

**INQUIRY INTO PROGRESS OF THE OMBUDSMAN'S  
INVESTIGATION 'OPERATION PROSPECT'**

**Name:** Mr Nick Kaldas (through Willam Roberts Laywers)

**Date received:** 18/06/2015

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17 June 2015

Our Reference: LCO-701500425

Your Reference:

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The Hon Robert Borsak  
Chair  
General Purpose Standing Committee No 4  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

**By Email:** [beverly.duffy@parliament.nsw.gov.au](mailto:beverly.duffy@parliament.nsw.gov.au)

Dear Sir,

**RE: GENERAL PURPOSE STANDING COMMITTEE NO 4  
INQUIRY INTO THE PROGRESS OF THE OMBUDSMAN'S INVESTIGATION  
"OPERATION PROSPECT"**

1. We act for Deputy Commissioner Kaldas in relation to the above matter.
2. We enclose a copy of submissions on behalf of our client.

Yours faithfully,  
William Roberts Lawyers

Robert Ishak  
Principal

**Encl.**



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**SUBMISSIONS OF DEPUTY COMMISSIONER NAGUIB KALDAS TO  
GENERAL PURPOSE STANDING COMMITTEE NO. 4**

**PROGRESS OF THE OMBUDSMAN'S INVESTIGATION  
"OPERATION PROSPECT"**

- 1      On 17 April 2015 *The Sydney Morning Herald* published an article that stated that the Ombudsman was considering referring Deputy Commissioner Kaldas to the Director of Public Prosecutions in relation to criminal charges for allegedly misleading the inquiry.
- 2      Prior to that article being published neither Deputy Commissioner Kaldas nor his legal representatives had been informed that the Ombudsman was considering any such referral or that Deputy Commissioner Kaldas may be accused of a criminal offence.
- 3      If the statements made in the article published by *The Sydney Morning Herald* are correct, procedural fairness requires the Ombudsman to inform Deputy Commissioner Kaldas that he was considering referring the matter to the Director of Public Prosecutions and the basis of the referral, together with providing Deputy Commissioner Kaldas with an opportunity to respond. None of these things occurred. It has been accepted by the High Court "that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention": *Kioa v West* (1985) 159 CLR 550 at 584.
- 4      Learning of such allegations for the first time in the media is a significant breach of procedural fairness and has caused distress to Deputy Commissioner Kaldas and his family as well as damage to Deputy Commissioner Kaldas' reputation. It may have also impacted upon a decision of the Executive to extend the appointment of the current Commissioner.

- 5 Of course, one must respect that the media has a right to publish matters that it considers to be in the public interest.
- 6 However, if it transpires that a person from, connected or retained by the Ombudsman's office was involved in disclosing information about a potential referral of Deputy Commissioner Kaldas to any third party, including the media, this may constitute a number of things:
- (a) a denial of procedural fairness;
  - (b) an apprehension of bias;
  - (c) impugning the integrity of the inquiry;
  - (d) a contempt of the inquiry;
  - (e) a breach of s 34 of the *Ombudsman Act 1974* (NSW); and
  - (f) a breach of s 20 of the *Public Interest Disclosure Act 1994* (NSW).
- 7 In relation to the last point (6(f)), it is noted that this continues a course of conduct against Deputy Commissioner Kaldas in that he has been the subject of detrimental action in retaliation for raising a complaint of unlawful activity associated with listening devices. Such conduct requires the strongest form of condemnation and also the possible referral of such matters to the Director of Public Prosecutions to determine whether a person or persons ought be the subject of criminal charges.
- 8 Whether the General Purpose Standing Committee No 4 will have sufficient resources and power to get to the truth as to who leaked this information is not clear at this time. Furthermore, the General Purpose Standing Committee No 4 may take the view that it is more appropriate for the Ombudsman or the new incoming Ombudsman to investigate this matter.

- 9 The current Ombudsman has indicated that he will not be investigating this matter and has expressly refused to do so (see the letters attached and referenced below).<sup>1</sup> The reasons why this decision has been made are not entirely clear and this raises concerns as to the appropriateness of such a decision in light of potential criminal offences having been committed. However, it is noted that a new Ombudsman is to be appointed shortly. Deputy Commissioner Kaldas intends to renew his application, once the new Ombudsman is sworn in, for the Ombudsman to investigate whether this information was leaked by a person from, connected or retained by the Ombudsman's office.
- 10 In the meantime, the Ombudsman has not corrected the public record in relation to the alleged referral of Deputy Commissioner Kaldas to the Director of Public Prosecutions and therefore has allowed this allegation to remain in the public domain. This has caused continuing distress and reputational damage to Deputy Commissioner Kaldas and his family. It also raises concerns as to whether there has been any unlawful conduct by any person associated with the Ombudsman's office.

DATED: 17 June 2015



Robert Ishak

William Roberts Lawyers

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<sup>1</sup> Letter from William Roberts Lawyers to Ombudsman Bruce Barbour dated 16 April 2015; letter from Deputy Ombudsman Linda Waugh to William Roberts Lawyers dated 16 April 2015; letter from William Roberts Lawyers to Ombudsman Bruce Barbour dated 16 April 2015; letter from Legal Counsel for NSW Ombudsman Timothy Lowe to William Roberts Lawyers dated 17 April 2015

16 April 2015

# URGENT

Solicitor Directors Robert Ishak BCom(Acc) LL.M.  
Bill Petrovski BCom(Acc) LL.D(Hons)  
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Our Reference EOBR-701410644

Your Reference

The Ombudsman  
New South Wales Ombudsman  
Level 24, 580 George Street  
SYDNEY NSW 2000

By email: [prospect@ombo.nsw.gov.au](mailto:prospect@ombo.nsw.gov.au)

Dear Ombudsman,

RE: OPERATION PROSPECT  
OUR CLIENT: DEPUTY COMMISSIONER NICK KALDAS

1. We act for Deputy Commissioner Kaldas.
2. On 15 April 2015, our client was contacted while he was overseas by Mr Nick McKenzie, journalist. Mr McKenzie sought comments relating to the Ombudsman's intention to ask the New South Wales Office of the Director of Public Prosecutions to investigate possible charges against Deputy Commissioner Kaldas. Mr McKenzie informed our client that the article will be published by Fairfax in various publications on Friday 17 April 2015.
3. We, of course, have no way of knowing whether the information to the journalist is correct. What we do know is that if Mr. McKenzie is truthful in the comments he has made, the only source of the information we can imagine is someone associated with Operation Prospect or someone who has somehow become aware of the internal musings or work in process of Operation Prospect.
4. Of course, we do not need to remind the office of the Ombudsman of the secrecy provisions in the *Ombudsman Act 1974* (NSW) (the Act) and that information given to the office of the Ombudsman is necessarily confidential unless conveyed in accordance with the taking of a legitimate step in accordance with the Act. As presently advised, we can think of no legitimate way this information (assuming it is correct) could have been conveyed directly to Mr McKenzie (or to a third party and thence to Mr McKenzie).
5. Our client is currently considering what, if any, steps he will take in relation to the proposed publication of the article on Friday 17 April 2015. In this regard, we ask that the office of the Ombudsman respond immediately to the following questions:
  - a) Has any view been formed by your office of the type communicated by Mr. McKenzie to our client?
  - b) If so, is there information you have as to how it is that Mr. McKenzie has been apprised of that information?
6. Needless to say, publication is likely to cause significant damage to our client. If Mr. McKenzie is relying on information conveyed to him by a third person, we propose to take

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the necessary legal steps to obtain information as to the identity of that person. We also expressly reserve our client's position in relation to any broader remedies he may have if it becomes apparent that what has been conveyed to McKenzie does, in fact, represent the view of the office of the Ombudsman.

7. We are not in a position presently to judge whether what has been conveyed to us is correct and accordingly need to be circumspect in drawing conclusions but, if what Mr McKenzie has said is correct, the seriousness of this information being conveyed to a journalist in a way, which on any available view is inimical to the purposes of the Act (and which has the effect of denying our client procedural fairness) cannot be overestimated.
8. We request the office of the Ombudsman's urgent written response.

Yours faithfully,  
William Roberts Lawyers

**Robert Ishak**  
Principal

16 April 2015

Mr Robert Ishak  
Principal  
William Roberts Lawyers  
Level 22, 66 Goulburn Street  
SYDNEY NSW 2000

*By email: [robert.ishak@williamroberts.com.au](mailto:robert.ishak@williamroberts.com.au)*

Dear Mr Ishak

I refer to your correspondence of 16 April 2015, received by my office at 3:40pm, in relation to contact your client had yesterday from a journalist, Mr McKenzie, seeking comment on an article he is proposing to publish on 17 April 2015.

Operation Prospect staff, and the staff of this office more generally, are aware of, and adhere to, the restrictions of section 34 of the Ombudsman Act.

Our media officer was also contacted by Mr McKenzie yesterday, at approximately 1pm. Mr McKenzie notified the media officer of his intention to publish an article relating to Operation Prospect and your client. He was not seeking any comment in relation to the article, and my staff member informed him that the office had no comment, consistently with its position in relation to all media inquiries relating to Operation Prospect.

In relation to the two questions you have asked in paragraph 5 of your letter, it is not appropriate to answer the first question, in paragraph (a): whatever intention the Ombudsman may or may not have formed is not a matter for comment. In view of the office's position on the question in paragraph (a), the second question, in paragraph (b), does not arise.

Yours sincerely



Linda Waugh  
**Deputy Ombudsman**

**CONFIDENTIAL**

16 April 2015

The Ombudsman  
New South Wales Ombudsman  
Level 24, 580 George Street  
SYDNEY NSW 2000

By email: [prospect@ombo.nsw.gov.au](mailto:prospect@ombo.nsw.gov.au)

Dear Ombudsman,

RE: OPERATION PROSPECT  
OUR CLIENT: DEPUTY COMMISSIONER NICK KALDAS

1. We refer to your letter received earlier this evening.
2. With respect, the response is unsatisfactory.
3. Given the response, we propose to work on the assumption that the material contained in the proposed article (a copy of which we have now seen) is accurate.
4. On the basis of this assumption, the information conveyed to Mr. McKenzie must have come from one of three sources:
  - 4.1 somebody with knowledge of the workings of Operation Prospect within the Office of the Ombudsman;
  - 4.2 a third party (such as somebody associated with the office of the Director of Public Prosecutions) to whom confidential information has been conveyed by the Office of the Ombudsman; or
  - 4.3 a third party who has come upon the information otherwise than in an official capacity.
5. We take it that your office must have taken immediate steps to ascertain which of these three categories of persons is responsible for the leak to the journalist.

6. So that we may be able to ascertain what steps we need to take, please let us know, by return, what steps have or are being taken by the Ombudsman's office to ascertain the source of the information conveyed to the journalist.
7. Our client, through the apparently deliberate act of a person or persons circumventing the confidentiality provisions of the Ombudsman Act, has been denied procedural fairness in having the opportunity of making submissions prior to the public dissemination of the information the subject of the article. This has caused the processes of Operation Prospect, insofar as it relates to our client, to miscarry. We reserve our client's rights in this regard.
8. Prima facie (and on the assumption identified above), it seems extraordinary that adequate safeguards were not in place to secure the confidential information and prevent illicit dissemination by your office either directly or through a third party. Again, we note we are unable to make specific allegations against a particular individual; we can say, however, that what has occurred serves to undermine the regime mandated by the Act for the proper conduct of the inquiry.
9. If our client is to take steps to ascertain the identity of the person or persons responsible, it is necessary for him to establish that he has taken all reasonable steps to ascertain the identity of that person or persons; for this reason, we ask you respond immediately to our request as to the steps the Office of Ombudsman is taking and whether the Office will apprise us of the results of its investigations.
10. We consider this matter to be both very serious and urgent and request your response by 11am tomorrow.

Yours faithfully,

William Roberts Lawyers

***Robert Ishak***

(signed electronically)

**Robert Ishak**

Principal

Mr Robert Ishak  
Principal  
William Roberts Lawyers  
Level 22, 66 Goulburn Street  
Sydney NSW 2000  
By email: [robert.ishak@williamroberts.com.au](mailto:robert.ishak@williamroberts.com.au)

Dear Mr Ishak

I refer to your further letter of 16 April 2015.

The office notes the issues that you raised in your further letter. Without responding to those issues in detail, I can advise that the Ombudsman is not of the view that Mr McKenzie's actions have caused Operation Prospect to miscarry in the manner that you assert, or at all.

I confirm the advice provided by Ms Waugh in her letter to you of yesterday's date, that Operation Prospect staff and the staff of this office more generally, are aware of and adhere to the confidentiality provisions of s 34 of the *Ombudsman Act 1974*.

Yours sincerely



Timothy Lowe  
**Legal Counsel**  
**for NSW Ombudsman**

17/4/15