly, I agree that in the context of the provisions of the TI Act, it is permissible to provide summaries of intercepted telecommunications which may otherwise attract legal professional privilege, to Counsel Assisting for the purposes of a public examination.

Corruption and Crime Commission Act

10. It is then necessary to consider whether the provisions of the *Corruption and Crime Commission Act* may otherwise preclude such a procedure. The issue of the influence of the *Corruption and Crime Commission Act* on the application of legal professional privilege to the processes of the Commission needs to be considered by reference to the exercise of the particular statutory power under consideration as there is no provision of general effect.

11. The observations conveniently refer to the provisions of the Act which specifically deal with situations in which an issue of legal professional privilege arises. None of those provisions relate to obtaining evidence pursuant to the *TI Act*, and accordingly it seems to me reasonably clear that in view of the authorities referred to above, the capacity of the Commission to intercept privileged telecommunications remains unrestricted. Similarly, the internal use that can be made of the otherwise privileged information in accordance with the permitted purpose of assisting an investigation by providing a summary to Counsel Assisting, in my opinion, by reference to the same authorities, is lawful.

12. I agree that when it comes to considering the use that can be made of the information during a hearing, provisions such as sections 144(1), 147 (3) and 160 indicate a legislative intent that legal professional privilege is not abrogated in relation to witnesses giving evidence in the course of an examination before the Commission. The result is that a witness would not be obliged to answer questions with regard to a recorded privileged communication. However, I do not consider that it follows that the effect of those provisions is to limit the internal use that the Commission can otherwise make of the intercepted communications in order to facilitate an investigation. That position is regulated by the *TI Act*, and includes briefing Counsel on the content of intercepted telecommunications.

13. It should not be overlooked that is not always clear that legal professional privilege is applicable, even though communications may be between a person and his or her lawyer. As the Federal Court pointed out in *Carmody v Mackellar*, one of the reasons for concluding that telephone interception warrants were not limited by legal professional privilege was that it will often be impossible to ascertain· with any degree of assurance whether a particular conversation is or is not privileged while it is taking place, because even a conversation which bears the appearance of a privileged communication may not be privileged. If the

lawyer is engaged in a criminal enterprise, the communication may not be privileged because it is made in furtherance of an illegal purpose.

14. The same position may exist while a matter is still being investigated, and it may not be until the investigation is complete that it becomes clear whether the communication was privileged. That is a further reason why it seems to me that there is no restriction upon using information in an investigation by providing summaries of intercepted telecommunications to Counsel Assisting. Whether the information can then be used in the examination will depend whether it can be demonstrated that the communication was in furtherance of a crime of fraud or dishonesty.

12 WENTWORTH SELBORNE CHAMBERS

9 August 2011 PETER HASTINGS QC.

8 September 2011

Mr Michael Silverstone,
Executive Director
Corruption and Crime Commission of Western Australia
PO Box 7667
CLOISTERS SQUARE WA 6850

Dear Mr Silverstone

COMMISSION REPRESENTATIONS: TELEPHONE INTERCEPTIONS AND LEGAL PROFESSIONAL PRIVILEGE

Thank you for your letter dated 6 September 2011 and accompanying submission.

It seems to me that you may have misread my draft rep011. Consequently, and notwithstanding that some, at least, of the matters addressed in this letter fall outside the process contemplated by s 200 of the *Corruption and Crime Commission Act 2003*, it seems to me to be important to address a number of errors and misconceptions in your letter and its enclosure.

In your letter and submissions, you:

(a) express the opinion that the draft report takes a view of the law that contrasts with that of the Commission; and

(b) criticise me for failing to give sufficient attention to the decision of the Full Court in *Carmody v MacKellar*.

In relation to (a), I do not believe that I have expressed any different position to that which might be gleaned from *Carmody*. Rather, I accept that that case represents the law as it presently stands. My draft report does not suggest that the legal position is any different from that stated in *Carmody*. What it says is that, although the *TI Act* permits the interception of TI information subject to legal professional privilege, and the communication of that information to an authorised recipient for any purpose, s 67 of the *TI Act* provides that it can only be communicated to another person for a permitted purpose within the definition in s 5(1) and, neither Mr Hall nor Mr Urquhart having been an authorised recipient, and the communication not having been for a permitted purpose, for the reasons expressed on page 15 of the draft report, the communication was unlawful. The case of *Carmody* has no bearing on this topic.

Secondly, I have expressed the opinion that s 67(1) of the *TI Act* is *permissive* and does not relieve the agency in question of the responsibility of determining, in the light of its governing statute,

whether the use in question is *appropriate*. I have concluded that it was not *appropriate* in this case, for reasons set out on page 19. Once again, *Carmody* has no bearing on that topic.

In relation to (b), I did not go into the detail of *Carmody* (notwithstanding that I have given it close consideration) for two reasons.

The first is that, as I hope the foregoing makes clear. I saw no reason to do so in circumstances in which nothing said in that case bore on the conclusions arrived at by me.

The second is that, when this issue was first discussed by me with Acting Commissioner Archer (and then Acting Commissioner Hullett) much earlier this year, I suggested that *Carmody* might not have been sufficiently considered in the Bar Association submission and I might consequently be obliged to give the whole issue close attention. Ms Archer responded by saying that I should not do that as the Commission would brief a barrister who could do the work for me. I was asked if David Jackson QC would be acceptable for that purpose. I said that he was. I have since been told that other counsel was to be briefed in lieu of Mr Jackson. If, as I suspected might be the case, the opinion actually obtained puts in question part of the Bar Association submission, I am happy to include a copy of it. even though the issue does not bear on any of my own conclusions.

Despite having been promised, and having since asked for, a copy of the opinion obtained, the Commission has yet to provide it to me. I would be grateful if you would provide me with a copy of it. Also, as I understand the position from Acting Commissioner Herron, a second opinion has also been sought by the Commission, this time from overseas counsel. I would appreciate it if that, too, could be made available.

There is another issue raised in your submission that requires clarification. It relates to Mr Urquhart. You suggest that I have somehow treated him as authority for a legal proposition.

I refer, in the draft opinion, to Mr Urquhart's responses to me because they are part of the factual history. Insofar as I refer to his comment concerning the discomfort he would have felt if he had read the summary sent to him, the reference is made in fairness to him, given that it supports his recollection that he did not in fact read the summary. It is not done to "accord him some authority" in that respect.

You also contend that Mr Urquhart has a conflict of interest. I assume that you limit this contention to his signing the letter from the Criminal Lawyers· Association as there is otherwise no question of any conflict of interest. I understand the contention, but I am unsure about its merit. I assume that the Commission does not contend that the view expressed to me (which does not address a legal proposition) gives rise to any conflict as regards his ability to sign the letter from the Criminal Lawyers' Association. Do you suggest that the view expressed in the letter differs from advice given by him to the Commission? If so, please let me know and I will then take the issue up with him. Alternatively, if I have in some way misunderstood the Commission's submission in this regard I would be grateful if you could revert to me in that respect.

You have asked me to include, in the report, the fact that none of the subject calls was transcribed. I am happy to include words to that effect.

You suggest, on page 1 of Appendix 1 to your submission, that the draft report is inaccurate as regards the dealings with 'sensitive' electronic files. What l said in that regard is derived from the Commission's letter to me dated 9 April 2010. In that letter I was told (page 4) that:

> *Once the summary is done, the session is saved and locked as 'produced' and released for viewing by investigators. The investigators have access to ECU terminals on their own floor, to enable them to review the TI summaries and product. They may decide that some content considered 'not relevant' by the IO is, in fact, 'relevant', or whether or not it is the subject of LPP or otherwise properly classified as relevant.*

Do you say that this information was inaccurate or that the Commission's processes are now different? If the latter, please tell me when the change was implemented.

You also suggest, on page 1 of Appendix 1, that my draft report is incorrect in the reference to information initially provided to me by Commissioner Roberts-Smith on page 6 of the draft report. I refer you in that respect to the letter identified in footnote 3 on that page.

You say, on page 2 of Appendix 1, that it was not the Commission's position that it was not thought inappropriate to provide Messrs Hall and Urquhart with information that might have attracted LPP. I had thought that this was necessarily the Commission's position, otherwise why did it provide the information to them? To say that the Commission regarded it as lawful to do so does not answer the proposition.

Next, you say that the draft report is inaccurate concerning the provision of disks or thumb drives. On page 5 of the letter dated 9 April 2010, the Commission informed me that:

> *Once a call is identified as necessary for the investigation or use in exempt proceedings, ECU will make it available to the investigators on disk or on a thumb drive.*

Do you now say that this information is inaccurate?

Further, you say that page 15 of the draft report is inaccurate in saying that "The Commission's contention is that the investigator ... is then said to have made the assessment, required by s 67". Once again, that is drawn from information provided by the Commission. In its letter dated 28 June 2011 (page 2), the Commission told me that:

> *[The Commission officer] as an officer of the Commission was, for a permitted purpose, authorised to communicate to another person, lawfully intercepted information, pursuant to section 67. [The Commission officer] communicated relevant information from the intercepts to Counsel Assisting the Commission pursuant to section 67.*

Do you now say that, notwithstanding that s 67 requires an assessment whether or not a communication to another person is for a permitted purpose, [the Commission officer] did not in fact make that assessment?

You say, on page 3 of Annexure 1, that the draft report is inaccurate in stating that investigators may make an assessment whether or not calls attract LPP. In its letter dated 9 April 2010, the Commission told me that investigators "may decide ... whether or not it [content of TI summaries and product] is the subject of LPP" and, if there is uncertainty, "they may seek legal advice." Was this incorrect?

You say, on the same page that page 18 of the draft report "conflates" information sourced from TI and from other places. I have re-read the relevant passages and cannot sec where it does this. However, I am able to assure you that everything on that page relates to TI information.

The final comment in Appendix 1 is that the report "fails to take into account or otherwise deal with *Carmody v MacKellar*". For the reasons given earlier in this letter that reflects the Commission's misunderstanding of the conclusions expressed in the draft report. Nothing in that case is relevant to my conclusions, which address whether or not the communications were for a permitted purpose and, if so whether they were appropriate.

Given all of the above, it seems to me that I should offer you a further opportunity to make submissions pursuant to s 200 of the Act. If you choose to take advantage of that opportunity, I would appreciate it if you could do so within the next 7 days.

Yours faithfully,

C D STEYTLER QC
PARLIAMENTARY INSPECTOR

CORRUPTION AND CRIME COMMISSION

6 September 2011

Mr Christopher Steytler QC
Parliamentary Inspector of the
Corruption and Crime Commission
Level 12, Westralia Square
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Dear Parliamentary Inspector

COMMISSION REPRESENTATIONS: TELEPHONE INTERCEPTIONS AND LEGAL PROFESIONAL PRIVILEGE

The Commission makes two sets of representations in response to your draft report dated 28 July 2011. The first takes the form of this letter and its enclosure. The second is representations by Acting Commissioner Mark Herron that specifically deal with the draft report's recommendations. This bifurcated approach arises as a result of Acting Commissioner Herron declaring a conflict of interest arising from his previous dealings with Mr Brian Burke.

These Commission representations, including its enclosure, address broad issues raised in the draft report. They do not repeat either the contents of, or the analysis in, the Acting Commissioner's representations. His representations, while focussing on the draft report's recommendations, provide a more detailed analysis of the various authorities that bear on the application of the *Telecommunications (Interception and Access) Act 1979 (Cwlth)* ('the TIA Act') in regards to the Commission's investigations and Legal Professional Privilege. Both sets of representations should be read together.

The Draft Report's Approach

In respect of telecommunications information, lawfully intercepted in accordance with the TIA Act, the draft report appears to take a position of what the law is which contrasts with the Commission's view of the correct legal position. Consequently, the Commission takes issue with the draft report in three ways.

a. The draft report fails to take account of the relevant leading authority in terms of the TIA Act and legal professional privilege. This authority is the Full Court judgment of the Federal Court in respect of *Carmody v MacKellar*. The draft report mentions the case in passing but otherwise does not deal with it at all. The Commission's position is that, absent any overruling of *Carmody v MacKellar*, this authority will continue to guide its approach to dealing with intercepted information in the context of the TIA Act. It has Senior Counsel's advice that supports this approach.

b. The draft report seeks to extend the protections provided under the Corruption and Crime Commission Act 2003 ('the CCC Act') at section 144 beyond their intended application within Part 7 of the CCC Act to more broadly apply legal professional privilege.

c. Last, the draft report fails to appreciate the differences between the Commission's function as primarily an investigative agency whose focus is the discovery of the facts of matters as opposed to traditional law enforcement agencies, such as the police, whose function is the gathering of evidence for the purpose of criminal prosecutions. The principal difference is that typically, in respect of legal professional privilege, the right to claim privilege applies in the context of claims that may arise in the course of a prosecution and the gathering of evidence for prosecutions, where the rights of a person will be determined by a court. It does not arise in the context of the application of the TIA Act, unless the material is to be used for the purposes of a prosecution or, in the context of investigations more broadly and lawfully intercepted information aside, unless the intention is to use the material that may be subject to a claim of privilege to advance the investigation. The Commission's primary purpose is an investigative one, which is to be contrasted with a court, and legal professional privilege is expressly protected in the context of the exercise of its various coercive powers under Part 7 of the CCC Act, at section 144. Otherwise, in respect of Commission investigations, privilege is only preserved within the bounds established by law and the various authorities.

The Commission's Representations

These representations reflect two key concerns.

First, the draft report has established that there has been no misconduct. The Commission contends that there has also been no unlawful or improper conduct by the Commission. It has complied with the law and the relevant authorities. This conclusion should be clearly stated in the final report.

Secondly, given the above analysis of the draft report's approach, the Commission's position is that its approach to the TIA Act and privilege should be, and is, guided by the relevant case law. However, that approach need not be conditioned solely by a strict compliance with the minimum standard required by them. On 29 June 2010 the Commission, in considering the Parliamentary Inspector's concerns, adopted some interim procedures for dealing with potential legal professional privilege claims connected with the application of the TIA Act that provided enhanced safeguards for intercepted information. While this interim policy differs from the detail of the draft report's recommendations it reflects a similar approach to them. The net effect has been the lock down of all material that potentially could attract claims of privilege since mid 2010.

In considering the draft report's recommendations, the Acting Commissioner has adopted an approach in his representations which qualify some of the recommendations in respect of the TIA Act and privilege. Subject to settling this matter with the Parliamentary Inspector, the Commission

will adjust its current interim processes to reflect those provided for in its representations about the draft report.

The Commission requests that should you decide to table a final version of the draft report that you include both these and Acting Commissioner Herron's representations.

Yours faithfully

Mike Silverstone
EXECUTIVE DIRECTOR

Encl.

CORRUPTION AND CRIME COMMISSION

COMMISSION'S REPRESENTATIONS IN RESPONSE TO THE PARLIAMENTARY INSPECTOR'S DRAFT REPORT

ALLEGATIONS OF TELEPHONE INTERCEPTION- MR BRIAN BURKE

The Commission welcomes this opportunity to make representations concerning the subject draft report. In doing so, to avoid unnecessary repetition, it will not repeat the matters dealt with by Acting Commissioner Herron in his representations concerning the draft report's recommendations.

These representations address six issues:

a. delays in responding to the Parliamentary Inspector's inquiries;

b. the insufficient detail in Part Ill- Background of the draft report;

c. Mr Urquhart's conflict of interest;

d. the draft report's dealing with 'other problems';

e. WABA's representations; and

f. Appendix One details comments on particular matters of fact raised by the draft report.

Delays in Responses

Part IV of the draft report raises concerns with the delays experienced in responding to the Parliamentary Inspector's various inquiries. The Commission acknowledges and regrets these. As noted in previous correspondence, these delays have arisen from a variety of causes mostly attached to staff turbulence, the need to address higher priority matters and the fact that at various times Commissioner Roberts-Smith and Acting Commissioners Archer, Hullett and Herron have each had involvement in dealing with these matters. Ms Hullett's recent resignation and Mr Herron's conflict of interest have further complicated the Commission's capacity to respond.

Another issue that has made dealing with this matter more complex is the Parliamentary Inspector's apparent decision to give little attention to the Full Court of the Federal Court's judgement in *Carmody v MacKellar* (1997) 76 FCR 115 at 144. The Commission's position has consistently been that the relevant authority in this matter is *Carmody v MacKellar*; recent Senior Counsel's advice has reinforced this. The current draft report follows this trend by only mentioning the case in passing appearing to take a position that contrasts with the Commission's view of the current legal position.

Part III - Background

In the part headed "Background" the Parliamentary Inspector provides a very brief summation of the background to the Inquiry.

The Commission submits that fairness requires that the draft report provide a more complete account of events in the Magistrates Court.

a. In an article on 8 March 2010 an article on AAP Newswire contained quotes from Mr Burke speaking outside court:

> *…he repeated his call for legislation to limit the CCC's capability to tap lawyer-client phone calls. "I remain absolutely appalled at the evidence that was led that showed that the CCC actually listened to my senior counsel's advice to me two or three days before the hearing" he said.*
>
> *When the matter was raised by Burke's lawyer Grant Donaldson in his summing up on Tuesday, Magistrate Richard Bayley asked him how the intercepted conversations related to the court hearing Mr Burke: "The magistrate may have said what's it got to do with him but this is something that's got to do with the whole state, and to every citizen, particularly you people (the media)."*

b. It was only Commission monitors in the Electronic Collection Unit who listened to these calls. These monitors necessarily listen to all calls as part of the process of executing a telephone interception warrant in order to determine how intercepted telephone calls should be dealt with. Summaries of two calls were prepared and distributed to the investigations team.

c. This action was neither unlawful nor improper. It accorded with the relevant legislation and authorities.

d. Mr Burke and Mr Donaldson first became aware of the existence of the interception of calls when they received the disclosure brief in relation to Mr Burke's prosecution for false testimony.

e. No complaint or issue was raised by either party prior to the trial.

f. During cross-examination, Mr Donaldson questioned a Commission officer who had not dealt with telephone interception material. This Commission officer stated another investigator 'may have given transcripts of these calls to counsel assisting'.

g. As is evident from the material that the Commission has provided to the Parliamentary Inspector in previous correspondence, transcripts were never produced in relation to these calls.

h. Mr Donaldson asserted during the trial on 8 March 2010:

> *Next your Honour, as emerged in this trial, leading up to the CCC examination of Mr Burke on 6 November the CCC were, in fact, bugging and listening to Mr Burke's conversations with me. Not only were they - were investigators and lawyers employed by the CCC and counsel assisting the CCC in that examination, listening to those telephone calls, according to Mr Ingham, regard was being had as to the substance of those telephone calls when framing questions that would be asked of Mr Burke…*

i. The comments made by Mr Donaldson in court were factually incorrect.

j. Only summaries by a monitor of two of the calls were provided to Counsels Assisting the Commission. They have since confirmed that they did not, or could not recollect reading the summaries, and that the summaries did not form the basis for any questioning during examinations.

k. The officer who was cross examined by Mr Donaldson correctly pointed out that another officer of the Commission, who was to be called later that day, could provide the information.

I. Mr Donaldson stood this later witness down saying he no longer required him.

m. As a result of this witness not being called the actual extent of the Commission's use of the subject TI and potentially privileged calls was not revealed. The record should be corrected in this regard.

The Draft Report's Dealing with 'Other Problems'

At page 20 the draft report asserts:

> *There appears to me to be other problems concerning the processes adopted by the Commission in respect of TI information. However, because these are the subject of ongoing enquiries, they will not be addressed in this report.*

This is an imputation without any supporting material. It is clearly a matter adverse to the Commission however, absent any further information the Commission is unable to otherwise deal with it. It should be deleted.

Schedule 1 - Submission by WABA

The Commission notes that parts of WABA's submission, at pages 2 - 4, are lifted directly from the Commission's submission to the Archer Review dated 10 August 2007.

At page 5, WABA's submission asserts:

> *Nevertheless, the observations in* Carmody v Mackellar *should not be overstated, nor should the case be relied upon for practices that are clearly not supported by it. That decision is not authority for any proposition that the Commission has the power or discretion to override the protection given by the legal professional privilege. It is clear*

> *that it does not have any such power or discretion. In particular, it is important to note that the decision in* Carmody v Mackellar *concerned the validity and the issuance of the warrants, and not the particular use made of the communications otherwise the subject of legal professional privilege.*

The Commission's view is that these observations are incorrect. As Acting Commissioner Herron's representations note in citing *Carmody v MacKellar* at 144:

> *This is not to understate the use that can be made of privileged communications that have been intercepted pursuant to a TI warrant. Information obtained in this manner can be communicated, used or recorded by an officer of the AFP for any 'permitted purpose': see TI Act, section 67 and the definition of 'permitted purpose' in section 5(1). In addition, the information may be passed on to other officials and authorities in accordance with ss68 and 69 of the TI Act.*

This points to deficiencies in WABA's representation of such seriousness they should be at least remarked upon, if not the representations discounted completely.

Appendix One: Particular Matters of Fact Raised by the Draft Report

Appendix One provides comments in regards to particular matters raised by the draft report.

Mike Silverstone
EXECUTIVE DIRECTOR

Appendix One

CORRUPTION AND CRIME COMMISSION

APPENDIX ONE
COMMENTS REGARDING PARLIAMENTARY INSPECTOR'S DRAFT REPORT RE: ALLEGATIONS OF TELEPHONE INTERCEPTIONS - MR BRIAN BURKE

Page No.	Para. No.	Point of reference	CCC Comments
6	2	States that monitors would mark the electronic file 'sensitive' and that investigators could open and read the file marked in that way	This is not correct. A call is locked as 'sensitive' and investigators could listen to a call rather than read the file. It has not been established that any of the investigators listened to the particular calls in question.
6	2	The draft report asserts that transcripts of privileged information were typed if requested by investigators.	The draft report should reflect the fact that, in this case, none of the calls relevant to this complaint were transcribed. Transcripts of calls are only requested in respect to material that would be used for the purposes of an examination, a prosecution or a Parliamentary Report on an investigation. The Commission's letter dated 9 April 2010, at page 4, para 1(b) asserted that '*There were no transcriptions produced in relation to any of the above calls*'
	7	'*Commissioner Roberts-Smith initially informed me that the investigator had emailed the relevant summaries to Messrs Hall and Urquhart because of a belief that they, as Counsel Assisting, were best placed to determine whether or not the summarised discussions attracted LPP. However, the*	This doesn't correctly portray the situation, see the Commission's letter of 20 July 2010, at page 7.

Page No.	Para. No.	Point of reference	CCC Comments
		Commissioner later corrected this and informed me that the investigator emailed the relevant summaries to Messrs Hall and Urquhart because they formed part of the investigation team.'	
6	8	*'It was not thought inappropriate to provide Messrs Hall and Urquhart with information that might have attracted LPP'*	This was not the Commission's position. The Commission's view was, and remains that the provision of summaries in this manner was lawfully permitted by the provisions of the TI Act and the authority of *Carmody v MacKellar*. External senior counsel's advice has recently confirmed the validity of this position.
10	4	Disk or thumb drive provision	This information is factually incorrect - ECU did not provide disks or thumb drives of these calls. Requests are made by investigators for calls to be transcribed if they were going to use the material in an examination or for a prosecution brief The Commission has a master list of all calls that were transcribed for Operation Tiberias – which shows that no requests were ever made for a transcription of these calls.
10	5	*'These procedures remain in place'*	This is not correct. Acting Commissioner Herron's response dated 5 September outlines the Commission's procedures. These alternate interim arrangements have been in place since 29 June 2010.

15	2	*'The Commission's contention is that the investigator…is then said to have made the assessment'*	This is not the Commission's position. The Commission investigator received the summaries and passed them on to Counsel Assisting in their role as part of the Commission's investigation. The investigator made no assessment. The Commission's earlier correspondence has previously addressed this. This approach accords with the law and relevant authorities.
18	5	The draft report states that no adequate assessment could be made by ECU monitors regarding the attraction of LPP intercepted calls. The draft report states that investigators may make an assessment whether or not calls attract LPP. The draft report concludes the paragraph by stating that it is inappropriate that investigators have access to information that is subject to LPP.	Most monitors are competent at identifying calls between lawyers and their clients; they use this knowledge to lock sensitive calls so that a determination can be made by others. Commission Investigators do not, and did not, determine whether matters are subject to privilege. This matter originally involved intercepted telecommunications information only, but the draft report does not delineate between information sourced from TI and from other places. This apparent conflation tends to confuse matters. The Commission submits that be misleading. The report fails to take into account or otherwise deal with *Carmody v MacKellar* as the relevant authority.

SUBMISSIONS IN RESPONSE TO THE RECOMMENDATIONS CONTAINED WITHIN THE PARLIAMENTARY INSPECTOR'S DRAFT REPORT

The Commission provides the following response to the specific recommendations made by the Parliamentary Inspector in the draft report on the handling of telecommunications interception and potentially privileged information.

The recommendations contained within the draft report go to two separate types of information. The first goes to information derived from intercepted calls which may attract legal professional privilege ('LPP'). The second type goes to documents giving rise to LPP "in any other context".

Telecommunications Interception and LPP

Background

The recommendation in the draft report raises an issue as to the way in which use may be made of material obtained from telecommunication interception material that may potentially be privileged.

In relation to the handling of potentially privileged material that is gathered through telecommunications interception the Commission outlines briefly the legislative history and Parliamentary debate that is relevant to the current considerations.

The Full Court of the Federal Court in *Carmody v Mackellar* (1997) 76 FCR 115 at 139 referred to relevant Parliamentary debates, noting that the Federal Parliament had specifically rejected a recommendation to provide protection to LPP in the TI&A Act on the basis that sufficient protection was already provided by the laws of evidence.

In March 2006 the provisions of the *Telecommunications Interception Amendment Bill 2006* were referred to the Legal and Constitutional Committee for report.

At recommendation 9 (paragraph 3.73) the Committee recommended that the Bill be amended to require the issuers of a stored communications warrant to consider whether the stored communications are likely to include communications the subject of LPP and whether any conditions may need to be implemented to prevent the disclosure of such communications.

The Committee specifically considered dissemination and subsequent use of TI material in relation to legal and other professional privilege (such as doctor/client privilege). The Committee highlighted the problem, specifically in relation to B-party warrants, of the potential for collecting a great deal of information that may be incidental to, or not even associated with the investigation for which the warrant was issued.

The Committee stated (at 4.63 of the Report) that the subsequent use of such material does not appear to be controlled.

In response to a question from the Committee a representative from the Attorney General's Department confirmed that use and derivative use would be permitted of material obtained under a warrant and it would be a matter for the courts to determine any claim as to privilege of material when the material was used, for example, in a prosecution.

Prior to this, in November 1986, the TI Act as it then was, was reviewed by a Joint Select Committee. Specifically at this time the Committee proposed that legal professional opinion should be protected.[1]

The Attorney-General's second reading speech included a schedule specifying the Committee's recommendations, with the Government's response.

The Government at the time did not accept the recommendation in relation to LPP as *'…legal professional privilege is already sufficiently protected under the laws of evidence.'*

Recommendation 1.

The following recommendation is made in respect to dealing with telecommunications interception material:

> *1. All information derived from intercepted calls between lawyer and client should be made available by the ECU monitors to a Commission lawyer who is an authorised recipient before any Commission investigator is afforded access to it. The lawyer should then assess whether:*
>
> *(a) the information is subject to LPP;*
>
> *(b) the information is relevant to a Commission investigation; and*
>
> *(c) if yes to (a) and (b), whether use by the Commission is permissible and, if so, appropriate, having regard for the relevance of the information to the investigation in question and taking into account the provisions of s144 of the CCC Act.*

As outlined previously in correspondence with the Parliamentary Inspector, the Commission's view is that, pursuant to the provisions of the *Telecommunications (Interception & Access) Act* (1979) ('TI &A Act') it is permissible to properly and lawfully handle TI material even though the material may be potentially privileged.

This view is reinforced by the decision in *Carmody v Mackellar* (1997) 76 FCR 115 in which in a joint judgment the Full Court of the Federal Court at 144 stated:

> *Section 78 provides that:*

[1] Report on the Joint Select Committee on Telecommunications Interception, Parliamentary Paper No 306/1986

> *Nothing in [Pt VII of the TI Act] renders information …admissible in evidence in a proceeding to a greater extent than it would have been admissible in evidence in that proceeding if {Pt VII} had not been enacted.*
>
> *The effect of this provision is that legal professional privilege is not destroyed if a privileged communication is intercepted pursuant to a warrant issued under the TIA Act. In particular the privilege survives so as to render the intercepted communications inadmissible in subsequent proceedings.*
>
> *This is not to understate the use that can be made of privileged communications that have been intercepted pursuant to a TI warrant. Information obtained in this manner can be communicated, used or recorded by an officer of the AFP for any 'permitted purpose': see TI Act section 67 and definition of 'permitted purpose' in section 5(1). In addition, the information may be passed on to other officials and authorities in accordance with ss68 and 69 of the TI Act. Nonetheless s 78 makes it clear that the legislature adverted to, and embraced, the possibility that communications not admissible in evidence in subsequent proceedings might be intercepted pursuant to a TI warrant. The reflects the specific decision of government made at the time the 1987 Bill was introduced, that legal professional privilege should not be protected, otherwise than by the law of evidence.*

As the Commonwealth DPP Manual on the Tl & A Act states:

Investigative agencies will generally try to conduct monitoring operations in a way that minimises the risk of intercepting privileged communications and will generally ensure that if a privileged communication is monitored the material obtained will be treated with proper care.

Legal advice received from external Senior Counsel (NSW) confirms the Commission's view that information may be passed to Commission staff involved in an investigation for a 'permitted purpose' connected with a Commission investigation and that *Carmody v Mackellar* is authority for the proposition that the TI&A Act, by necessary implication, abrogates legal professional privilege on the basis that the Act would be unworkable if it were to be construed as not authorising the interception of communications subject to LPP and that '*…the principle does not seem to have been called into question since.'*

Senior Counsel further advised that whilst the Court did not specifically rule that use of intercepted material after initial interception was similarly unrestricted by issues of LPP, it is *'…clear that the Court contemplated that because s 78 of the TI Act provides for the possibility that communications would not be admissible in evidence that might be intercepted pursuant to a TI warrant, the intention was that legal professional privilege should not be protected, otherwise than by the law of evidence, that is, only at the point where the evidence is tendered in court proceedings. The inference from that proposition is that intermediate steps involving the use of the information for a permitted purpose, would be unaffected by legal professional privilege. I am unaware of any authority which casts doubt upon that position.'*

'Relevant' to the investigation

The Commission is concerned that a determination as to 'relevance' of the material to the investigation during the initial investigative stages imports an unnecessary test not required by the legislation.

Setting the threshold for use of TI information by reference to the evidential test of 'relevance' is much higher than that which is required.

When an interception agency applies for a telecommunications warrant pursuant to ss.46 (service warrant), or 46A (named person warrant), of the TI&A Act it is necessary for the agency to satisfy the eligible Judge or nominated AA T member that the information that would likely to be obtained by intercepting under a warrant communications made to or from the service would be likely to assist in connection with the investigation by the agency of a serious offence, or serious offence in which the particular person is involved: s.46(1)(d), s.46A(1)(d).

If a warrant is granted, the information may be communicated within the agency for a permitted purpose, being a purpose connected with an investigation under the CCC Act into whether misconduct has or may have occurred, is or may be occurring, is or may be about to occur or is likely to occur, or a report on such an investigation.

The Federal Court in *Day v Commissioner, Australian Federal Police* (2000) 116 A Crim R 453 at 455 referred to the ordinary meaning of the term "investigation" as 'the act or process of searching or inquiring in order to ascertain certain facts.'

The Federal Court in *Samsonidis v Commissioner, Australian Federal Police* (2007) FCAFC 159 at [16] considered the meaning of 'permitted purpose' in relation to telecommunications interception material being 'connected with' an investigation in the following terms:

> *An investigation… is a process, normally carried out over a period of time, which has the objective of discovering, collecting, organising and analysing (against specific criteria) information about facts and circumstances, or the relationship between them not previously known or sufficiently understood. Although there is a danger in viewing the intended meaning of a statutory term through the prism of a particular controversy, we consider that the purpose of some communication or other action would have a connection with such an investigation normally, and certainly most obviously, if the communication or action was intended, or calculated, to affect or influence the investigation considered as such a process.*

In *MF1 & Ors v National Crime Authority* (1991) 105 ALR 1 Jenkinson J said at 16:

> *The word "relevance" suggests to a lawyer that connection between evidence and an issue of fact for determination by a court which the law of evidence requires, and for that reason may be thought an inappropriate term by which to signify the required connection between documents or testimony and an investigative process, which for much of its course is devoid of anything resembling a curial issue of fact.*

> *As a precept of the law of evidence "relevance" connotes a connection between the evidence and a fact in issue for determination by a court. It is largely an inappropriate term by which to signify the required connection between evidence and an investigative process, the purpose of which is not to determine issues of fact, but to discover them.*

Consideration of s.144

It is proposed that all information derived from intercepted calls between lawyer and client be assessed by a Commission lawyer, who should take into account s.144 of the CCC Act.

While the A/Director Operations and the Commission's legal staff do take into account the relevance of s.144 of the CCC Act when considering any possible privileged material, it is the Commission's view that this consideration is limited at the earlier information gathering stages of an investigation as it relates to telephone interception.

Section 144 clearly applies to non public officers who may make a claim for privilege if required to answer questions, give evidence or produce records, things or information. That is, when the Commission uses its powers of compulsion in Part 7 of the CCC Act in which s.144 is sound. At the point of interception when TI material is gathered and the use of it is being considered s.144 is not normally engaged and it is unnecessary to address the s.144 requirements. It is only necessary to address s.144 when the Commission considers use of its powers of compulsion, such as requiring a person to answer questions or give evidence.

Whilst the Commission is entitled to utilise interception information in public or private examinations, as they are 'exempt proceedings' under the TI&A Act, the Commission accepts if it were ever contemplated that potentially privileged material be put to a witness in an examination, the Commission would clearly be mindful of the requirements of s.144 and s. 78 of the TI&A Act.

As highlighted in the advice by external Senior Counsel, s.144 indicates a legislative intent that LPP is not abrogated in relation to witnesses giving evidence in the course of an examination, and as such a witness would not be obliged to answer questions with regard to recorded privileged communications. In Counsel's view it follows that the effect of those provisions is not to limit the internal use the Commission can otherwise make of the intercepted communications in order to facilitate the investigation and that that position is regulated by the TI&A Act.

Importantly, as stated by Counsel:

> *It should not be overlooked that it is not always clear that legal professional privilege is applicable, even though communications may be between a person and his or her lawyer. As the Federal Court pointed out in* Carmody v Mackellar*, one of the reasons for concluding that telephone interception warrants were not limited by legal professional privilege was that it will often be impossible to ascertain with any degree of assurance whether a particular conversation is or is not privileged while it is taking place, because even a conversation which bears the appearance of a privileged communication may not be privileged.*

The same position may exist while a matter is still being investigated, and it may not be until the investigation is complete that it becomes clear whether the communications was privileged.

Currently, as soon as a Commission monitor or senior monitor identifies a call between a lawyer and client they immediately lock the call down and notify the A/Director Operations of the call. A summary is provided to the A/Director Operations for assessment and determination. The A/Director Operations then assesses the call (at times in consultation with Commission lawyers). Typically, the A/Director Operations acts out of an abundance of caution and has left the call locked down whether or not it attracts LPP. However, the occasion may arise when a call which does attract LPP and has operational value might be released to advance the purposes of the operation, i.e. it "would be likely to assist in connection with the investigation". Although this situation has never occurred, it is something which the Commission envisages could occur.

It is necessary for the A/Director Operations to be consulted as he will usually have the investigative experience and a better understanding of the circumstances of the investigation and whether the material is likely to assist TI&A Act.

The Commission believes that it's current procedure whereby a telephone call between lawyer and client is locked down and the relevant monitor contacts the A/Director Operations immediately, is appropriate, and ensures the material is handled with proper care.

The Commission is of the view that if the information is relevant in the sense explained above, i.e. it "would be likely to assist in connection with the investigation" use of the information by the Commission is permissible at that early stage of an investigation and it is not then necessary to take into account s.144.

If the answer to recommendation 1 (b) is yes, in the sense explained above, it follows use of the information is by law permissible and appropriate. It is not necessary to give consideration to or address the provisions of s.144 at the point of time when deciding whether to use the information. It is only necessary to consider s.144 at the point in time when the Commission uses its powers of compulsion, which normally occurs at a later time after a decision is made whether to use the TI material. Therefore, the need for the procedure set out in 1 (c) falls away.

Notwithstanding the Commission believes its current procedures are appropriate and provide adequate safeguards in respect of TI material subject to a potential claim of LPP, it accepts the recommendation insofar as it refers to the ECU monitors providing TI material to a Commission lawyer to make the necessary assessment in the first instance rather than the Director Operations. The Commission will therefore adjust its procedures so that a lawyer from the Legal Services Directorate, (who is separate from the Investigations Unit), will provide the initial advice as to whether the call may be privileged. If the lawyer forms the view the TI material contains privileged material he or she will consult with the A/Director Operations as to the communication of the contents of the call to other Commission staff such as investigators on the basis the information is likely to assist in connection with the investigation.

Recommendation 2.

It is recommended that if a Commission lawyer assesses information from intercepted calls which may be subject to LPP, but not relevant to an investigation or, if relevant, it is not appropriate for the information to be used having regard to s.144, the information will not be released to a Commission investigator.

In respect to LPP the Commission already has in place procedures[2] to govern the handling of potential LPP material that it believes are sufficient for the lawful handling of the material, and which are not dissimilar to the recommendation 1.

Also, as explained above, the Commission is of the view it is unnecessary to consider s.144 at this early stage of an investigation, when not engaging powers of compulsion, and therefore there is no need for the procedure set out in paragraph 1 (c).

However, as previously explained, the occasion may arise when a call, which does attract LPP but which has operational value, might be released to advance the purposes of the investigation, i.e. it "would be likely to assist in connection with the investigation" for the purposes of s.46.

The Commission:

(1) accepts a lawyer is best placed to assess whether TI material may be subject to a claim for LPP, but in assessing the extent to which the material is likely to assist in connection with the investigation for the purposes of s.46 and s.46A the Director Operations will usually be best placed to make that assessment;

(2) accepts that if the information is not relevant to an investigation in the sense it will not be likely to assist in connection with the investigation, the lawyer should ensure that access to the information is not afforded to any investigator; and

(3) considers an occasion may arise that a call subject to LPP may be likely to assist in connection with an investigation and therefore in these circumstances use of the information by a Commission investigator is permissible.

Recommendation 3

A process where claims of privilege arise in 'any other context' (not including telecommunications interception) is recommended. The Commission notes that the Parliamentary Inspector has referred to 'telephone calls' only in respect to Recommendations 1 and 2, and all other material in Recommendation 3. However all telecommunications interception material is treated in the same way as telephone calls. Telecommunication interception material includes not only telephone calls, but (if applicable pursuant to the warrant) all internet communications, including emails.

[2] Process last amended 29 June 2010.

In relation to telecommunications interception material, the Commission has not received correspondence or communicated with the Parliamentary Inspector as to procedures for handling privileged material that is not telecommunications interception material specifically arising out of the complaint the subject of the draft report.

Documents and LPP

It is recommended in the draft report that where claims of LPP arise in any other context:

> *(a) A person or body claiming LPP (claimant), where the existence of that right is denied by the Commission, should have the right to bring that claim in the Supreme Court.*

Section 144(2) implicitly abrogates LPP for all public authorities and public officers with respect to communications made in that capacity.

As outlined in the Commission's Bench Book and in the Hearing Practice Directions on the Commission's website, the Commission's position is that based on the authority of *AWB Ltd v Cole* (2006) FCA 571 it is clear that a decision made by the Commission about a claim of LPP is binding only in respect to the processes and procedures of the Commission. It is not a decision which determines as a matter of law the claim for LPP. (A copy of the relevant extract from the Hearing Practice Directions is attached as Appendix A).

Thus a party who wished to remove from the presiding Commissioner the decision about the claim of LPP may, at any time, pursue the claim judicially. The Commission would never deny a person or body the right to claim LPP and accepts, as it has always accepted, a person has the right to bring a claim for LPP in the Supreme Court.

It is the Commission's view that the procedures as set out in its Hearing Practice Directions are similar in content to the Parliamentary Inspector's recommendations, except that generally the Commissioner, rather than an Acting Commissioner, currently assesses and decides whether the documents are protected by LPP.

> *(b) If the claimant claims LPP but does not wish to pursue the claim judicially, and the claim is one in respect of the contents of a document or documents that cannot adequately be determined without inspecting the documents, then unless the claimant agrees otherwise, the claim must be determined by an Acting Commissioner having no connection with the investigation in the course of which the claim arises.*

The procedure the Commission currently follows is if a claim for LPP arises in such circumstances the Commission seals the documents and puts them in locked storage and writes to the claimant seeking express authorisation to inspect the documents for the purpose of deciding the claim.

The Commission, by the Commissioner, will only inspect the documents if authorisation is granted.

The Commission will then make procedural orders that the claimant file written submissions with the Commission setting out the nature of the claim with reference to relevant authority, and file evidentiary materials by way of statutory declaration. If the evidentiary material is sufficient to demonstrate the claim for LPP without further examination the Commissioner may uphold the claim 'on the papers', or alternatively convene a private hearing to enable a determination to be made about the claim.

Since the Commission's inception only one claim for LPP has been dealt with by way of a private examination. This private examination was conducted by an Acting Commissioner who dealt with a claim for LPP that was made in respect to documents provided in response to a s.95 notice.

Implicit in the recommendation is a concern that the Commissioner has to examine material to determine LPP when he or she will be the ultimate decision maker on an opinion of misconduct, and the material, if the claim for LPP is upheld, will nevertheless influence the opinion. This concern must be balanced against possible delays in appointing and having available an Acting Commissioner to determine one issue in a particular investigation.

In practice it may be difficult for an Acting Commissioner with no connection to the investigation to decide the claim. As the Commission currently has only one Acting Commissioner who is regularly briefed through investigative updates, a complete lack of 'connection' with the investigation would be difficult to establish. If an Acting Commissioner who did not have any connection with the investigation is available the Commission agrees it is appropriate for that Acting Commissioner to inspect the documents and determine the claim for LPP.

However, it is also the Commission's view that the Commissioner should be able to disregard any privileged material he or she has viewed in arriving at an ultimate opinion and making recommendations for the purposes of a report pursuant to sections 80 and 84. It is not uncommon for a trial judge in civil matters to make rulings on admissibility of evidence, having heard or read the evidence, where the judge makes binding determinations on the rights of parties but disregarding evidence ruled inadmissible.

The Commission does not make any binding determination of rights. The claimant of LPP retains the right to go to the Supreme Court if there is a disagreement as to determination of the claim. If the Commissioner considers he or she is not in a position to compartmentalise privileged material it will be appropriate, when it is logistically possible, for the matter to go an Acting Commissioner, having no connection with the investigation, to be determined.

> *(c) Where the Commission has in its possession a document or documents that might give rise to a claim for LPP, the Commission must, before making use of that document write to the prospective claimant asking whether LPP is asserted and, if so, seeking express authorisation for an Acting Commissioner to inspect the documents for the purpose of deciding the claim.*

The Commission comes to possess documents through a number of channels including:

- through covert interception;
- in response to notices pursuant to sections 94 and 95 of the CCC Act;
- from agencies or third parties when notifications of allegations of misconduct against public officers are made; voluntarily from complainants or witnesses;
- through entry authorisations pursuant to s.1 00;
- through search warrants conducted pursuant to s.1 01 or other forms of warrants (such as MDA or CIA); and
- from other law enforcement agencies via intelligence sharing.

Importantly, when the production of documents is compelled by notice or individuals are summonsed to attend an examination at the Commission their rights to make a claim for LPP are clearly outlined to them in the summons or notice they receive. Copies of the relevant parts of these notices are attached to these submissions and marked as Appendix B. In the Commission's view it is required to provide a person with a reasonable opportunity to make a claim for LPP. The Commission believes that by providing the notices in Appendix B it provides that reasonable opportunity to make the claim. Therefore because it has provided reasonable opportunity to make the claim it is unnecessary to provide a further opportunity to make the claim for LPP by writing to the person. When a person provides documents in response to a s.95 notice that person will sort through his or her documents to determine what documents must be provided and during that process is able to determine, having being given an opportunity to make the claim, whether he or she wishes to make the claim. The Commission accepts that if a person has not been provided with an opportunity to make a claim for LPP the Commission should write to the person in the terms recommended before seeking to use the documents.

The process which is recommended, and which is consistent with the Commission's approach, is not dissimilar to s.151 (2)(b) of the *Criminal Investigation Act* (2006) in that if a record is seized under a Criminal Investigation Act warrant, or an order to produce a business record issued and the record is produced, the officer seizing the record, or to whom it is produced, reasonably suspects that all of some of the information is privileged, it must be dealt with by securing the record and making an application to the court to determine the claim.

The seizures and productions that are the subject of this provision are for evidentiary value, or with a view to prosecution of an offence. This is markedly different from the information gathering stage of an investigation.

It is the Commission's current practice that if officers come across a document they believe may be privileged and they wish to make use of that document they contact a Commission lawyer as to the appropriateness in further dealing with· the material and Commission lawyers provide advice

as to whether the material is privileged. This process is always followed prior to the utilisation of material by the production of information at hearings, in contemplation of a prosecution or in the evidential collection of material for a criminal or disclosure brief.

> *(d) Once the Commission writes to a prospective claimant and that authorisation is not provided the Commission is not to make use of any document before affording the claimant a reasonable opportunity to assert the claim in the Supreme Court.*

It is the Commission's position that, as outlined in the Practice Directions, a party who wishes to remove a claim of LPP from the Commission may at any time pursue the claim judicially and therefore accepts this recommendation in respect to an overt investigation.

> *(e) If authorisation is provided by a claimant, once they have been contacted by the Commission, an Acting Commissioner must conduct a private examination in order to make a decision in respect to the claim.*

The current procedure that is followed within the Commission is that the Commission may uphold the claim 'on the papers' or that it may convene a private hearing to make a decision about the claim.

As a hearing would be convened to allow a party the opportunity to make good a claim for LPP it is undoubted that the claimant must be allowed to make submissions and call evidence.

Following *NCA v S* (1991) 100 ALR 151 at 159, the procedure to be adopted by a Commission of Inquiry in response to a claim for LPP is akin to a voir dire examination where the person asserting the claim can make submissions which the tribunal can test by cross-examination or other evidence. This approach is reflected in the Commission's Hearing Practice Directions.

Recommendation (f)

This recommendation outlines procedural orders similar to the procedures already instituted by the Commission, as explained above and accordingly the Commission agrees with and accepts the recommendation.

In relation to the serving of search warrants generally the Commission proposes to provide a similar notice to that which is provided when serving, for example, s.95 notices.

Summary

In summary, the Commission:

1. with regard to recommendations 1 and 2 accepts a Commission lawyer should in the first instance assess whether TI material is subject to LPP;

2. believes it is necessary for the Director of Operations (currently the A/Director Operations), who will have the investigative experience and who will be most familiar

with the investigation and therefore best able to judge whether the intercepted material is "likely to assist in connection with the investigation", to be involved in the process by being able to be consulted by the Commission lawyer in assessing whether use of the information by the Commission is permissible because the information is likely to assist in connection with the investigation rather than by reference to whether the information is "relevant" to the investigation;

3. is of the view it is unnecessary to give consideration to or address the provision of s.144 at the point of time of interception and when deciding whether to use the information. It is only necessary to consider s.144 at the point of time when the Commission uses its powers of compulsion, which normally occurs at a later time after a decision is made whether to use the TI material. Therefore the need for the procedure set out in 1 (c) falls away;

4. accepts that, if the Tl information is not likely to assist in connection with the investigation the lawyer should ensure access is not afforded to an investigator;

5. accepts recommendation 3, which again generally accords with the Commission's current practice, except that the Commission believes there is no impediment to the Commissioner determining a claim for LPP;

6. agrees a person must be given a reasonable opportunity to assert a claim for LPP and that if that opportunity has not been provided, the Commission should write to the person in the terms recommended; and

7. is of the view that if a person has already been given a reasonable opportunity to make a claim for LPP, e.g. upon service of a s.95 notice, there is no need to provide the person with a further opportunity to make a claim for LPP by writing to that person asking whether they wish to assert a claim for LPP.

Mark Herron
ACTING COMMISSIONER

APPENDIX A

DEALING WITH CLAIMS FOR PRIVILEGE

"Privilege" is a term describing a number of rules excluding evidence that would be adverse to a fundamental principle or relationship if it were disclosed. Examples include client legal privilege (CLP), privilege against self-incrimination, marital privilege, parliamentary privilege and public interest immunity.

Client legal privilege

The High Court's decision in *Daniels Corporation International Pty Ltd v Australian Competition & Consumer Commission* (2002) 192 ALR 561 indicated that CLP "…is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining "'legal advice or the provision of legal service, including representation in legal proceedings".

CLP is thus not merely a rule of evidence and, as such, in .the absence of contrary intention may be called in aid to resist giving information or producing documents in investigatory procedures. The importance of CLP is supported by the well-settled principle that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.

Section 144 of the Act expressly preserves CLP. , Section 144 is, however, subject to subsection 144(2) which provides that the privilege does not apply to a public authority or public officer "…in that capacity".

The decision of the Federal Court in *AWB Ltd v Cole* [2006] FCA 571 reaffirmed the judicial position that CLP is a substantive rule of law and not a rule of evidence. The privilege operates to protect a communication between a client and lawyer, whether by documentation or otherwise, from being revealed if such communication was made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings. The Court confirmed that for CLP to be abrogated by a legislative provision it must be done either expressly or by implication but the parliamentary intention to so abrogate must be unmistakably clear.

CLP may be claimed by a person who satisfies the legal test confirmed in *AWB v Cole* in respect to documents sought by the Commission for its investigative and examination purposes. Subsection 144(1) of the CCC Act expressly preserves CLP for any person or body that is not a public authority or public officer but subsection 144(2) implicitly abrogates CLP for all public authorities and public officers in that capacity.

Therefore if a person or body claims CLP over a communication in the possession of or required to be produced to the Commission the procedure that the Commission proposes to adopt is set out below. NB: *AWB v Cole* makes it clear that the decision made by the Commissioner about the claim of CLP is binding only in respect to the processes and procedures within the Commission. It is not a decision which determines as a matter of law the claim for CLP. Thus a party who wishes to remove from the presiding Commissioner the decision about the claim of CLP may, at any point, pursue this claim judicially:

A If the person or body claiming CLP does not wish to pursue their claim judicially, the Commission should write to the claimant seeking express authorisation to inspect the documents for the purpose of deciding the claim;

B On obtaining such authorisation, the Commission will conduct a private examination to enable it to make a decision about the claim;

C The Commission will make procedural orders that the claimant file written submissions with the Commission. Such submissions will set out the nature of the claim and refer to relevant authorities. The Commission will also order that the claimant file evidentiary materials by way of statutory declarations in support of the claim at least 4 working days before the CLP private examination. If such evidentiary material is in writing and is sufficient to demonstrate the privilege without further examination, the Commission may uphold the claim "on the papers";

D Upon making its decision the Commission will order:

(a) that such part of the documents which are protected by immunity under CLP be returned to the claimant, and

(b) that such part of the documents which are not protected by immunity under CLP be retained by the Commission, and

E The Commission will then deliver the decision made in respect to the claim and may provide a copy of any written ruling evidencing this decision to the parties concerned.

Parliamentary privilege

Parliamentary privilege is the sum of the peculiar rights enjoyed by parliament and its members. In respect of the performance of the functions of the Commission, it is noted that subsection 3(2) of the CCC Act expressly provides:

> *(2) Nothing in this Act affects, or is intended to affect, the operation of the Parliamentary Privileges Act 1891 or the Parliamentary Papers Act 1891 and a power, right or .function conferred under this Act is not to be exercised if, or to the extent, that the exercise would relate to a matter determinable exclusively by a House of Parliament, unless that House so resolves.*

The Commission accepts that it is "a place out of Parliament" within the meaning of Article 9 of the Bill of Rights 1689 and, therefore, bound by parliamentary privilege. It is clear that Parliament intended that the Commission be constrained by Article 9. The Commission accordingly considers itself bound by the privilege.

Where a question of parliamentary privilege arises during an investigation or Commission examination, the Commission will invite the Speaker of the Legislative Assembly or the President of the Legislative Council (as the case may be), to make submissions on the relevant issue and, if need be, to appear at a private examination to determine the question.

Public interest immunity

This privilege exempts the giving of evidence and/or production of documents or information where their disclosure would be against the public interest. In determining whether to allow the exercise of public interest immunity, the Commission must balance the public interest in withholding the production of the document against the public interest in ensuring that inquisitors should have access to relevant evidence: *Sankey v· Whitlam (1978)* 142 CLR 1; 21 ALR 505. The Commission may convene a private examination to determine these issues: *Halden v Marks (1995)* 17 WAR 447, at 465.

CORRUPTION AND CRIME COMMISSION

APPENDIX B

NO PRIVILEGE OR DUTY OF SECRECY

The powers conferred on the Commission by section 94 of the Corruption and Crime Commission Act 2003 may be exercised despite -

(a) any rule of law which, in proceedings in a court, might justify an objection to the production of a statement of information on grounds of public interest;

(b) any privilege of a public authority or public officer in that capacity which the authority or officer could have claimed in a court of law; or

(c) any duty of secrecy or other restriction on disclosure applying to a public authority or public officer.

This means you cannot avoid the need to comply with this notice to produce a statement of information by claiming privilege or raising a duty of secrecy or confidentiality.

Dated the day of 201X.

Mark Herron
ACTING COMMISSIONER

CORRUPTION AND CRIME COMMISSION

INFORMATION FOR RECIPIENTS OF A SECTION 95 NOTICE

This information is intended for persons who have been issued with a Notice under section 95 of the *Corruption and Crime Commission Act 2003* ("the Act") to produce records or other things specified in the Notice.

THE NOTICE - WHAT IT WILL SAY

The Notice will specify the records or other things that you must produce to the Commission.

The Notice will specify the date and time by which, the place at which and name the officer of the Commission to whom the records or other things must be produced.

The Notice will state whether the requirements of the Notice may be satisfied by some other person acting on your behalf. In this regard, it may also specify a person or class of persons who may act on your behalf to satisfy the requirements of the Notice.

OFFENCES

Disclosure

Unless permitted under section 167(4) of the Act, you must not disclose to anyone anything about:

- the existence of a notice or summons or any official matter (as defined in section 99 of the Act) connected with a notice or summons; or
- any information about that notice, summons or official matter.

The penalty for a breach of section 167(3) of the Act is imprisonment for 3 years and a fine of $60,000.

For more information about the effect of section 167 of the Act, please refer to the **attached Statement** pursuant to sections 99(6) and 167 of the Act.

Failure to Comply with Notice

A person who, without a reasonable excuse, fails to comply with a Notice served on that person under section 95 of the Act is in contempt of the Commission.

'Reasonable excuse' means an excuse that would excuse a similar failure by a witness, or a person summoned as a witness, before the Supreme Court except that it does not include as an excuse for failing to comply with a Notice, that -

(a) the production of the documents or other things as required in the Notice might incriminate, or tend to incriminate that person or render that person liable to a penalty, or

(b) the production of the document or other thing would be in breach of an obligation of the person not to disclose information, or not to disclose the existence or contents of the document, whether the obligation arose under an enactment or otherwise.

Furnishing False or Misleading Information

A person who, in purported compliance with a Notice to produce a statement of information served on the person or some other person, furnishes information knowing it to be false or misleading in a material particular is in contempt of the Commission.

Contempt

Pursuant to section 163 of the Act, a contempt of the Commission is treated as if it was a contempt of the Supreme Court of Western Australia.

PRODUCTION OF RECORDS OR THINGS

The Commission considers the security of records or things to be paramount. All records or things produced under Section 95 Notices must be either delivered by hand in a secure and suitable container such as a strong sealed envelope or sealed cardboard box or other suitable container.

The container is to be delivered by hand to the Commission Officer nominated in the Notice, or if he or she is unavailable, then to another Commission officer.

LEGAL PROFESSIONAL PRIVILEGE

Subsection 144(1) of the Act expressly preserves legal professional privilege. Subsection 144(1) is, however, subject to subsection 144(2) which says that the privilege does not apply to "a public authority or public officer in that capacity".

This means that when appearing at, or producing a record or thing to, the Commission in your capacity as a public officer, neither you nor your agency, can claim legal professional privilege as a reason for refusing to comply.

If you are not a public officer and wish to make a claim of legal professional privilege in respect of this Notice, you should seek independent legal advice.

LEGAL AID

PUBLIC OFFICERS AND FORMER PUBLIC OFFICERS

The WA Government has established a fund to provide legal assistance for serving and former public officers called as witnesses or served with notices or summonses by the CCC.

To qualify for such legal assistance, the CCC must have requested you attend an interview, served a notice to provide a statement of information, served a notice to provide documents or other things or served a summons to appear to give evidence AND you must be a former or serving public officer.

The grant of assistance is not means-tested.

Representation can be provided by the lawyer of your choice, provided he or she accepts the standard applicable rates or by a Legal Aid WA lawyer or in private practice chosen from a panel set up for this purpose by Legal Aid WA. Information on legal assistance and/or legal representation for serving and former public officers called as witnesses and/or served with notices or summonses by the Commission can be provided by Legal Aid WA - Info Line 1300 650 579 and www.legalaid.wa.gov.au.

See, in particular, http://www.legalaid.wa.gov.au/laservices/aspx/default.aspx?Page=CCC/ccc.xml

ENQUIRIES

General enquiries regarding the Notice should be directed to the Commission contact officer named on the Notice.

AT THE EXAMINATION

Having attended at the Commission in answer to your summons, you will be called to the witness box and asked to swear an oath or, if you have a conscientious objection to taking an oath, to affirm that the evidence you will give will be the truth. You must either be sworn or make an affirmation. If you refuse to be sworn or to make an affirmation, you may be in contempt of the Commission.

You are not entitled to refuse to answer any question relevant to the Commission's investigation which is put to you by the Commissioner or by counsel assisting the Commissioner at the examination. Nor are you entitled to refuse to produce any documents or other things in your custody or control that the summons requires you to produce.

However, a statement made in answer to any question put to you as a witness at the examination is not admissible in evidence against you in criminal proceedings or proceedings for the imposition of a penalty.

Notwithstanding this protection, your answers may be admissible in the following proceedings:

(a) contempt proceedings;

(b) proceedings for an offence against the *Corruption and Crime Commission Act 2003*; or

(c) disciplinary action.

NO PRIVILEGE EXCEPT LEGAL PROFESSIONAL PRIVILEGE

You are not excused from answering any question or producing any document or other thing on the ground that:

- the answer or production may incriminate or tend to incriminate you;
- by seeking to rely on any other ground of privilege;
- on the ground of a duty of secrecy or other restriction on disclosure; or
- on any other ground,

save and except, where the answer to the question would disclose, or the document or other thing contains, a privileged communication passing between you and a legal practitioner (in his or her capacity as a legal practitioner) and where the communication was for the purpose of providing or receiving legal advice or seeking representation in relation to your appearance, or reasonably anticipated appearance, at an examination before the Commission.

Further information about your rights to legal representation is set out below.

SCHEDULE 2

SUBMISSION BY THE WA BAR ASSOCIATION

WABA

WESTERN AUSTRALIAN BAR ASSOCIATION

3 February 2011

C D Steytler QC
Parliamentary Inspector of the Corruption and Crime Commission
Locked Bag 123
PERTH BUSINESS CENTRE WA 6849

Dear Sir

SUBMISSION REGARDING LEGAL PROFESSIONAL PRIVILEGE AND THE *CORRUPTION AND CRIME COMMISSION ACT* 2003

Controversy has arisen in Western Australia, from time to time, as to the use, by the Corruption and Crime Commission ("the Commission"), of recordings obtained by it under the *Telecommunications (Interception and Access) Act 1979 (Cth)*, where those recordings are of communications between lawyers and their clients which are the subject of legal professional privilege. The extent of that use is not known, although there have clearly been some instances where such communications have been considered and used by officers of the Commission.

This submission, made by the WA Bar Association Inc, sets out its serious concern as to the permissibility and the appropriateness of that practice. A mechanism for practically dealing with the issue is also identified. That mechanism is not the only one that may be available to deal with the issue.

Legal Professional Privilege and the *Corruption and Crime Commission Act* 2003

It is not necessary to deal exhaustively with the circumstances in which a proper claim of legal professional privilege may arise. A convenient summary of the essential "core" of legal professional privilege may be found in *Daniels Corporation International Pty Ltd v Australian Competition & Consumer Commission* (2002) 213 CLR 543 ("*Daniels*") at 552 [9]:

> "It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the

> production of documents which would reveal communications between a client and/or his/her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings."

The courts have consistently confirmed that legal professional privilege is not a mere rule of evidence but a fundamental and basic common law right. Indeed, in *Daniels* the privilege was described as "not merely a rule of substantive law ... [but] an important common law immunity" and a "fundamental right or immunity" (see para [11] and [44]).

As a consequence, legislative provisions that are drafted in general terms will not be construed as abrogating or adversely affecting the privilege unless Parliament makes its intention unmistakably clear (see *Baker v Campbell (1983)* 153 CLR 52 at 96-97, 116-117, and 132; *Pyneboard* at 341). Similarly the privilege applies not only to judicial and quasi judicial proceedings but to investigative procedures such as notices to produce, search warrants etc. (see *Baker v Campbell*).

For example it was held in *Baker v Campbell* (1983) 153 CLR 52, that general provisions providing for the issuance and execution of search warrants (in that case s 10 of the *Crimes Act 1914 (Cth)*) did not evince an intention to exclude claims of legal professional privilege and was to be construed as not including, in the things which it authorised to be inspected or seized, documents whose confidentiality would be protected by the doctrine of legal professional privilege (see the summary in *Arno v Forsyth* (1986) 4 FCR 576 per Lockhart J at 587).

Far from seeking to abrogate legal professional privilege, the *Corruption and Crime Commission Act 2003* expressly preserves the privilege. This can be seen in, for example, s 144 which provides:

> "144. **Legal Professional Privilege**
>
> (1) Subject to subsection (2), nothing in this Act prevents a person who is required under this Act to answer questions, give evidence, produce records, things or information or make facilities available from claiming legal professional privilege as a reason for not complying with that requirement.
>
> (2) Subsection (1) does not apply to any privilege of a public authority or public officer in that capacity."

The effect of that provision is such that, generally, it is to be expected that "public authorities" or "public officers" (in such capacities) will be unable to rely on legal professional privilege as a basis for not complying with any requirement of the *Act* and, conversely, that such a privilege held by any other person could be maintained.

The operation of s 144 is reflected in various provisions in Part 7 of the *Corruption and Crime Commission Act 2003* which confer powers on the Commission. Section 94, for example, provides a power to obtain information from a public authority or public officer by requiring the production of a "statement of information". Consistent with s 144(2),

s 94(4) provides that those powers may be exercised despite "any privilege of a public authority or public officer in that capacity". Section 94(4) thus, *in respect of public authorities or public officers*, completely abrogates all privileges or immunities which might otherwise have applied.

Other powers in Part VI, however, which are not limited to public authorities or other officers, such as the power to obtain documents (which may be exercised in respect of "a person") in s 95, the power to summon witnesses in s 96, and the power to conduct examinations in s 137, being of general application, do not evince an intention to abrogate legal professional privilege. Any person (apart from a public authority or public officer) could therefore maintain that privilege.

Similarly in relation to entry, search and seizure, a distinction is drawn between public premises and other premises. Section 100 of the Act provides that an officer of the Commission so authorised may without a warrant enter and inspect public premises, inspect documents in the premises and take copies of the documents. Section 100(4) provides that those powers may be exercised despite any privilege or immunity available (in the same terms as s 94(4)). Conversely, the power to obtain a search warrant under s 101, being of general application and applicable to any premises, does not evince an intention to abrogate legal professional privilege: see *Baker v Campbell* (1983) 153 CLR 552.

In relation to witnesses before the Commission, their obligations are established in Part 10 of the *Act* by various provisions which provide circumstances in which a person will be in contempt of the Commission. Where a contempt is alleged to have taken place, the Supreme Court has jurisdiction to deal with the contempt as if it were a contempt of that Court (s 163).

Section 160 of the Act provides:

> "160. **Failing to be sworn or to give evidence when summonsed**
>
> (1) A person served with a summons under s 96 requiring the person to attend and given evidence who –
>
> (a) refuses or fails to be sworn or make an affirmation; or
>
> (b) fails to answer any question relevant to the investigation that the Commission requires the person to answer,
>
> is in contempt of the Commission."

Given its general wording, and in light of the provisions of s 144(1), this section would clearly not require any answer which would be in breach of legal professional privilege, at least in the case of a person who is not a public authority or a public officer.

It is in this context that the Commission's approach to, and respect for, legal professional privilege, must be viewed.

***Telecommunications (Interception and Access) Act 1979* (Cth).**

The Corruption and Crime Commission is, of course, a law enforcement agency for the purposes of the *Surveillance Devices Act 2004* and an "eligible State authority" for the purposes of the *Telecommunications (Interception and Access) Act 1979 (Cth)*. The Commission is therefore able to, and does, obtain warrants pursuant to the *Telecommunications (Interception and Access) Act 1979 (Cth)*. The process of obtaining warrants under that Act, in turn has a number of practical consequences that may impact upon legal professional privilege.

Clearly it will often (if not invariably) be the case that persons applying for, or granting, warrants for the interception of telecommunications, will not know, in advance whether a particular conversation being intercepted is, or is not the subject of legal professional privilege. For that reason, the Full Court of the Federal Court held, in *Carmody v MacKellar* (1997) 76 FCR 115, that warrants issued under the *Telecommunications (Interception) Act 1979 (Cth)* may authorise the interception of communications ordinarily subject to legal professional privilege (see 137-138).

The practical reasons why that was so were set out at 136-137:

> "It follows that, as a practical matter, it is impossible to predict in advance whether a particular conversation will or will not contain privileged communications. Similarly, in practice, it will often be impossible to ascertain with any degree of assurance whether a particular conversation is or is not privileged while it is taking place (that is, at the time of the interception authorised by the legislation). For example, if an interception device is placed on the telephone service in a solicitor's office or barrister's chambers, any given conversation involving that lawyer may or may not be privileged. Whether it is privileged, in whole or in part, will depend upon the nature and purpose of the communication. Even a conversation which bears the appearance of a privileged communication may not be privileged. If the lawyer is engaged in a criminal enterprise (as is alleged of the present applicant) he or she might communicate in a manner designed to attract the privilege, yet the communication may not in truth be privileged because it is made in furtherance of an illegal purpose. Conversely, a communication which does not appear on its face to be privileged may, in context, prove to have been made for the purpose of obtaining legal advice.
>
> The position is the same in relation to the interception of communications taking place on a telephone service used by a private individual who is suspected of serious offences. It would generally be reasonable to expect that most of those communications would not be privileged. Yet that individual and others using the service might make telephone calls genuinely for the purpose of seeking and obtaining legal advice. If they do so, their conversations are covered by legal professional privilege. However, it is impossible to know in advance whether any such conversations will take place during the period in which an interception device is in place. It will also often be impossible for

> those recording the conversation (assuming a monitor is on duty) to determine at the time of the recording whether a particular conversation is or is not privileged."

The conclusions reached by the Court in *Carmody v MacKellar* set out sound practical reasons why it would be wholly ineffective to exclude, from the operation of the *Telecommunications (Interception) Act 1979 (Cth)*, conversations between lawyers and their clients. Similarly, in circumstances in which a lawyer is, himself or herself, engaged in an illegal enterprise (where privilege will clearly not apply), it is appropriate that the law enforcement agencies have access to investigative tools such as provided by the *Telecommunications (Interception) Act 1979 (Cth)*.

Nevertheless, the observations in *Carmody v MacKellar* should not be overstated, nor should the case be relied upon for practices that are clearly not supported by it. That decision is not authority for any proposition that the Commission has the power or discretion to override the protection given by legal professional privilege. It is clear that it does not have any such power or discretion. In particular, it is important to note that the decision in *Carmody v MacKellar* concerned the validity and the issuance of the warrants, and not the particular use made of the communications otherwise the subject of legal professional privilege. The fact that, in accordance with the decision in *Carmody v MacKellar*, the warrant under which such communications were intercepted may be valid does not mean that all uses of such information are lawful. Moreover, even if an interception was lawful under the *Telecommunications (Interception) Act 1979 (Cth)*, the propriety of the use of such information is a matter which must be given close consideration and scrutiny.

In that regard, the WA Bar Association submits that it cannot have been intended by the Parliament that the Commission would deliberately use information, documents or other communications, that it knows are covered by legal professional privilege. An officer of the Commission who, through administrative inadvertence of a lawyer and through no fault of their own, is provided with a copy of written advice from the lawyer to their client (in circumstances where the privilege is not waived[1]), could not legitimately make use of that information for the purposes of an investigation. To use such a document, which could not by other means have been obtained, would be inconsistent with the general preservation of legal professional privilege by the *Corruption and Crime Commission Act 2003*.

In the same way, having regard to the *Act*'s general preservation of legal professional privilege, it would be quite inappropriate for the Commission to use privileged communications obtained from telephone intercepts with the express purpose of furthering its investigations. That would extend to communications between lawyer and client for the purpose of obtaining legal advice, and the advice itself. Similarly, given that the Commission itself conducts legal proceedings (including by way of prosecutions) it would be improper to review communications between lawyer and client in relation to those proceedings with a view to gaining some strategic advantage. Certainly, in the Bar

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[1] See e.g. *Key International Drilling Co Ltd v TNT Bulkships Operations Pty Ltd* [1989] WAR 280.

Association's submission, the routine review of such communications, for strategic purposes, would be something to be deplored.

As stated earlier, none of the above is intended to suggest that communications with lawyers may not, in some cases, legitimately be the subject of interception. It may also be accepted that there would often need to be consideration of the content of such material in order to determine whether, in fact, it is *prima facie* privileged. It is therefore appropriate that some mechanism be put in place to determine whether a particular communication is legitimately the subject of legal privilege.

However, once it is determined that material in the Commission's possession is privileged, the *use* of that material should cease.

Nor should it be thought that in all cases the privileged nature of communications would be difficult to recognise. Indeed, it is to be expected that in the majority of cases it would be obvious. Commission officers with the responsibility of monitoring communications under the *Telecommunications (Interception) Act 1979 (Cth)* should therefore be trained and instructed as to the matters likely to be the subject of privilege. In those cases, the communications should be excluded from material provided to investigators or Commission lawyers.

In cases in which the privileged nature of the Communication is unclear, it would be a simple matter for the particular communication to be referred to the Commissioner, or an Acting Commissioner, for a determination as to whether or not the communication is privileged. In those circumstances, again, where it is concluded that the communication is covered by privilege, the communication should be excluded from material provided to investigators or Commission lawyers (and retained only by the Commissioner).

The abovementioned procedures would be a simple and practicable means of protecting privileged communications. While there are obviously differences necessitated by the context, the procedures may be compared, for example, with the procedures in relation to search warrants under s151 of the *Criminal Investigation Act* 2004, where privileged material is inadvertently seized – in which claims of privilege are determined by the Magistrates Court.

The operation of such procedures would be a matter that could be audited by the Parliamentary Inspector under Part 13 of the *Corruption and Crime Commission Act 2003*.

The above measures are necessary for the proper administration of justice, of which legal professional privilege plays no small part, and to give the public confidence in the operation and integrity of the Commission itself.

Those are measures which, in the Bar Association's view, ought to be instituted by the Commission of its own initiative so as to comply with the high standards of propriety that are expected of it.

In the absence of it undertaking to do so, the *Corruption and Crime Commission Act 2003* should be amended to limit the Commission's functions and the scope of its investigations in relation to matters that are properly the subject of legal professional privilege. While it would not be possible, for constitutional reasons, for the State to limit the scope of the operation of the *Telecommunications (Interception) Act 1979 (Cth)* itself, the Commission, being a creature of the State Parliament may nevertheless have its functions limited as a matter of State law.

A copy of this submission has been provided to the Law Society of Western Australia Inc and the Criminal Lawyers Association Inc for their consideration.

Yours faithfully

THEO LAMPROPOULOS SC
VICE-PRESIDENT

SCHEDULE 3

LETTER FROM THE LAW SOCIETY OF WESTERN AUSTRALIA

The Law Society
OF WESTERN AUSTRALIA
The **voice** of the **legal profession** in Western Australia

10 February 2011

Mr C D Steytler QC
Parliamentary Inspector of the Corruption and Crime Commission
Locked Bag 123
PERTH BUSINESS CENTRE WA 6849

Dear Sir

LEGAL PROFESSIONAL PRIVILEGE
CORRUPTION AND CRIME COMMISSION ACT 2003

The Law Society of Western Australia has reviewed the submission on legal professional privilege made to you by the Western Australian Bar Association dated 3 February 2011. The Society endorses the submission and fully supports the recommendations made by the Association.

We understand the Government is currently considering amendments to the *Corruption and Crime Commission Act 2003*. In our view the Act should be amended to limit the Commission's functions and the scope of its investigations in relation to matters that are properly the subject of legal professional privilege. The Society will recommend this course to the Attorney General.

Yours sincerely

Hylton Quail
President

cc. Western Australian Bar Association

SCHEDULE 4

LETTER FROM THE CRIMINAL LAWYERS' ASSOCIATION

Criminal Lawyers' Association of Western Australia Inc.

15 February 2011

Mr C D Steytler QC
Parliamentary Inspector of the
Corruption & Crime Commission of Western Australia
Locked Bag 123
PERTH BUSINESS CENTRE WA 6849

Dear Sir,

Legal Professional Privilege and the Corruption and Crime Commission Act 2003

I refer to the above matter and the Western Australian Bar Association's letter dated 3 February 2011 written by that Association's Vice President, Mr Theo Lampropoulos SC.

In my capacity as President of the Criminal Lawyers' Association of Western Australia ("the CLA") I was provided with a copy of that letter.

The CLA fully supports the position taken by the WABA and endorses the measures that are proposed at page 6 as a means to ensure that privileged communications are protected.

Yours faithfully,

Philip Urquhart

President: Philip Urquhart
08 9225 0164
purquhart@lavanda.com.au

Secretary: Seamus Rafferty
08 9421 5073
seamusrafferty@bigpond.com

PO Box 3230
Adelaide Terrace Perth WA 6832

SCHEDULE 5

RECOMMENDATION OF THE ARCHER REPORT CONCERNING THE DETERMINATION OF QUESTIONS OF LPP

The Archer Report

In the Archer Report, Gail Archer SC set out the mechanisms provided in other jurisdictions concerning the determination of claims for LPP. These included mechanisms provided by the *Royal Commissions Act 1902* (Cth), the *Crime and Misconduct Act 2001* (Qld), the *Independent Commission Against Corruption Act 1988* (NSW) and the *Police Integrity Commission Act 1996* (NSW). She also considered the practice adopted by the Office of Police Integrity (Vic) and the recommendations of the ALRC in what was then a discussion paper prepared in respect of its inquiry into matters relating to the application of LPP to the coercive information gathering powers of Commonwealth bodies.

The ALRC final report

Since the preparation of the Archer Report, the ALRC's final report (referred to above)[1] has been published. It makes two points that are presently pertinent. Both were foreshadowed in the discussion paper considered by the Archer Report.

The first of these is as follows:[2]

> *The ALRC agrees with the current policy of abrogation of client legal privilege for bodies which focus on the public accountability of government. As noted above, submissions to this Inquiry argued that adequate accountability of government entities is vital to ensure the proper functioning of democratic institutions. The rationales for the privilege of protecting the citizen against the incursions of the state and promoting compliance are not justifications for protecting advice received by a government body from investigation by an agency charged with ensuring its accountability.*

In this State a similar policy is reflected in s 144(2) of the *CCC Act*, which, as I have said, expressly exempts public authorities or public officers acting in that capacity from the preservation of LPP provided by s 144(1).

The second pertinent point made by the ALRC is that:[3]

> *While it may be appropriate for Royal Commissioners – who are usually retired judges – to assess whether or not a document is privileged in the context of an independent inquiry to discover the truth – it is not, in the ALRC's view, appropriate for members of other*

[1] ALRC *Client Legal Privilege and Federal Investigation Bodies*, 24 December 2007.

[2] Paragraph 6.165.

[3] Para 8.296.

> *federal bodies or government departments to make such an assessment – particularly where those bodies have enforcement functions.*

The ALRC went on to recommend a legislative framework designed to give effect to this conclusion[4] as well as policies and procedures that might be implemented.[5]

Ms Archer's recommendation

Having considered some of these issues (as they then appeared from the ALRC discussion paper) the Archer Report arrived at the following conclusion:[6]

> *It is recommended that the Act be amended to provide a mechanism for the CCC to determine claims of privilege for the purposes of the CCC. It would not be appropriate to require an independent adjudicator in each case due to security concerns that are likely to arise. However, it would be valuable to give the CCC a discretion to appoint an independent adjudicator in an appropriate case.*

4 Paras 8.297-8.299 and Recommendation 8.11.

5 Paras 8.300-8.331 and Recommendations 8.12-8.14

6 Para 19.8.

APPENDIX TWO

HEARING WITH THE PARLIAMENTARY INSPECTOR OF THE CORRUPTION AND CRIME COMMISSION

19 October 2011

[10.30 am]

STEYTLER, MR CHRISTOPHER DAVID:

ALDER, MR MURRAY COLIN:

The CHAIRMAN: Inspector, I confirm that we have now moved into a closed hearing. In that respect, we would specifically like to discuss with you the "Telecommunication Interceptions and Legal Professional Privilege" report dated 6 October 2011. Before I proceed to some questions that we have in respect of that report, perhaps I can ask a more broad question with regard to the convention that continues to exist between your office and this committee whereby wherever possible you endeavour to table these reports with our committee on the understanding that the committee will act on it within 30 days and should the committee not, you would be at liberty to table directly to the Parliament. Given that we are—albeit in closed session—continuing our discussion in relation to the report, in the reporting period in question, do you remain satisfied with the implementation of that convention?

Mr Steytler: Yes, I do.

The CHAIRMAN: If I can then take you to the report itself, inspector, and deal firstly with a letter that the committee has received from the Corruption and Crime Commission, which I understand has been copied to you. That letter is from Acting Commissioner Herron, dated 12 October 2011. In essence, the acting commissioner is asking that whatever decision is made in relation to the report, that his letter dated 6 October 2011 be removed or completely redacted. I have two questions for you, Inspector: firstly, have you received a copy of that letter? Secondly, do you have any issue with the request from the acting commissioner?

Mr Steytler: I have received a copy of it and I have no issue with it. His letter was included only because I was asked to include it by Mr Silverstone.

The CHAIRMAN: Thank you, inspector.

If I can perhaps take you through aspects of the report: I would like to start at page 2 of the report—the Executive Summary. In the third last paragraph on that page the following comment was made —

> No assessment was made whether the communication was for any such purpose. In fact the communication was not for a permitted purpose. Nor was any assessment made by any person whether or not the communication might be inappropriate in the circumstances. In fact it was inappropriate.

There seems to be a large level of agreement ultimately between your office and the commission—not complete agreement but a large level of agreement—but is it fair to say that the commission has yet to concede those particular points; in other words, that no assessment was made, the communication was not for a permitted purpose, and it was inappropriate?

Mr Steytler: The communications that I received from the commission have been inconsistent on the first. In some cases they say that, in terms that no assessment was made—whether it was for a permitted purpose—and in other places they seem to imply that an assessment was made. I have

certainly taken it that there is no agreement that an assessment was made and certainly no agreement that an assessment was required. As to the issue of appropriateness, it seems to me that the commission's attitude throughout has been that that is unnecessary.

The CHAIRMAN: Yes; if I understand correctly, the commission seems to indicate that so long as the purpose is legal, it is unnecessary to consider its appropriateness.

Mr Steytler: That is correct.

The CHAIRMAN: If we continue then to the next paragraph, inspector, a number of important points are made including the fact that you concluded that there was no misconduct by any commission officer. You also indicate that in some respects the procedures used still are inappropriate and that there seems to be a serious misunderstanding by the commission of its obligations. You make the point that that misunderstanding still persists. I have to say that up until yesterday I was inclined to ask you whether we should defer the tabling of this report for about a month to enable the employment of a new commissioner to come in and to establish whether the new commissioner shares your view on this or whether the misunderstanding is likely to continue in the future. However, I am in a position to indicate to you today—although you probably already are aware in any event—that the committee met with a particular person yesterday who is the Premier's recommended candidate. However, my understanding is that should the Premier ultimately proceed with that appointment, it is unlikely that it will happen until at least the third or fourth week in November, which really would make my initial suggestion probably untenable. I guess I just want an indication from you as to how soon you would like to see this tabled or whether you would see merit in waiting for the new commissioner to express a view.

Mr Steytler: I think the period would be too long, Mr Chair, to wait. It also seems to me that it would be better for a new commissioner not to be faced with the need to deal with this. If he shares the view that I have put forward, it would not be the best or easiest to start for him with his own people, I suspect. I think it would be fairer to him to have the issue dealt with before he takes over.

The CHAIRMAN: Very well. I turn then to page 9 of the report. This is probably more of a theoretical point or academic —

Mr J.N. HYDE: Sorry, what page is that in our papers?

Principal Research Officer: Page 25.

Mr J.N. HYDE: Thank you.

The CHAIRMAN: About one-third of the way down the page, there is some reference to the fact that Mr Burke was a client and that Mr Donaldson was counsel. My question to you is: is it possible in Western Australia for a barrister to have a client other than his or her instructing solicitor?

Mr Steytler: I think that it is possible although it is unlikely. I think the rules now provide for barristers to take instructions directly under certain circumstances. But I take your point; in the general use of language, the client would be the instructing solicitor.

The CHAIRMAN: Yes. In that respect, I will not take that any further but leave you to take that on notice.

Mr Steytler: For the purpose of legal professional privilege, it is still a barrister–client relationship.

The CHAIRMAN: Yes.

Mr Steytler: It would be categorised by the law.

The CHAIRMAN: Understood.

I turn then to page 11 of your report and the final paragraph in which you indicate that a "summary of the call is provided to him for assessment and determination". So this is in respect of how the commission now deals with TI information that might be subject to legal professional privilege.

A summary of the call was provided to him —

"Him" being the acting director of operations —

for assessment and determination.

Then it states —

(at times in consultation with the commission lawyers.)

So my question is: why would that not occur at all times? Why would there be consultation with the commission lawyers only at times and not for every event?

Mr Steytler: I do not know the answer to that. This is the answer provided to me by the commission.

The CHAIRMAN: Would you prefer that it occurred at all times?

Mr Steytler: I prefer that the assessment always be made by a lawyer.

The CHAIRMAN: Yes. So even if the decision was ultimately made by the acting director of operations, would it be acceptable if he did so at all times on the advice provided to him by a legal practitioner?

Mr Steytler: My preference would be that a legal practitioner made the decision because it may be a decision to the effect that it is inappropriate for the director of operations to see it. I appreciate that that might be "counsel of perfection" and might be difficult to achieve in practice because often you would not be able to make the assessment of the importance of information without talking to somebody who understood more of the context. That would be my ideal position.

The CHAIRMAN: Okay.

In terms of the ideal position: is that ideal position what has been expressed in your recommendations in this report?

Mr Steytler: Yes. I have said that it seems to me that it would be best if the initial decision is made by a senior lawyer, the director of legal services, or another senior lawyer who is independent of the actual investigation. And that decision is made, where necessary, in consultation with the director or the acting director in the absence of the director. And where it is necessary for a practical purpose for there to be disclosure, there is disclosure to that person.

The CHAIRMAN: Is there any reason why this assessment cannot always be done by the commissioner or the acting commissioner or is the sheer volume of these occurrences too much to warrant that?

Mr Steytler: I think that at times the sheer volume would be too much.

The CHAIRMAN: I turn to page 13 of your report; in particular the second paragraph in which you refer to or state that —

> The High Court has confirmed that LPP 'is an important civic right'.

You have referred to some comments by then Justice Kirby. This is again perhaps a little bit academic but I am curious to know whether that statement was in fact concurred by the majority of the High Court or more accurately the quote of the single judge?

Mr Steytler: It is the quote of a single judge, but those quotes have all been referred to subsequently in other cases.

The CHAIRMAN: Other cases of the High Court?

Mr Steytler: And independent, intermediate appellate courts—yes.

The CHAIRMAN: If I can then continue, on the same page a quote from the Australian Law Reform Commission, the final sentence in the first paragraph of that quote states —

> The protection of the confidentiality of such communications facilitates compliance with the law and access to a fair hearing in curial and non-curial contexts, thereby serving the broad public interest in the effective administration of justice.

Is it fair to say that that is the case except where a solicitor is conspiring to pervert the course of justice?

Mr Steytler: Yes, it is.

The CHAIRMAN: I move to page 16 of the report. This is merely a typographical matter. The second line of the third paragraph reads —

> …comment I have been informed buy the commission …

That is a typographical error.

Mr Steytler: Yes.

The CHAIRMAN: I then move to page 18 of the report. Again, my notes were just in respect of whether it was timely to check with the new commissioner, but I think that given our earlier conversation that is not necessary but perhaps you and this committee will follow that up with the new commissioner in the new year.

Mr Steytler: Yes.

The CHAIRMAN: Once the new commissioner has had an opportunity to settle in.

At the bottom of page 20 of the report, and moving onto page 21, you state that the Law Society —

> … proposed to recommend to the Attorney General that the *CCC Act* 'should be amended to limit the Commission's functions …

In your report you have not gone as far as to suggest that. I think it would be fair to say that in terms of the limitation of the functions —

[10.45 am]

Mr Steytler: Yes, I have not gone that far.

The CHAIRMAN: But nevertheless, given that the Attorney General has recently indicated that there will be no progression of the reforms in this calendar year but rather in 2012, I take it that is yet another reason why this report should be tabled as soon as possible, and in any event some time in November prior to the rise of the Parliament for the summer recess?

Mr Steytler: Yes.

The CHAIRMAN: I refer now to page 22, the conclusions, the fourth paragraph. It reads —

> I have mentioned that each of the counsel to whom the privileged information was sent has no recollection of having read that information. There is consequently no basis for concluding that either of them was aware of the fact that privileged information had been sent to him.

I am curious about that, inspector, only insofar as it appears an agreed fact that the information was provided to both respective councils. So, having determined that the summaries were provided, is it reasonable to say that a barrister is more likely than not to have read information provided to him or her by his or her client?

Mr Steytler: One would have thought so, and I gave some thought to what I could say in that respect. But I said what I said given that in each case the barrister informed me that had that material been read by him, he would have recalled it, because of its nature; and neither did. There is no doubt that it was sent. The only possible explanation, other than that it was read, was that it was overlooked in the wealth of other information that was sent at the same time.

The CHAIRMAN: I turn now to page 23. Again, this is just a typographical matter. In the final paragraph, in the third line, you will see that the word "right" is used twice in succession. It reads —

> The 'very important entitlement' or 'basic human right' right afforded by LPP is fundamental.

Mr Steytler: Yes; thank you.

The CHAIRMAN: I refer now to page 24 of the report. In the fourth paragraph, the following comment is made —

> The need for this is apparent from the fact that the then Deputy Director of Operations (now the Acting Director) believed that the information in the relevant summaries was not subject to LPP.

I just question that, inspector, only insofar as that my understanding is that the deputy director of operations, now the acting director, is not saying that he believed that the information in the relevant summaries was not subject to legal professional privilege. What he is saying is that it was irrelevant whether it was or it was not, because it was part of the investigation; and, therefore, because it was part of the investigation, one need not turn one's mind to whether it is subject to LPP.

Mr Steytler: No, that is not what he said. He said that at the time—that letter may or may not be in the correspondence—there was a difference of opinion in the commission as to whether or not these summaries were privileged, and his personal opinion was that they were not; however, he did not think it mattered. That is what he said.

The CHAIRMAN: Okay. It certainly does matter, and it certainly was.

Mr Steytler: Yes.

The CHAIRMAN: I refer to page 28, for the sake of referring to a page, and the conclusion of your recommendations. The only thing that I might suggest is whether there would be merit in making a recommendation that these procedures that you have indicated should be implemented ought to be reviewed, for example, 12 months thereafter, to assess their effectiveness or the need for any further amendments.

Mr Steytler: Yes, I think that would be a sensible addition.

The CHAIRMAN: The last note that I have is a general one, inspector. That is in relation to what I refer to as the Brickhill case—the solicitor Trevor Brickhill. As I understand it, that was a matter where solicitor-client material was used appropriately. Is there some merit in referring to that particular case in this report as an example of where such communications can be used appropriately, as compared with the example in here, which is where it was used inappropriately?

Mr Steytler: Yes. The Brickhill case was an issue where, from my understanding of the evidence, it would not have been privileged anyway. It would have fallen within the Cox v Railton exception, which deals with material that is done for the purposes of furthering an iniquity. In that situation, as I understand it, Mr Brickhill was advising his client to destroy evidence, and that would not be privileged; but, even if it was privileged, it would be very material and may be a kind of circumstance in which you would say that its use was so important as to override the protection.

The CHAIRMAN: So even if you were not inclined to include that in the report, because as you indicate that is not a matter of privilege, would you have any objection if the committee in its report, which would include your report, might make reference to that for that purpose?

Mr Steytler: Not at all. I think that would be appropriate.

Mr J.N. HYDE: Inspector, I refer you to schedule 1, the relevant correspondence, the first letter from the Acting Director of Legal Services. From reading that letter, it comes across to me that the CCC seems to be dysfunctional in terms of its approaches to this issue, with changes of staff, and people not being able to recollect what has happened previously. Did you have any concerns about that?

Mr Steytler: I certainly did, and I think that is a very valid observation. The correspondence, to put it mildly, was inconsistent, and I was criticised for making statements in the report which had come directly from prior correspondence with the commission, and in a number of instances there were statements made which completely contradicted factual statements it had earlier made. What had obviously happened is that the lawyer had written this letter, and its predecessor I might say as well, which is not included here, and is not aware of some of the earlier correspondence.

Mr J.N. HYDE: My particular concern is the blatant acknowledgment that there were different views within the team about whether LPP applied or not. But there seemed to be no addressing the core issue of what do you do when you have differing views on an interpretation.

Mr Steytler: And that is because they have consistently taken a view that it does not matter whether or not material is subject to LPP. That is an unacceptable process, as I have pointed out. But it is something that does not seem to me to have been acknowledged.

Mr J.N. HYDE: Yes. I guess one of the key issues in oversight by both yourself and ourselves is that what we are doing actually engenders a change in culture or a change in operation. It deeply concerns me that there does not seem to be an acknowledgment in the responses of the CCC that there was such a huge problem.

Mr Steytler: I believe that the CCC generally does not accept that there was a huge problem. And that is a matter of great concern to me, because it suggests to me a failure to appreciate the fundamental importance of legal professional privilege and what it is designed to protect, and a failure to understand that it is not a matter of simply looking to see whether the federal court has said that intercepting material subject to legal professional privilege is lawful, and that you can use that material—which is the commission's interpretation, which is probably correct—but it is essential that the commission understands that it has to be for a permitted purpose connected with an investigation. The commission refers to authority which says that "permitted purpose" is very wide; and it is. But nonetheless, it has to be for a valid investigatory purpose at the very least. No-one has ever made that assessment in this case, and I have not got a clear acknowledgement from anybody that that was necessary.

Secondly, there is a complete failure to understand that even if it is lawful in the sense that you can intercept the information and you can use the information, and it is for a permitted purpose, there seems to be a complete failure to understand that there is then a question of asking whether the use is appropriate in the circumstances; and the circumstances must take place in a context, and the context is one in which Parliament has seen fit to say in other fields of investigation that material obtained by other means is to be protected by legal professional privilege in the case of people who are not public servants. So that is a factor which cannot override the federal act, but it is a factor which should inform the exercise of a discretion as to whether to make use of the information or not. And not only is that not acknowledged, there is no clear acknowledgment from the commission that any issue of appropriateness ever arises.

The CHAIRMAN: I have two or three final matters that I want to refer you to, some less significant than others. At page 31 of your report is the first page of a letter from the Western Australian Bar Association to yourself. This is more a question in relation to process than anything else. It appears to me that this is an unsolicited letter from the association to yourself, expressing their concerns in relation to the commission and its use of the issue of legal professional privilege. Is this a matter that, in terms of good process, the association ought to have directed at first instance to the commission; and then, if dissatisfied with the response by the commission, would, for lack of a better word, escalate it by bringing it to your attention?

Mr Steytler: Yes, I think that would have been a better process.

The CHAIRMAN: I turn now to schedule 5, which is at pages 33 and 34 of your report. This is the Archer report recommendations, or summary thereof. In particular, it states that the Archer report arrived at the following conclusion —

> 'It is recommended that the act be amended to provide a mechanism for the CCC to determine claims of privilege for the purposes of the CCC.

It then goes on to elaborate on that. In terms of the committee's report to the Parliament in relation to your report, would it be satisfactory if the committee were to reinforce its previous recommendation that the government addresses this aspect of the Archer recommendation when it does its reforms; and, when it does so, that it takes due note of the manner in which you have recommended that that should take place?

[11.00 am]

Mr Steytler: Yes; it would be appropriate, Mr Chair.

The CHAIRMAN: Inspector, is there anything further you would like to raise in relation to this report?

Mr Steytler: No; nothing further, thank you.

The CHAIRMAN: Perhaps as a way forward, inspector, the committee will obviously deliberate on what it intends to do and will communicate that to you, most probably today. But, at the very least, if there is going to be a minor amended report on your part, even if it is just for typographical purposes, you could send that through to the committee and then the committee will provide you with its view shortly.

Mr Steytler: I will make those amendments.

Mr J.N. HYDE: Are there any other CCC issues you would like to bring to our attention?

Mr Steytler: No, not at present, I think.

The CHAIRMAN: Inspector, there being nothing further, I proceed to close today's hearing. I thank you for your evidence before the committee. A transcript of this hearing will be forwarded to you for correction of minor errors. Any such corrections must be made and the transcript returned within 10 days from the date of the letter attached to the transcript. If the transcript is not returned within this period, it will be deemed to be correct. New material cannot be added and the sense of your evidence cannot be altered. Should you wish to provide additional information or elaborate on particular points, please include a supplementary submission for the committee's consideration when you return your corrected transcript of evidence. Thank you.

Mr Steytler: Thank you.

Hearing concluded at 11.01 am