

Submission  
No 1

**INQUIRY INTO THE CONDUCT AND PROGRESS OF THE  
OMBUDSMAN'S INQUIRY "OPERATION PROSPECT"**

Name: Mr Clive Small

Date received: 17/12/2014

---

Partially Confidential

Submission to Legislative Council Select Committee  
on the conduct and progress of the  
Ombudsman's inquiry 'Operation Prospect'

by Clive Thomas Small

17 December 2014

Submission to Legislative Council Select Committee  
on the conduct and progress of the  
Ombudsman's inquiry 'Operation Prospect'

This submission comprises the following parts:

1. Eight observations,
2. Summary of critical issues in chronological order and
3. Comments Ombudsman's inquiry Operation Prospect.

I have no objection to the release of the whole of this submission.

I am willing to appear before the Committee, if requested to do so, and have no objection that appearance being conducted in public.

I have separately provided my private contact details.

Clive Small  
17 December 2014

# 1 Eight observations

I make the following eight observations.

First, the secrecy provisions of the New South Wales Crime Commission (CC) were never intended to be used by the New South Wales Police (the Police), any agency, authority or any person/s as a means of covering up corruption, misconduct or bad management, or to enable police working with the CC, but still responsible and accountable to the Police Commissioner, to avoid responsibility and accountability. Nor were the secrecy provisions intended to be used by the Police Commissioner, the Police Executive, the CC Management Committee or the government as an excuse for avoiding responsibility and accountability for the performance of the Special Crime Unit (SCU), the broader Special Crime & Internal Affairs (SCIA) command of which SCU was a part, or other members of the Police. But that is exactly how the secrecy provisions have been used in what has become known as the Emblems matter. Further, the way in which the secrecy provisions have been applied raise serious questions about the financial management of the Police at the highest levels. In effect, over many years the Police Commissioner and Police Executive have been allocating millions of dollars of the Police budget to SCIA without knowing what that money has been spent on---other than in the most general sense---and have had no way of evaluating whether it has been spent appropriately or has provided value for money.

Second, it is too easy to say that these matters happened a long time ago, things have now changed and we need to move on. The reason we have this situation is because politicians of the major political parties have, at different times and in different ways, delayed the investigation of these complaints for almost a decade. These delays have done little to reinforce integrity or, at least the perception of integrity, within the Police or government.

Third, in its June 2004 two volume Operation Florida report to the New South Wales Parliament, the Police Integrity Commission (PIC) wrote that the operation had 'identified 418 incidents of police corruption or misconduct' of which 'Twenty-nine ... were the subject of examination in the (public) hearings'. The other 389 were to be investigated by 'a Task Force (Volta) set up by NSW Police' and overseen (my emphasis) by the commission. Volta completed its inquiries in just under a year, investigating and resolving an average of one or more incidents of corruption or misconduct for each day of its existence (including weekends and public holidays.) An Olympian, if not arguably an impossible, task. The integrity of the PIC's claims and Operation Volta remain hidden from the public view. Given that it was sufficiently important to include in its report to the Parliament and the people of New South Wales the assertion that a further 389 cases of police corruption or misconduct had been identified and were to be investigated, why is it not equally important to report the outcome of the investigation of those claims to the Parliament and people of the state?

Fourth, while I have not seen every application and affidavit for a telephone intercept or listening device, or seen every warrant issued, it is clear that significant false information was presented to many of the issuing judges. (see for example, paragraphs 5 and 7) This raises several serious questions:

- Was the PIC inquiry Operation Florida based, in part at least, on corruptly or otherwise improperly obtained information?
- Was the evidence used to convict several people (police and others) following the Mascot and Florida inquiries corruptly obtained? (This is not a debate about guilt or innocence, but about the integrity of the criminal justice system and justice!).
- Was Operation Volta and its findings based on corruptly obtained information?
- Were findings in any other criminal or internal investigation based on information corruptly obtained during Mascot?

Fifth, it is absurd for the New South Wales Ombudsman (the Ombudsman), Mr Bruce Barbour, to say in his letter dated 19 November 2014, that Prospect is 'not a secret investigation' when all investigations and formal sworn interrogations conducted by the Ombudsman are carried out behind closed doors and witnesses called to the inquiry are not allowed to tell the public of their attendance at or evidence given to the inquiry without threat of punishment. Those against whom allegations are made are not permitted to be present at hearings when the allegations are being made, denied or tested. Similarly, those who make allegations are not permitted to be present when their claims are tested.

The Daily Telegraph of 15 November 2014 best sums up the Ombudsman's Inquiry: 'a secret inquiry into a secret report into a secret inquiry'.

Sixth, there appears to have been an excessive interest by the Ombudsman into the 'leaking' of documents related to Emblems. Under the Crimes Act 1900, section 316, it is a criminal offence that carries a two year jail sentence if a person knows or believes that an offence has been committed and fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority. Significantly, what appears to have been ignored is that, with perhaps few exceptions, the leaks did not begin until it was clear that there was to be a cover up by politicians and the agencies involved and there would be no investigation into the serious allegations raised. If it hadn't been for the 'leaks' there would not have been an 'Operation Prospect', even with its shortcomings. On the other hand, section 317 of the Crimes Act makes it a criminal offence with a maximum penalty of ten years jail if any person who, with intent to mislead any judicial tribunal in any judicial proceeding: (a) suppresses, conceals, destroys, alters or falsifies anything knowing that it is or may be required as evidence in any judicial proceeding, or (b) fabricates false evidence (other than by perjury or suborning perjury), or (c) knowingly makes use of fabricated false evidence. There is ample evidence that fabricated evidence has been used in this case and prima facie it is so widespread that one is entitled to suspect it was done knowingly and deliberately and there has been a significant and deliberate attempt to cover it up.

Furthermore, despite having been the subject of fabricated information which was included in at least one application for listening devices and being included on a SPCU target list under the pseudonym 'Big', which suggests I was a target for about two years or more, and having made a substantial submission on corruption and misconduct I was not asked one question about these matters by the Ombudsman. Nor have I been asked or told anything about M5's claims that he had been told by a corrupt police officer with whom he had worked to 'find out things' about Clive Small and others, to do 'the dirty things for him (Small)'.

Seventh, in practical terms, the problems at SCIA began almost from the moment the 1995-97 Wood Royal Commission into the New South Wales Police (Wood RC) closed its doors and reform of the Police commenced. The lessons of the \$75-100 million Wood RC appear to have been ignored by some police, the PIC, the CC, the Management Committee of the CC and politicians alike.

Eighth, as with point seven, the lessons of responsibility and accountability, dealt with at length in the 1990 the Royal Commission of Inquiry into the Arrest, Charging and Withdrawal of Charges against Harold James Blackburn and Matters Associated (Blackburn RC), have been lost.

These observations are drawn from Parts 2 and 3 of this submission.



## 2 Summary of critical issues in chronological order

Part 2 summarise in chronological order critical issues, complaints and alleged failures within the former SCU and aspects of the broader SCIA command, of which the SCU was a part, relative to the Ombudsman's inquiry Operation Prospect. Where appropriate, the chronology also includes apparent shortcomings by the PIC, the CC and others relevant to the actions and inactions by SCU and SCIA.

Some facts are included to give context to the activities of SCU/SCIA and management of the New South Wales Police.

A number of sustained complaints against SCIA that do not fall under the Emblems' umbrella have been included as they contribute significantly to understanding the pattern of operational and managerial behaviour and practices under investigation at SCU/SCIA.

In many cases it was years before the misconduct or bad practice alleged was identified, while in some cases defective practices persisted for several years without any attempt at correction. I have listed each complaint under the date on which it occurred rather than on the date it came to light.

Paragraphs in the chronology are numbered to identify and separate issues. Where multiple paragraphs refer to the one matter they are given only one number.

## 1997

1. **February.** Malcolm Brammer is appointed Commander (Assistant Commissioner) in charge of Police Internal Affairs (PIA)---later renamed Special Crime & Internal Affairs (SCIA). Newly appointed Commissioner Peter Ryan agrees to SCIA working on strike forces with the CC to identify corruption between organised crime and police. The New South Wales Crime Commission Act 1985 states that a police 'task force' may be formed 'to assist the Commission to carry out an investigation' but was to be 'under the control and direction of the Commissioner of Police', (my emphasis) a fact reiterated during the Wood RC and by the then Crime Commissioner, Philip Bradley.
2. **March.** SCIA and the CC begin a corruption investigation into Police Task Force Bax, which had been established in February 1996 'to investigate criminal activity centred on Kings Cross'. The PIC joins the investigation (Operation Jade). Public PIC hearings are held during late 1997 and early 1998. The task force is disbanded. Two detectives (only one of whom was attached to Bax) are jailed for perverting the course of justice and lying to the PIC. Several members of Bax sue over SCIA's handling of the investigation. In December 2007 the Police and Government settle the claims of nine former Bax officers with a rumoured payout of around \$5 million.
3. **August.** Ryan seeks 'advice' from Brammer over complaints made against him, Brammer, by Detective Sergeant John Edlund and the New

South Wales MP John Hatton. The complaints include claims of serious misconduct, both before and after Brammer's appointment to SCIA.

Brammer advises Ryan that 'any further inquiry is an absolute waste of time and effort'. Strike Force Shillingstone, set up in February 2000 to investigate the complaints, found that Brammer's advice was biased; amounted to a conflict of interest, perverting the course of justice and misconduct. Shillingstone observed: 'It would be difficult to identify an officer within the NSW Police Service with a greater obligation concerning issues of conflict of interest, than one holding the position of Commander of Special Crime & Internal Affairs.' In obtaining advice from Brammer, Ryan had ignored written warnings from Edlund, Hatton and Assistant Commissioner Christine Nixon, who had each expressed 'unambiguous concerns' about involving Brammer in a complaint against himself.

4. SCIA's use of the police records management system is also found to be deficient: 'entries were often quite inadequate, sometimes missing altogether, poorly and (in certain instances) improperly assessed, led to inappropriate responses and frequently contained inaccurate data.'

## **1997-98**

5. SCIA conducts operations Burnley, Altar and Brent in the Young area in the south west region of Southern New South Wales after allegations are made of police corruption and drug dealing with members of the local

Rebels outlaw motorcycle gang. One of the people who called for the operation was Brammer's father, who was described as having acted like an informant for his son. Malcolm Brammer initiates and takes control of the operations. In June 1998 SCIA led raids resulting in Sergeant Terrence Fraser and Detective Senior Constable Cliff Whiteman being suspended from duty for misconduct; locals Richard Tyler and Dianne Ewan are charged with drug offences

Whiteman is convicted of an assault and leaves the police. Ewan pleads guilty in 1999 to possessing and supplying cannabis. Tyler pleads not guilty to supplying cannabis and the charges are dropped when 'police legal advisers reveal that Internal Affairs officers lied to Supreme Court judges to get search warrants and permission to install listening devices'

After being suspended for 26 months Fraser receives a letter from Commissioner Ryan clearing him of any wrongdoing. He later resigns from the police.

6. Following a complaint by Fraser, Strike Force Banks is formed to investigate SCIA's handling of the case. Banks makes adverse findings against seven SCIA officers. No charges are laid but managerial action is taken against several officers.
7. Eighteen affidavits for telephone intercepts and listening devices, sworn by three different SCIA officers (an Inspector and two detective sergeants) include paragraphs 'containing false information' during operations Burnley, Altar and Brent. 'Only inculpatory material was

included' in the affidavits. 'Exculpatory material (was) omitted providing an unbalanced view.' Information in the affidavits was also 'embellished, exaggerated and was often misrepresented'. The affidavits were not 'subject to any form of documented review by a (supervisor).' These were the findings of Strike Force Sibutu, which was established in 2001, on the recommendation of Banks, 'to investigate alleged lies told by SCIA officers to Supreme Court judges when obtaining search, telephone intercept and listening device warrants'.

## **1997-2000**

8. Two police officers, 'Joe' and 'Jessie'---I have used the pseudonyms by which they were known during their time as undercover operatives---are recruited to undercover duties at SCIA. Over the next three years they carry out numerous undercover operations in New South Wales and Queensland. In 2001 Jessie lodges a formal complaint against SCIA and Strike Force Tumen is established. It investigates almost 40 separate issues. Adverse findings are made in sixteen matters against at least five SCIA officers and general adverse findings against the command are made in about twenty matters. It found that SCU (and therefore SCIA):
  - failed to exercise proper supervision;
  - some staff were untruthful;
  - there were conflicts of interest among senior staff;
  - the unit had misused authority;

- had used incorrect procedures and had failed to maintain adequate record keeping, causing files to go missing;
- had conducted a seven-month surveillance operation during 1998 on one of its own officers, Detective Inspector Deborah Wallace, and that records of the operation either went missing or never existed; that no senior officer at SCIA could explain why the operation had been undertaken and that Wallace had done nothing wrong, and
- several officers given temporary promotion at SCIA---some to the ranks of Inspector and Superintendent---are found 'not to have the capability to properly discharge the functions of the positions they held'.

Joe and Jessie sue the Police for psychological trauma and injury. The matter is settled in 2007. The then Commissioner, Ken Moroney, presents them with awards for 'outstanding and meritorious performance of duty' and for their contribution to undercover policing. Both leave the police.

(This story and others not set out here are fully dealt with in a book I wrote with Tom Gilling, *Betrayed: The shocking story of two undercover cops*. The book is, I suggest, directly relevant to understanding the matters that have arisen in Emblems and are now part of Operation Prospect.)

## **1998-2001**

9. **December-February 1998-99.** Detective M5 (Name deleted, but can be supplied, if required.) approaches the CC, admits to corruption and offers to roll over on corrupt colleagues. SCIA and the CC begin Operation Mascot. About a week later M5 admits himself to a psychiatric clinic where he stays for about ten days. At this time M5 is suicidal and has other significant mental and other problems, including the excessive consumption of alcohol, depression, intense distress, and is on antidepressant medication.

10. **1999-2001.** Knowing of these medical problems M5 is put 'undercover' to expose his corrupt colleagues. This includes spending a significant amount of time drinking alcohol with them in pubs and clubs (Thereby exacerbating his medical condition and reducing his reliability).

M5 later claims that as a rollover he was 'nurturing corruption' and, on occasions, was 'settling old scores' for (Detective Superintendent) John Dolan, a senior officer at SCIA. The investigation culminates in PIC Operation Florida (see paragraphs 16 and 41).

In 2003-04 M5 is boarded out of the police on a full police pension and, reputedly, was also given a substantial ex gratia payment. Neither the amount nor the settlement itself has been made public, but such a quick and secretive settlement only served to increase suspicion among police that the payment was made to prevent serious allegations of misconduct M5 was beginning to make against SCIA being aired publicly.

## 1999

11. **January-March.** During this period SCIA undercover police Joe and Jessie surveilled the Woolwich Pier Hotel, Woolwich, where I was said to be meeting eastern suburbs organised crime figure Michael Hurley. The surveillance was suddenly dropped, without explanation to the undercover police. There were no meetings.

Significantly, at the time I was allegedly meeting with Hurley, SCIA and the CC had had Hurley under surveillance for two years or more. Not once had they seen Hurley and me meet or otherwise detected us communicating with each another. Despite this, I was named as being the subject of a major criminal investigation.

At this time I was the Assistant Commissioner in charge of Crime Agencies. The operation was undertaken just prior to the position of Deputy Commissioner, Specialist Operations, being advertised. To this date I have never been interviewed about this allegation.

12. **May-September.** A criminal, given the pseudonym 'Paddle' by SCU, who is under committal for trial on 1994 armed robbery and kidnapping charges in Coffs Harbour when he is recruited by SCIA, claims to have been set up by Detective Peter Burgess and other police who arrested him. Paddle is wired up and given a new \$500 video cassette recorder as an excuse to go to a pawn shop at Kempsey where Burgess works. He tries unsuccessfully to get Burgess to admit to corruption. Three weeks later he returns to try again. Burgess is suspicious and concerned about



Paddle's record of violence. He contacts the police and Paddle is arrested for breaching his bail condition by approaching a witness in his forthcoming trial.

In September Paddle appears at the Coffs Harbour District Court to answer the breach of bail charge. During evidence under oath, he falsely claims he was surprised to see Burgess in the pawn shop. The judge reprimands Paddle for speaking to witnesses, describing it as 'a very serious breach' of his bail conditions. Neither Paddle's perjury nor the truth about the circumstances of his attendance at the pawn shop is brought to the attention of the judge.

In 2003 an inquiry (Emblems) is set up to examine allegations that SCIA influenced witnesses and perverted the course of justice and that Paddle committed perjury. SCIA officers deny knowing details of Paddle's bail conditions at the time of the original breach of his bail, ie, when he first approached Burgess.

Emblems' finds substantial documentary and other evidence to support each of the allegations. Journalist Neil Mercer has since told me that he has learned that SCIA officers involved in the management of Paddle as an undercover operative were at the court when he gave his perjured evidence. If this is correct, then SCIA officers have condoned the perjury and facilitated the perversion of justice. Even if SCIA officers were not at the court, given the circumstances under which Paddle went to the pawn shop, it is beyond belief that members of SCIA did not know of his

perjury. The failure to report the perjury is a serious issue of corruption. It strongly suggests that the perjury was condoned by members of SCIA and, if that is correct, they were directly involved in the commission of a crime.

13. **December.** Ryan formalises SCIA's relationship with the CC. SCIA, he writes, 'will continue to work in partnership with the CC which will provide accommodation, intelligence analysis, financial analysis and coercive powers.' Responsibility and accountability for SCIA task forces remains with the Commissioner of Police.

14. **December.** During a casual conversation with Detective Superintendent John Dolan, Joe, the SCIA undercover cop (see paragraphs 8 and 9), mentions that the commissioner and his wife sometimes go for a drink after work in the bar of the Marriott Hotel near police headquarters in College Street, Sydney. In mid-December Joe is told by his supervisor, 'Brammer has a little job for you. He wants you to pop in to the piano bar at the Marriott and keep an eye on Ryan.' When asked by Joe what it is that he is to look for, the supervisor is said to have replied, 'Anything. Who he meets. Who he speaks to. Brammer wants you to try and listen to the conversation to see if he is talking shop.

They might be a 'security leak', Joe is told.

Joe visits the Marriott half a dozen times. He reports in person to his supervisor. There is nothing untoward about the Ryans' behaviour. The

operation fizzles out in January 2000. SCIA surveillance of the Police Commissioner and his wife is never documented or mentioned again.

### **1999-2003**

15. **1999-2001.** During almost two and a half years of covert operations, Operation Mascot investigators make applications through the CC to the Supreme Court for telephone intercept and listening device warrants authorising the use of an estimated 350 telephone intercept and listening devices; more than 200 of which are estimated to be 'mega' warrants, ie, include the names of around 100 people or more. The warrants are believed to have been signed by more than 20 judges.

The truth or otherwise of the information contained in these applications is unknown, as is the number of applications that contain insufficient grounds for the inclusion of names on warrants, but then Acting Commander of SCU Catherine Burn's report of April 2002 (see paragraph 26) raises many questions that need to be answered. If judges had been properly and truthfully informed about the names on the applications and affidavits and the reasons for their inclusion, would they have signed the warrants?

It is clear that significant false information was presented to many of the issuing judges. This raises several serious questions:

- Was the PIC inquiry Operation Florida based, in part at least, on corruptly or otherwise improperly obtained information?
- Was the evidence used to convict several people (police and others) following the Mascot and Florida inquiries corruptly obtained? (This is not a debate about guilt or innocence, but about justice!)
- Was Operation Volta and its findings based on corruptly obtained information?
- Were findings in any other criminal or internal investigation based on information corruptly obtained during Mascot?
- From an impartial investigative view, the judges who signed the warrants containing false information were either knowingly taking part in the commission of serious crimes or are principal witnesses against those who have committed serious misconduct or criminal offences. How many of these judges have been interviewed and had statements taken from them?

In May 2012 the former Supreme Court judge Bruce James says ‘that almost all applications are granted’ and that false affidavits are ‘unlikely to be detected.’ (see paragraph 36)

16. **1999-2003.** SCIA and the CC run Operation Mascot, using M5 in an undercover role. In mid-2000 the PIC joins the investigation; naming the operation Florida. Between late 2001 and late 2002, 29 cases of corruption and misconduct are heard in private and public PIC hearings. Six police and former police are prosecuted, convicted and jailed. Twenty nine police and former police---including the six criminally charged---are found to have engaged in misconduct.

There is no question that serious corruption was identified, exposed and dealt with, and for that credit is given. However, other aspects of the operation raise serious unanswered questions. (see paragraph 10 re M5's discharge from the police, paragraph 17 re M5's admitted criminality while working undercover and the failure of police and the crime commission to take action, and paragraphs 38 and 41 re Operation Volta)

## **2000**

17. **16 August.** M5 swears false information in support of an application for a search warrant to be used in an integrity test. He falsely tells the magistrate that the police informant has seen drugs on the premises. M5 would not have obtained the search warrant without the lie. About a week later, Detective Superintendent John Dolan of SCIA and Mark Standen of the CC speak with M5 about the application. M5 apologises for his actions. He claims that it was a new magistrate who considered his

application and that, 'in general terms', the magistrate invited him to lie. M5 says that nobody directed him to lie but he simply 'went into auto mode'---referring to past corrupt practises. The 'principle of swearing the false information was authorised,' he says, and he believed that he was acting in good faith and supporting the SCIA/CC operation.

M5 is told by Dolan and Standen not to swear false information again. Then Detective Inspector Catherine Burn is advised of the false swearing (a criminal offence) in writing. No further action is taken against M5. The magistrate is neither told of nor confronted with M5's allegation that he 'invited' M5 to lie. It is not known what happened in operational terms following M5's admission of corruption.

The false swearing and allegation against the issuing magistrate was made one month after PIC joined the operation. Was the PIC told of the crime/corruption by M5 or about the alleged corruption by the magistrate which appear to have been committed at a time when PIC were heading the investigation? If so, what did they do? If not, why not? What would they have done, if told? What is the PIC view about agencies that do not tell them about crime/corruption committed during the course of an investigation in which they had a leading, if not the leading, role?

18. **August-December.** Brammer conducts an internal investigation into the activities of two English detectives, Ken Seddon and Robin Napper, seconded to Australia by Commissioner Ryan, and colleagues working on the reform of criminal investigation. Brammer is found by the PIC

(Operation Malta) to have been 'affected by bias in his investigation of Seddon and the Crime Management Support Unit; there was a lack of fairness in Brammer's investigation in that none of the individuals concerned were spoken to about the allegations against them.'

19. **14 September.** In an affidavit for seven listening devices Detective Sergeant Glenn Trayhurn swears that on 10 December 1999 M5 had 'unexpectedly met with former NSWPS Inspector John Bourke who had retired from the police in 1989 in The Corso, at Manly.' (Interestingly, it was apparently one of the rare occasions during this period when M5 was not wearing a recording device.) The affidavit continues:

(Bourke) engaged (M5) in conversation regarding Assistant Commissioner Clive Small. (Bourke) used words to the effect 'I have the best brief on him.' (Bourke) went on to describe Assistant Commissioner Small's alleged involvement in the release of information to former NSWPS officer Jack Whelan, an associate of NSWPS drug target that was under investigation. As a result, the NSWPS drug target was warned of the NSWPS investigation, which ultimately failed.

Trayhurn says of the claimed allegation: 'I suspect (Bourke) has information or evidence, which he believes, incriminates Assistant Commissioner Small. I suspect (Bourke) meant to indicate that he would use that information or evidence to protect himself, if necessary, from investigation or prosecution, or both.'

Contacted by Neil Mercer in April 2013 and told of his reputed 1999 conversation with M5 about Small, Bourke replies: 'The name (refers to M5 by name) is not significant to me, ... I can confirm with absolute confidence, I have never met any such named person on the Manly Corso at any time in my lifetime. ... I have never had any discussions dealing with former Detective Clive Small along those lines claimed. Bourke continues, saying that any claim to the contrary is 'a fabrication'. Bourke says that the last time he visited Manly 'was about 1978 the year I left Sydney to work at the (name of country police station deleted).' In the early 1980s Bourke transferred to another country posting where he remained until he retired in 1989. (See Neil Mercer article 'Aggrieved officers doubt ability to handle so many alleged offences' in The Sydney Morning Herald, 6 May 2013.)

I have made a number of inquiries from serving and retired police about Bourke. All have spoken of him as having the highest ethical standards.

At their most serious, Bourke's denials raise questions of serious criminal conduct and corruption by one or more people involved in Operation Mascot while at a minimum they raise questions of serious police misconduct and incompetence. What action did Operation Mascot take to check the truth or otherwise of the claim attributed to M5, particularly given it had been made 15 months earlier and, almost certainly, has appeared in numerous applications for earlier and, perhaps, later warrants?



It also appears that there was no attempt by Trayhurn or any other person to clarify precisely who it was that M5 claimed to have spoken with.

OMITTED BY RESOLUTION OF THE COMMITTEE 20 JANUARY 2015

OMITTED BY RESOLUTION OF THE COMMITTEE 20 JANUARY 2015

OMITTED BY RESOLUTION OF THE COMMITTEE 20 JANUARY 2015

In the September 2000 affidavit for the warrant Trayhurn also swears that on 25 May 1999 M5 had been told by a corrupt police officer with whom he had worked to 'find out things' about Clive Small and others, to do 'the dirty things for him (Small)'. Who told M5 to do this? Have these matters ever been investigated?

M5 was sworn in as a constable in 1980; two years after Bourke left Sydney. How does M5 say he knows Bourke?

Bourke has never been interviewed by SCIA, the CC or the PIC about his alleged conversation with M5, nor have I. It is not known whether he has been interviewed by the Ombudsman.

In September 1998 I told M5 that he would not be accepted into Crime Agencies due to outstanding internal affairs investigations. This decision was consistent with undertakings given to the PIC as part of the reform of the NSW Police. M5 says that he became 'very pessimistic' about his future.

## **2001**

20. **July.** Brammer resigns from the New South Wales Police and takes up a position as the Executive Director, Operations, at the Independent Commission Against Corruption (ICAC). In February 2003, after the release of the PIC Malta report (see paragraph 18), Brammer resigns from the ICAC.
21. Andrew Scipione is appointed Commander (Assistant Commissioner), SCIA.
22. **April-November.** In November Detective Inspector Brett McFadden of SCIA sends an email to Andrew Scipione, then Commander of SCIA, outlining operational and managerial concerns by some staff over the 'legality of TI (telephone intercept) affidavits for (Operations) Orwell/Jetz' because of legal advice 'provided by the PIC (on 10 April 2001) ... to the SCU' that the information contained in the affidavits for the offences of 'corruption' and 'pervert the course of justice' was not supported by the information available. Despite the PIC advice, similar information

continues to be used in applications at least seven months later. Further, there are 'concerns about some material provided from the (Police) Commissioner's office seeking to override the PIC advice.'

The email also raises concerns about the release by police of 'fictitious information to facilitate search warrant applications and executions' by Operation Mascot. It explains that 'It apparently relates to the process by which the Mascot investigators knowingly provided false information to criminal identities. This information was subsequently released by the identities to serving police. This information ultimately formed the basis for search warrant applications made by target officers.'

Scipione forwards the email to then Commissioner Moroney after having discussed it with him. It is not known what, if anything happened next with regard to the concerns about past operational and management practices, current practices or changes to future practices.

- 23 On the information available it appears that I was a Mascot target of SCU from at least the day of M5's reported meeting on The Corso at Manly which was reported as being 19 December 1999 and was still a target when the PSU target list headed 'Mascot/Boat ... Pseudonyms', in which I was assigned the pseudonym 'Big' was in use on '11/09/01', almost two years later. The target list at that time comprised 100 names made up of 57 police and 43 criminals or suspected criminals. Some of the 43 names

are recognisable. I would classify them as major drug importers and traffickers, some of whom had a reputation for corruption. I do not personally know any of them.

## **2002**

24. **February.** Andrew Scipione, Commander (Assistant Commissioner) promoted to Deputy Commissioner, Support (Specialist Operations), which has responsibility for Internal Affairs.
25. **April.** A copy of a Mascot listening device warrant, issued on 14 September 2000 by Justice Virginia Bell, is leaked to Steve Barrett and other Sydney journalists. Barrett's name is one of 114 listed on the warrant whose conversations were to be recorded. A police and media outcry over the warrant follows.
26. **April.** The then Police Minister, Michael Costa, asks the Inspector of the PIC, Mervyn Finlay, QC, to report on whether 'the warrant was justifiably sought; the seeking of the warrant complied with the relevant legislation, and the material obtained by the warrant was used appropriately'. Two weeks later Finlay reports that 'the warrant was justifiably sought' and that 'the material obtained by the warrant was used appropriately'. He does not offer an opinion as to whether the claims made in the application are truthful or whether the issuing Justice was misled.

Responding to inquiries from Finlay, then Acting Commander Catherine Burn of the SCU, wrote in a report on behalf of SCIA, dated 3 April 2002, that of the 114 named in the warrant,

- ‘only 66 were mentioned in the September affidavit. The majority of the remaining names (46) were mentioned in previous affidavits.’
- ‘in two cases *no reason* was given for including the person named in the application,’
- two other people were included only because one had a ‘significant’ and the other had a ‘lengthy’ complaints history and that
- 29 people, who had not been included in the affidavit but who had been referred to in previous applications for warrants, were on the warrant because they were attending a police function at which they might speak to M5. According to an attachment to Burn’s report, 10 of the 28 were included because they were ‘suspected to have been involved in or have knowledge of, corrupt or criminal conducted by police,’ while the other 18 were included because they had had some form of adverse mention.

The names of the 29 were still being included in applications three months after the function. Most of 29 did not attend the function because they barely knew King or didn’t know the farewell was on.



It is difficult to understanding how the issuing Justice could have been appropriately informed of the justification for the issue of the warrant when, according to Burn, the information justifying the inclusion of many of those named in the warrant was not included in the affidavit and was not, apparently, presented to Justice Bell.

The judges who signed the warrants during the July-September period appear to have been seriously misled. How can the flaws/facts revealed in Burn's reply be reconciled with Finlay's conclusion that the warrant had been 'justifiably sought'?

So far as can be ascertained few, if any, of the 29 who did not attend the King function were interviewed over their alleged knowledge of or participation in corruption were interviewed over these suspicions or allegations, more than a decade later.

27. **April.** Doubts about the legitimacy of the September warrant were dismissed in 2002, first by Commissioner Peter Ryan and later by his deputy, Ken Moroney. Both explained that many of the people named in the warrant were expected to attend a police 'social function' at which they were likely to speak to M5. Brammer, the head of SCIA at the time the warrant was obtained, later ridiculed the explanation, telling Steve Barrett that there was 'no evidence' to support their claim of a social function, but he did not offer an alternative explanation for their inclusion on the warrant. Brammer's denial of a social function is, in part, contradicted by the explanation for the inclusion of names as set out in

the report of the then Acting Commander of SCU, Cath Burn, (see paragraph 25) but later supported when, in 2003, Burn was interviewed by Emblems investigators and asked if she knew the basis of Ryan's 'social function' claim. She replied, 'I have no idea why he said it, I'd say he wasn't briefed (correctly).'

28. OMITTED BY RESOLUTION OF THE COMMITTEE 20 JANUARY 2015

29. **April-May.** Peter Ryan resigns as Police Commissioner. The following month Ken Moroney is appointed Police Commissioner.

## **2003-2004**

30. **July 2003-February 2004.** Strike Force Emblems begins in July 2003 after representations by the Police Association on behalf of members 'in relation to the impropriety of listening Device Warrant No 266 of 2000 ...

which contained 114 names ... (and) ... allegations concerning the management of the Special Crime Unit of SC&IA'. This was the warrant in which Barrett was named. Following a six-month investigation Emblems reports that it cannot complete its investigation and make findings 'until the subject affidavit and source material can be analysed along with the interviewing of the involved officers and witnesses'. Emblems further reports that 'authorisation was not granted by the CC to interview persons under the Operation Mascot reference' which was covered by the commission's 'secrecy provisions'.

Emblems find that despite its limited access to documents and individuals involved there is an 'overwhelming inference' in support of the 'allegations in that the subject affidavit may contain false information and there has been an abuse of due process'. There are 'serious questions impacting on the propriety of the affidavit/s. This in turn may impact on past and present prosecutions as they may be perceived as being tainted due to the legalities of the listening device warrant process. It would then be incumbent upon the Police to inform the appropriate authorities.'

Emblems observes that its findings are similar to those of Strike Forces Sibutu and Tumen and Operation Banks which 'identified systemic corruption and mismanagement (in SCIA).' Emblems goes on, 'This was endemic in the areas of applications for listening device, telephone intercept and search warrants. It was also prevalent in the management procedures and practices adopted by officers in Command positions.'

31. **September-October 2004.** Phillip Bradley, New South Wales Crime Commissioner, addresses the Western Australia National Conference on Parliamentary Oversight Committees of Anti-Corruption/Crime Bodies. Referring to Operation Mascot, he states: 'There were nervous breakdowns among police---both the investigators and investigated. There was a suicide, attempted suicides, and many unfortunate other events. Respected police were accused, some of them unjustifiably. Inevitably the work suffered. The public paid a price as drug dealers and others received less attention from police.'
- It is a damning indictment from the head of one of three agencies leading the operation. Have the claims expressed by Bradley been investigated to determine whether the actions of one or more of those agencies were responsible through mismanagement, misconduct or other failures, such as duty of care, for any of the harms caused?

## **2005**

32. Andrew Scipione, Deputy Commissioner, Support (Specialist Operations), appointed Deputy Commissioner, Field Operations.

## 2007

33. **September.** Andrew Scipione promoted from Deputy Commissioner, Field Operations, to Commissioner of Police

## 2012

34. **May.** A Channel 7 news interview with the then Police Minister, Michael Gallacher, and Police Commissioner, Andrew Scipione, raises further questions about Mascot-Florida. The Minister explains that the recommendations 'quite clearly ... do not make sense the way they are worded' and 'it is not in the public interest that they be released' (see paragraph 37). Evidently the government of the day and the Police Executive accepted a report containing recommendations they could not understand and for seven years made no attempt to clarify them. Apparently, neither the previous State government nor the current government questioned the Police Executive on this failure.

Commissioner Andrew Scipione, standing beside the Minister, claims not to have seen the Emblems report because of the CC secrecy provisions. However, in September 2005 Philip Bradley, head of the CC, told a parliamentary committee that Emblems was a police matter and had nothing to do with the commission. Then PIC Commissioner, Mr Terry Griffin, told the same committee that Emblems was 'a police matter'. Commissioner Moroney told the committee that the complaint that led to

Emblems was made by serving police officers through the Police Association. It was registered as a formal complaint and investigated. These statements contradict Scipione's explanation for not having read the report and Gallagher's supportive stance of the explanation. It seems inexplicable that Scipione never understood that such a controversial and important report into allegations of misconduct and criminal practices within his department was a police complaint for which he had final responsibility as Police Commissioner and had not read it or, perhaps because he was named in it and there could have been a conflict of interest, at least assigned some person in authority to review it and provided legal advice on the issues arising.

35. **May.** The then new PIC Inspector, former New South Wales Supreme Court Judge David Levine, tells the New South Wales Parliament's Joint Committee on the Office of the Ombudsman and the PIC: 'It would be a very unusual state of affairs for me to dissent from any view expressed by someone as eminent as the Hon. Mervyn Finlay.' Levine is later asked to review Finlay's findings on Emblems. His words to the Parliamentary Committee raise concerns about the rigour of his review of Finlay's findings and create a perception at least of a potential bias by him in any assessment he might make of statements made by Finlay.
36. **May.** Appearing before the Parliamentary Committee on the same day as Levine, the former Supreme Court Judge Bruce James, now head of the PIC, acknowledges 'a problem' with the process of applying for warrants

from Supreme Court judges. 'It is a fact,' he says, 'that almost all applications are granted,' and that false affidavits are 'unlikely to be detected.' As to whether warrants are scrutinised beforehand by the NSW Solicitor General, he says: 'I do not think there is any close scrutiny of an application in the Solicitor General's office.' This is a damning indictment on the integrity of the system and an indictment that judges themselves have not seen fit to address.

37. **May.** Michael Gallacher asks the PIC Inspector, Mr David Levine, QC, to examine whether the recommendations contained in the Emblems report have been satisfactorily implemented and whether those recommendations may be made available to the public.

Six months later Gallacher announces that the government has received a report from Levine, who found the Emblems report 'to be such an abstruse and unsatisfactory internal police document that it is not in the public interest for it, its findings (such as they are) and its recommendations (such as they are) to be made public.' (see paragraph 34)

The PIC Inspector went on: 'With the utmost respect to those involved in the preparation of the Strike Force Emblem Report it is severely wanting in sound reasoning and local exposition of investigations said to have been undertaken. Its findings and recommendations on my reading of the accompanying internal police communications do not enjoy support or

confidence among police commentators of high rank.’ The ‘police commentators of high rank’ are not named.

Appearing before the Parliamentary Committee on the Ombudsman, the PIC and the CC on 22 February 2013, Levine agreed with Committee member, The Hon Adam Searle, that the Emblems report was ‘such a rubbish document it would have just been embarrassing to the institution (the Police) if it was made public’.

The comments by Levine are consistent with the earlier comments by the then Police Minister (see paragraph 34) and those of Searle. The question of their validity aside, the claims by the Police Minister, the PIC Inspector, and member of the Committee on the Ombudsman, the PIC and the CC, raise serious questions about the performance and competence of the senior officers who reviewed and endorsed the Emblems report, including the then Deputy Commissioner (Specialist Operations), the Inspector Professional Standards; Assistant Commissioner Gary Dobson (the commander of Emblems) and Commissioner Ken Moroney, and the management of professional standards within the Police. But so far as I am aware none of these serious concerns were addressed. Alternatively, if any of these police are among the ‘police commentators’ referred to be Levine, then they have failed significantly and displayed, either by act or omission, dishonesty and a lack of integrity, in their duties in accepting the Emblems report in the first instance.



It is difficult to take Levine seriously on this or any other matter given his answer to the Parliamentary Committee on the Ombudsman, the PIC and the CC when asked how he determined whether information put before him was 'flawed or incompetent or misleading' and he replied, inter alia, 'I am going to look to see if there is someone named in this warrant who is named as "M Mouse" or "D Duck"---I did that. That is one way.' (see paragraph 40)

38. **September.** An application by me to the New South Wales Police Force for access to purely statistical data about Volta---the task force established to investigate the 389 cases of corruption and misconduct claimed to have been identified during Florida and referred to the NSW Police by the PIC---under the Government Information (Public Access) Act 2009 is refused. Professional Standards Command (formerly SCIA) advises that 'a new investigation has been commenced (presumably Operation Prospect) and documentation involving Strike Force Volta forms part of this investigation. ... (R)elease could impede and prejudice any adjudication of the matter.'

The Police further advise that releasing the information sought 'may prejudice any court processes by revealing matter prepared for the purposes of or in relation to current or future proceedings.' But the material (for which, it admits, 'there is no overall index') has lain dormant in Professional Standards/SCIA archives for the past eight years. In any case, the information sought is purely statistical. It is difficult to see how it

could prejudice court proceedings, past, present or future. The lack of an overall index also raises serious questions about the integrity of the investigation management system---if there was such a system---used by Volta. The integrity of Operation Volta and its findings remain hidden from the public view. Given what is known about the SCIA operations outlined here, there is justifiable cause for public concern. (see paragraph 41)

39. **7 October.** The then Premier, Barry O'Farrell, announces that the Ombudsman will be given the powers of a Royal Commission to conduct a thorough inquiry into Emblems and related matters. The inquiry is to be conducted in secret. There will be no public hearings. In short, the matter will be 'buried' from the public for at least two years. Journalist Sean Nicholls, writing in the *Sydney Morning Herald*, notes that before the 2011 state election, Opposition leader Barry O'Farrell announced that a Coalition Government would 'pursue a new era of open government. The community has the right to openness, accountability and transparency'. Community scrutiny of government, O'Farrell said, 'both protects the public interest and propels better public sector decision-making and performance'.

## **2013**

40. **February.** Appearing before the Parliamentary Committee on the Ombudsman, the PIC and the CC, Levine was asked by the Committee

Chair, The Hon Catherine Cusak, about Emblems and the situation where police officers seek a warrant from a judge. 'Is the veracity of the information they put before that judge open to any form of scrutiny or testing? If the information that was put before the judge was flawed or incompetent or misleading, are there any means by which that could be detected and addressed?' Levine replied,

I, like any other judge, developed an idiosyncratic methodology for reading this material, which at times would come in inundating waves, one after the other. I do not want to diminish the process, but I said, 'I am going to look to see if there is someone named in this warrant who is named as 'M. Mouse' or 'D. Duck'—I did that. That is one way.

Levine went on to explain that the judicial officers who issue the warrant 'must have confidence in the integrity of the applying body. That is the area of difficulty that has evolved since, for example, the Emblems matter.'

The Chair continued,

It is an important point in any investigation because if something has gone wrong at that point, then everything that happens after that is going to be contaminated. If it went wrong, with the best will in the world, aside from the fact that it is exposed to abuse, if people feel that it is not accountable—and it concerns me that any judge would be searching for M. Mouse and D. Duck. It seems to

reflect a lack of confidence or it seems there is a vulnerability that you feel in issuing these warrants.

‘Yes, I would not place great weight on my particular choice of M. Mouse and D. Duck,’ Levine responded, ‘It was one of several criteria that I applied to determine whether or not I would issue a warrant. I think there is a legitimate complaint or area for complaint to be made—and this is perhaps more for the courts than for my own office.’

Committee member, The Hon. Adam Searle then asked, ‘I hesitate to ask—did you ever find an M. Mouse or a D. Duck?’ to which Levine replied, ‘No, I think I had to discontinue looking for D. Duck after a very well-known member of the legal profession by that surname was appointed a judge of the Workers Compensation Commission.’

Levine’s findings on and comments about Emblems repeat the views of the Police Minister, stated before Levine was asked to undertake the review, and raise serious questions about the Strike Force Emblems team that was led by an Assistant Commissioner and comprised five Detective Inspectors, and the performance and competence of the senior officers who reviewed and endorsed the Emblems report (none raised any objection to it), including the then Commissioner Ken Moroney, the Deputy Commissioner (Specialist Operations), the Professional Standards Manager, Deputy Commissioner’s Office; Assistant Commissioner Gary Dobson (the commander of Emblems) and the management of professional standards within the Police.

41. **February-March.** The same statistical information respecting Volta sought by me from the Police is sought from the PIC, which replies that the investigation was conducted by the Police. 'The information requested is confidential and it is not considered necessary in the public interest for it to be released by this Commission. Unfortunately the Commission is unable to help you with your request.'

In its June 2004 two volume report Operation Florida to the New South Wales Parliament, the PIC wrote that the operation had 'identified 418 incidents of police corruption or misconduct' of which 'Twenty-nine ... were the subject of examination in the (public) hearings'. The other 389 were to be investigated by 'a Task Force (Volta) set up by NSW Police' and overseen (my emphasis) by the commission.

Clearly the PIC had not read the report of the 1989-90 Blackburn Royal Commission which states: 'The word "oversight" ('overseen ') provides an excuse to claim no Responsibility.' Or Justice Wood who made the same point in his Royal Commission into the New South Wales Police Force---which led to the formation of the PIC.

On 27 March 2013, Mr David Shoebridge MLC, of The Greens, asked Mr Michael Gallagher, the Minister for Police and Emergency Services, about Volta. Five weeks later Gallagher replied that Taskforce Volta was led by AInspector Greg Jewiss and reported to the Commander Special Crime and Internal Affairs. 'The Taskforce ran for approximately 12 months with an authorised strength of 21 officers. Each matter

considered by the Taskforce was investigated as a complaint under the Police Act 1990 and the outcomes reported in accordance with that Act. Records relevant to Taskforce Volta have been supplied to the NSW Ombudsman.'

Volta completed its inquiries in just under a year, investigating and resolving an average of one or more incidents of corruption or misconduct for each day of its existence (including weekends and public holidays.) An Olympian, if not arguably an impossible, task.

According to the PIC's actions, it is in the Parliament's and the public's interest to know that the PIC claims to have uncovered 389 cases of police corruption and misconduct and that these cases have been referred to the police for investigation under the oversight of the PIC, but it is not in the public interest that the public know the results of those cases. Why not? Did the PIC mislead the Parliament in stating extent and quality of its findings?

### 3. Comment on Ombudsman's inquiry

#### Operation Prospect

On 14 July 2014 I attended a hearing of the Ombudsman's inquiry known as Operation Prospect in response to a summons to 'give evidence and produce documents'. On that date I did produce copies of relevant documents in my possession and gave evidence. I had previously made a submission to Operation Prospect.

At the time of my attendance I was advised that hearings for Operation Prospect had been divided into what I understood to be two parts. One part related to the 'leaking' of information and the other part related to the investigation of various allegations made about the conduct of Operation Mascot and related matters. In the first instance the hearings, including that on 14 July, were to focus exclusively on the 'leaks'. I was not to raise anything beyond the 'leaks', either by way of question or answer, at the day's hearing. I was told that I might be recalled at a latter and asked about the allegations. All questions asked of me during my several hours in the witness box related to the 'leaks'. There was only one minor exception, and that was to clarify some general aspects of a further submission that was tendered by me on that date.

At the conclusion of my evidence I was given a non-disclosure direction by the Ombudsman and told that I was still bound by the summons and may be recalled.

I heard nothing further from the Ombudsman's Office until I received a letter, dated 9 September 2014, advising that '(i)nterviews and hearings are still currently being conducted as well as additional document review and analysis' and that '(a)t this stage it is anticipated that the investigative stage will be largely finalised by December 2014'. I have heard nothing further since receiving the letter.

Despite my submission to the Ombudsman containing a significant number of issues relating to potential serious criminal offences, corrupt conduct, misconduct and/or incompetence, I was not asked one question about them, either while giving evidence before the Ombudsman or since. Particularly, I was not asked about the following matters nor was I given the opportunity to comment on them:

- false claims allegedly made by M5 about me;
- false unchecked information alleging my involvement in corruption going back to about 1982---about 17 years earlier---included by the police preparing the application and affidavit;
- the number of applications/affidavits on which my name appeared or the basis for those inclusions, and
- the reasons for my inclusion on the Mascot target list, seemingly for about two years or more including at least part of the period when the PIC was directly involved in the investigation.

These failures are made even more serious when, following the allegation and suppositions, is the comment by Trayhurn that on 25 May 1999 M5 had been



told by a corrupt police officer with whom he had worked to 'find out things' about Clive Small and others, to do 'the dirty things for him (Small)'.

I have never been interviewed about these allegations by the Ombudsman. I have not been given any advice that the allegations have been investigated or those involved have been interviewed, nor whether they were part of the Task Force Volta investigation. Nor have I been told how many times these allegations have been included in applications and affidavits for listening device or other warrants.