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**Appendix 3:**

Report by Inspector of the Police Integrity Commission  
of Preliminary Investigation dated 8<sup>th</sup> November 2001  
re: "Four Corners" program: 8<sup>th</sup> October 2001



COPY

*Inspector  
of the  
Police Integrity Commission*

Ref No. C10-01AD

REPORT

8 NOVEMBER, 2001

RE : "FOUR CORNERS" PROGRAM : 8 OCTOBER 2001

REPORT BY INSPECTOR OF PRELIMINARY INVESTIGATION

On 17 October 2001, I wrote to the Commissioner of the Police Integrity Commission as follows :

*"I have just downloaded from the Parliamentary website an extract from Legislative Assembly Hansard of 16 October 2001.*

*This incorporates the motion of censure moved by Mr Tink. I enclose a copy of the pages to which I refer. I note the final paragraph reads :*

*"My final point is that the Premier and the Minister for Police have made much of the role of the Police Integrity Commission. I believe also that the Police Integrity Commission has a vital role to play. That is why it troubles me deeply that the Minister identified in this House this afternoon that the Police Integrity Commission went along with this idea of evidence, secret tapes, yet to be presented to the hearing of the Police Integrity Commission being given on an exclusive basis to Four Corners. That goes to the heart of the role of the Police Integrity Commission and it is why I say with the greatest respect to Mr Sage that he must explain himself on that point in the morning."*

*When we met with the Assistant Commissioner Mr Tim Sage this morning, I was unaware of the censure motion in the Parliament yesterday.*

*What troubles me in particular is the circumstance of the Four Corners program being provided with material, including secretly taped evidence, which had not at the time it was provided and then broadcast on the 8 October 2001 been presented as evidence in the hearing. Was such material divulged in accordance with a direction following certification under Section 56(4)(c) of the Police Integrity Commission Act that it was*

*in the public interest to do so?*

*Whilst I have not as yet received a formal complaint concerning this matter, Section 89 of the Act provides that :*

*"The functions of the Inspector may be exercised on the Inspector's own initiative."*

*Having regard to my concern on reading this material, I exercise my initiative by asking the Commission to provide a comprehensive explanation for what has happened."*

I was advised by letter of 19 October 2001 that "a substantive reply to the matters raised in your letter will follow as soon as possible."

After viewing some tentative draft response I wrote on 23 October 2001 :

*"The question remains, what went wrong? If the Commission had effectively made arrangements so that they would know what material supplied by them was to be broadcast on the night of 8 October 2001, why could it not have ensured that such material was tendered in evidence during that day in the course of the opening? That, as I see it, remains a major issue."*

I have now received a comprehensive response from the Commission dated 8 November 2001 with extensive attachments.

Such comprehensive response enables me to deal expeditiously with what I have described above as "a major issue".

### Some Fundamental Principles

First I note some fundamental principles which I consider are relevant.

The Police Integrity Commission is a powerful body required, as far as practicable, to turn its attention principally to serious police misconduct.

Its principal functions are set out in s13(1) of the Act as follows:

- "(a) to prevent serious police misconduct and other police misconduct;*
- (b) to detect or investigate, or manage other agencies in the detection or investigation of, serious police misconduct;*
- (c) to detect or investigate, or oversee other agencies in the detection or investigation of, other police misconduct, as it thinks fit;*
- (d) to receive and assess all matters not completed by the Police Royal Commission, to treat any investigations or assessments of the Police Royal*

*Commission as its own, to initiate or continue the investigation of any such matters where appropriate, and otherwise to deal with those matters under the Act."*

The Commission is empowered to conduct investigations and for the purpose of an investigation the Commission may hold hearings (s32(1)).

At each hearing the Commissioner or Assistant Commissioner presiding must announce the general scope and purpose of the hearing (s32(3)). Here the scope and purpose of the hearing was duly announced by the Acting Commissioner.

Whilst the Commission is an administrative enquiry it is to be conducted in accordance with the principles of natural justice and procedural fairness. The rules guided by such principles vary according to the nature of the enquiry. Here the nature of the enquiry is as stated above.

The Commission "*is a investigative agency, and not a Court or Tribunal in the sense that it may adjudicate on the legal rights of persons ...*" (see the "Role and Function of the Commission" in Appendix A to the Commission's Report to Parliament in Operation Glacier in November 2000).

Such commissions of enquiry do not exercise judicial power but have a duty, as I have stated, to observe procedural fairness or the requirements imposed by the rules of natural justice.

The content of that duty to observe procedural fairness or the requirements imposed by the rules of natural justice, vary with the circumstances of the enquiry and will depend upon the nature of the functions, the subject matter of the enquiry, the rules under which the decision maker operates, the legitimate expectation of the parties and the nature of the consequences which may result from an adverse decision<sup>1</sup>.

The critical question would always be, not whether the rules of procedural fairness apply, but rather, what does the duty to act fairly require in the circumstances of the particular case<sup>2</sup>

Mr Justice Hunt then CJ at CL considered procedural fairness in Royal Commissions in the *Donaldson v Wood & another* (as yet unreported 15 September, 1995). I respectfully agree with Mr Justice Hunt's following description of the then Royal Commission into the New South Wales Police Service<sup>3</sup>.

*"The terms of its inquiry relate to the nature and extent of corruption within the police force, particularly of any entrenched or systemic kind. Its task is to investigate, not to lay charges against anyone, or to make decisions which directly affect the rights of anyone. It is accepted, as I understand it, that the Commission is obliged to observe procedural fairness to those*

<sup>1</sup> *Stollery v Greyhound Racing Control* (1972) 128 CLR 509 at 526; *Kioa v West* (1985) 159 CLR 550 at 584-585; *Johns v Release on Licence Board* (1987) 9 NSWLR 103 at 109.

<sup>2</sup> *Kioa v West* above.

<sup>3</sup> *Donaldson v Wood and another* Administrative Law Division (unreported) 15 September, 1995 at p.11.

*persons against whom adverse evidence may be given. But that obligation does not call into play a body of rigid procedural rules which must be observed regardless of the consequences; the precise content of the obligation varies according to what is necessary in the circumstances of the particular case."*

Whilst the position of Counsel Assisting may vary from hearing to hearing, in practice the assembly and presentation of evidence necessarily devolves upon Counsel Assisting. However, the Commission ultimately has control of the enquiry.

I consider that the application of these principles required the Commission to ensure that any arrangement it entered into with the media for publication of material, proposed to be tendered in evidence at a Public Hearing of its investigation, effectively precluded any risk of the material being published by the media before it was tendered in evidence at the Public Hearing.

I further consider that the media is only at liberty to report lawfully obtained intercepted telephone conversations when such material has been given in evidence at a Public Hearing (an "exempt proceeding" under the Telecommunications (Interception) Act 1979 (Cth)).

### Considerations

I referred on page 2 above to the comprehensive response dated 8 November by the Commission and the extensive attachments thereto. I appreciate the considered and comprehensive response of the Commission in this matter. The Commission helpfully identifies the four allegations made against it as follows :

- "1. that the Commission was involved in the provision of "secretly taped evidence" to journalist Chris Masters and others at the Australian Broadcasting Commission's Four Corners program prior to the adduction of such material into evidence before a hearing of the Commission ("Allegation 1");*
- 2. that the information referred to at sub-paragraph 2.1, above, was provided on an "exclusive" basis ("Allegation 2");*
- 3. that the Commission permitted or was involved in the granting of permission to Four Corners to broadcast "secretly taped evidence", which evidence had not been presented at evidence in the hearing conducted on 8 October 2001 ("Allegation 3");*
- 4. in particular, that the Commission permitted or was involved in the granting of permission to Four Corners to broadcast the contents of "a tape of the conversation between a solicitor, Mr Green, and B5 recorded on 14 November 2000", which tape and the related transcript "were not tendered into evidence before the Police Integrity Commission until Tuesday 9 October 2001" ("Allegation 4")."*

Before turning to allegations 3 and 4 above, I have considered the Commission's responses to the first two allegations together with its annexed material. I consider the Commission's responses on these first two allegations to be satisfactory and I accept the submissions made by it in paragraphs 14 and 16 hereunder.

Such replies by the Commission on the first two allegations are as follows :

*"Allegation 1*

4. *The Commission communicated information obtained under both the Telecommunications (Interception) Act 1979 (Cth) ("the TI Act") and the Listening Devices Act 1984 ("the LD Act") to Chris Masters and other members the team involved in preparation of the Four Corners program aired on the evening of 8 October 2001. This information was communicated in advance of the commencement of the Operation Florida hearing.*

5. *Information obtained under the TI Act was communicated pursuant to s 67 of that Act, which provides as follows:*

*An officer or staff member of an agency may, for a permitted purpose, or permitted purposes, in relation to the agency, and for no other purpose, communicate to another person, make use of, or make a record of the following:*

(a) *lawfully obtained information other than foreign intelligence information;*

(b) *designated warrant information.*

6. *Information obtained under the LD Act was communicated pursuant to s 56(4)(c) of the Police Integrity Commission Act 1996 ("the PIC Act").*

7. *In relation to information communicated pursuant to s 67 of the TI Act, I observe that:*

7.1. *The determination to communicate information obtained under the TI Act (referred to in relevant documents as "lawfully obtained information" but here as "TI product") was made by Acting Commissioner Tim Sage (as he then was). This determination and the supporting reasons are set out in a memorandum from Mr Sage to Mr Matthew Byrne (our ref: 6330/1670). A copy of this memorandum is attached: see Annexure "A". Please note that, while the final version of the memorandum is dated 24 September 2001, I am informed that Mr Sage formed and communicated his views on the matter on 19 September 2001. The relevant Detrak record was initiated by his Associate on that date. However, Mr Sage did not conclude the documenting of his decision and reasons until 24 September 2001.*

7.2. Mr Sage's memorandum was given in response to a memorandum from Mr Byrne, Manager Investigations, dated 14 September 2001 (our ref: 6330/1635). A copy of this memorandum is attached: see Annexure "B". Mr Byrne's memorandum canvassed a number of options for enabling "the communication of telephone intercept product, hereinafter referred to as lawfully obtained information, to ABC TV journalist Chris Masters and selected members of his staff". Mr Byrne's memorandum stated: "[t]he communication of the lawfully obtained information would facilitate the preparation and presentation of a Four Corners current affairs program which will achieve a number of the strategic purposes of PIC Operation Florida", viz.:

- *Placing considerable pressure on targeted individuals to admit their complicity in the commission of crimes and/or serious police misconduct during the course of oral testimony in the public hearings;*
- *Placing considerable pressure on targeted individuals to admit their complicity in the commission of crimes and/or serious police misconduct during the course of discussions with Commission staff prior to the appearance of those persons in the hearing room with a view to those persons then assisting the Commission in furtherance of its investigation;*
- *Encourage the provision of information to the Commission and its partner agencies by members of the public and officers of the NSW Police Service relating to crimes and/or serious police misconduct so that the investigation can be further pursued and the purposes of the investigation realised.*

*It is noted that in addition to achieving the strategic purposes of the operation, the presentation of material in the television program will greatly assist the Commission in addressing its principal functions of preventing, detecting and investigating serious police misconduct and in the fulfilment of its other functions regarding police activities, education programs and the assembly of evidence and information for provision to appropriate authorities.*

*There is likely to be a significant deterrent effect flowing from both the broadcast of the information and the conduct of the Commission's hearing in that the revelations of the investigation will deter NSW Police officers and members of the criminal milieu from engaging in serious police misconduct and criminal activity.*

7.3. Mr Byrne's memorandum continued:

*In order to allow sufficient time to the program makers to prepare and present the television program it will be necessary to provide the program makers with lawfully obtained information and other material holdings of the Commission in Operation Florida. Provision of such information on the first day of the hearings will not allow sufficient time for the preparation of the program and accordingly the provision of lawfully obtained information and other material must be effected prior to the first hearing date and preferably at a date no later than Monday the 17<sup>th</sup> of September 2001.*

7.4. *Mr Byrne recommended to Mr Sage that, "upon consideration of this memorandum, ... you convene a meeting with the (sic) your senior operational and legal staff and that further discussion take place on the issue". In accordance with this recommendation, on 17 September 2001 Mr Sage met with the following persons: Mr Byrne; Mr Andrew Naylor, Commission Solicitor; Mr Allan Kearney, Manager Intelligence; Mr Tom McGrath, Investigator (Specialist Advisor); Ms Michelle O'Brien, Operational Lawyer (Specialist Advisor); and Ms Karen O'Neil, TI Unit Manager. A divergence of opinion was expressed at this meeting as to whether there was a valid permitted purpose to warrant communication of TI product to Mr Masters and his Four Corners team.*

7.5. *By memorandum dated 18 September 2001 (our ref: 6330/1656), Mr Naylor provided written advice to Mr Sage that, in his opinion, "there is a valid permitted purpose in relation to the Commission for the purposes of s 67". A copy of Mr Naylor's memorandum is attached: see Annexure "C". Mr Naylor's memorandum formulated this permitted purpose in the following terms:*

- (a) The Commission is conducting an investigation into serious police misconduct.*
- (b) Comparatively speaking, the nature and kind of the misconduct under investigation is extremely serious. In particular, I note that the matters under investigation include the following types of allegations:*
  - (i) thefts by police officers of large amounts of money during the course of executing search warrants;*
  - (ii) extortion and attempted extortion by police officers;*
  - (iii) the taking of bribes by police officers, and attempts to obtain bribes; and*
  - (iv) perversion of the course of justice or attempts to pervert the course of justice.*
- (c) The investigation has involved the use of a police officer on an undercover basis as an agent for the NSW Crime Commission. The*



*Commission is embarked upon a joint investigation with the Crime Commission in relation to this matter. The role of this informer, codenamed "Sea", has been compared with and is not dissimilar from that played by Trevor Haken for an on behalf of the Royal Commission into the NSW Police Service. It is a matter of public record that a considerable portion of the Royal Commission's success lay in Mr Haken's involvement in the Royal Commission and the publicity generated therefrom.*

- (d) *It is hoped that similar rewards can be reaped by this Commission in terms of performance of its statutory functions if similar publicity can be generated from informer "Sea"'s involvement in the joint investigation being conducted by this Commission and the NSW Crime Commission. In particular, it is hoped that publicity generated by informed media commentary will (see at page 2 of Mr Byrne's memorandum):*
- *plac[e] considerable pressure on targeted individuals to admit their complicity in the commission of crimes and/or serious police misconduct during the course of oral testimony in the public hearings;*
  - *plac[e] considerable pressure on targeted individuals to admit their complicity in commission of crimes and/or serious police misconduct during the course of discussions with Commission staff prior to the appearance of those persons in the hearing room with a view to those persons then assisting the Commission in furtherance of its investigation;*
  - *encourage the provision of information to the Commission and its partner agencies by members of the public and officers of the NSW Police Service relating to crimes and/or serious police misconduct so that the investigation can be further pursued and the purposes of the investigation realised.*
- (e) *It is also hoped that the informed publicity to be generated by Mr Masters' program will create "a significant deterrent effect", that is, it "will deter NSW Police officers and members of the criminal milieu from engaging in serious police misconduct".*
- (f) *It is proposed that Mr Masters' program will be broadcast on the evening of the first day of public hearings conducted for the purpose of the investigation. During this day, the Commission intends to tender into evidence all intercepted information which it is proposed to make available to Mr Masters for the purpose of the program. It is anticipated that the degree to which the Commission is likely to be*

*successful in achieving the above objectives will be diminished if Mr Masters' program cannot be broadcast contemporaneously with the first day of the Commission's public hearings.*

- (g) *The Commission's objectives are likely to be further enhanced by the fact that the information will be broadcast as part of a program that has a well-established reputation for corruption investigations. In addition, the reporter, Mr Masters, has himself a reputation for quality journalism in a range of disciplines, including the investigation of police corruption. It was a broadcast of "Four Corners" put together by Mr Masters that led to the establishment of the Fitzgerald Royal Commission into police corruption in Queensland. As I understand, Mr Masters was also provided with information regarding Mr Haken in advance of the Royal Commission's exposure of the fact of Mr Haken's assistance as an undercover agent.*

7.6. *Despite, however, reaching the view that there was a "valid permitted purpose in relation to the Commission for the purposes of s 67", Mr Naylor concluded that TI product could not be communicated to Mr Masters under s 67. He reasoned (at paragraph 16):*

*In the circumstances at hand, there is a purpose connected with the communication other than the Commission's permitted purpose, namely, the production of a television program for the ABC. This purpose is not in relation to the Commission and is not a permitted purpose. It follows that the proposed communication to Mr Masters under s 67 is unlawful. Were the program to be produced for the Commission as distinct from the ABC, the situation would be altogether different since the only purpose would belong to the Commission. That, however, is not the case.*

7.7. *I note from Mr Sage's memorandum of 24 September that he was satisfied that "the proposed communication of the lawfully obtained information is a valid permitted purpose in relation to the Commission for the purposes of s 67 [of the Act]". This permitted purpose was in the same terms as that formulated in Mr Naylor's memorandum dated 18 September 2001.*

7.8. *Mr Sage was, however, "... not persuaded by the opinion Mr Naylor has discussed in his memorandum that the production of a television programme by Mr Masters is a purpose other than the Commission's permitted purpose". In particular, Mr Sage remarked (at pp 3-4):*

*... I am of the opinion that the production of the programme forms part of the permitted purpose, in fact a vital component of the permitted purpose in relation to this Agency. There is a collateral benefit to Mr Masters and the ABC by producing the programme but it is a purpose,*

*in my opinion, that does not need to be separated from the permitted purpose of the Commission.*

*In many cases where lawfully obtained information is communicated there is a collateral benefit to the recipient. For example when an Agency communicates lawfully obtained information to a suspect in an effort to gain (sic) cooperation as part of the investigative process then the recipient of the information has the benefit of knowing the evidence. His agreement to participate in an interview may be for his purpose, however the permitted purpose of the Agency communicating should not be lost because there is another purpose vesting in the recipient. The recipient has the benefit of knowing the information before he decides what is best for him. Clearly in such a case the purpose of the recipient might be different to that of the Agency but the permitted purpose should not be lost. The recipient's standing in the criminal milieu may be elevated in that he can and often does boast, rightly or wrongly, of an 'association' with the Police or other agency. The flow on effect can also be a monetary gain.*

8. *In the penultimate paragraph of his memorandum, Mr Sage formally recorded that TI product could be communicated to Mr Masters and members of his team, subject to certain undertakings on their part. I do not believe that the decision taken by Mr Sage was unreasonable in the circumstances, although it is fair to say that informed minds will often differ on matters of this kind. Clearly, the decision was not taken lightly.*
9. *Insofar as information and evidence obtained under the LD Act is concerned, an initial dissemination occurred on 17 September 2001. As I have said, the decision was taken pursuant to s 56(4)(c) of the PIC Act. Mr Masters and certain members of the Four Corners team were nominated to receive the material. Additional members of the Four Corners team were later provided with access to the material as a result of further dissemination orders. I enclose at Annexure "D" a copy of the form of certificate executed by Mr Sage on 17 September 2001 (our ref: 6330/1654). Also enclosed is a copy of a dissemination certificate signed by Mr Sage on 28 September 2001 in relation to additional Four Corners team members, and a copy of an unsigned and undated form of certificate in relation to Ms Tracey Ellison.*
10. *Regrettably, searches have failed to locate the original, signed certificates relating to the dissemination of 17 September and to Ms Ellison. I am informed that Mr Sage recalls signing the certificate of 17 September to allow the provision forthwith of material to Four Corners staff then on the Commission's premises. This is supported by the signing of undertakings by Mr Masters and members of his team on 17 September 2001, in acknowledgment of the restrictions imposed on the use of the material under the order. The existence of a signed undertaking by Ms Ellison dated 1 October 2001 also suggests that*

*the order adding her to the persons entitled to have access to the disseminated material was made at that time. Copies of undertakings may be found at Annexure "E".*

11. *It is noted that the certificates pertained to information in the following categories:*

*1. All holdings including electronic material of the Police Integrity Commission in relation to PIC Operation Florida with the exception of lawfully obtained information as defined by the Telecommunications (Interception) Act 1979.*

*2. All holdings including electronic material of the Police Integrity Commission associated with and reasonably incidental to PIC Operation Florida with the exception of lawfully obtained information as defined by the Telecommunications (Interception) Act 1979.*

12. *Mr Byrne's memorandum of 14 September relevantly submitted that:*

*The provision of holdings of the Commission in Operation Florida other than lawfully obtained information can be effected by means of the dissemination of that information pursuant to section 56(4)(c) of the Police Integrity Commission Act on the basis that the anticipated outcome of the screening of the television program will be such that it is in the public interest that there be such dissemination of information to the program makers.*

13. *The Commission is not in possession of a written record of reasons in support of the determination to divulge listening device and other records to Mr Masters and his team in advance of the commencement of the Operation Florida hearing. I am informed, however, that the reasons were consistent with those which ultimately came to be relied upon in support of the decision to communicate lawfully obtained information pursuant to s 67 of the TI Act.*

14. *It is further submitted that the dissemination of information and evidence obtained under the LD Act did not contravene the LD Act. Sub-section 7(1) of the Listening Devices Act provides that "[a] person who ... has used, or caused to be used a listening device to record a conversation (whether in contravention of section 5 or not), shall not subsequently communicate or publish to any other person any record of the conversation made directly or indirectly by use of the device", unless the communication or publication is made for one or more of the purposes specified in sub-s 7(2). Sub-section 7(2) provides, inter alia, that where the communication or publication "is made to a person who has, or is, on reasonable grounds, by the person making the communication or publication, believed to have, such an interest in the private conversations as to make the communication or publication reasonable under*

*the circumstances in which it is made". In my respectful submission, the dissemination to Mr Masters and his team of information and evidence obtained under the LD Act was "reasonable under the circumstances" for the same reasons as those providing the foundation for the communication of lawfully obtained information under s 67 of the TI Act.*

### *Allegation 2*

15. *The information communicated to Mr Masters and his Four Corners team was not communicated to any other media outlet in advance of the commencement of the Operation Florida hearing. Nor has the Commission communicated any information, other than that tendered as public exhibits in this hearing, to any media outlet since the commencement of the hearing.*
16. *The reason for the decision to communicate otherwise confidential information to Mr Masters and his Four Corners team and to no other media outlet is best expressed by the final paragraph of the formulation of the permitted purpose in relation to the communication of TI product under s 67 of the TI Act, viz.:*

*(g) The Commission's objectives are likely to be further enhanced by the fact that the information will be broadcast as part of a program that has a well-established reputation for corruption investigations. In addition, the reporter, Mr Masters, has himself a reputation for quality journalism in a range of disciplines, including the investigation of police corruption. It was a broadcast of "Four Corners" put together by Mr Masters that led to the establishment of the Fitzgerald Royal Commission into police corruption in Queensland. As I understand, Mr Masters was also provided with information regarding Mr Haken in advance of the Royal Commission's exposure of the fact of Mr Haken's assistance as an undercover agent."*

The Commission then addresses the third and fourth allegations as follows :

### *"Allegations 3 & 4*

17. *It is convenient to deal with these allegations together.*
18. *All information divulged to Mr Masters and his Four Corners team pursuant to s 56(4)(c) of the PIC Act (that is, " ... holdings including electronic material of the Police Integrity Commission in relation to [associated with and reasonably incidental to] PIC Operation Florida with the exception of lawfully obtained information as defined by the Telecommunications (Interception) Act 1979) was subject to the following restriction (see at paragraph 2 of the abovementioned dissemination certificate):*

*The use of the disseminated material is restricted to the extent that there is to be no further use of the material other than with the express leave of the*

*Commission. This restriction applies, but is not limited to, the use of disseminated material in the broadcast of any television program.*

19. *As previously indicated, to better ensure that Mr Masters and members of his team were made aware of this restriction, the Commission arranged for written undertakings to be signed. The undertaking was in the following terms (see Annexure "E"):*

*I [name] hereby undertake to abide by all order, direction and requests of the Police Integrity Commission in relation to all materials supplied by the Commission to me.*

*I undertake not to further disseminate any material supplied to me other than with the express leave of the Commission.*

*I acknowledge that to act otherwise than in accordance with the order of the Commission is an offence pursuant to the Police Integrity Commission Act and that I may be liable to prosecution for any such act.*

20. *On 8 October 2001, Mr Sage varied the dissemination orders made on 17 September and 1 October 2001 so as to permit the broadcast of information divulged pursuant to s 56(4)(c) of the PIC Act. This variation relevantly provided that:*

*The restriction placed upon further dissemination of the material supplied in the abovementioned orders is lifted to the extent that holdings of the Police Integrity Commission including electronic material in relation to PIC Operation Florida, with the exception of lawfully obtained information as defined by the Telecommunication (Interception) Act 1979, are permitted to be broadcast in a Four Corners program by ABC-TV.*

21. *A copy of this variation order is attached: see Annexure "F".*

22. *In relation to the "tape of the conversation between a solicitor, Mr Green, and B5 recorded on 14 November 2000", while it is correct that it had not been exhibited before hearings of the Commission prior to its broadcast by the ABC, it is also the case that there was adequate warrant for the publication of this information on the Four Corners program. In this regard, I note further that the LD Act is silent on the question of further dissemination of information and evidence obtained by use of a listening device otherwise in contravention of s 5 of the Act. Were the Act to be interpreted as prohibiting such further communications, it would have the effect, for example, that other law enforcement agencies to which listening device information is divulged by the Commission could not publish the information, say, to a suspect during the course of an interview. In my respectful submission, this could not have been the intention of the legislature.*

23. *The situation in relation to TI product was slightly different. As indicated above, this information was communicated to Mr Masters and his Four Corners team pursuant to s 67 of the TI Act. Relevant records of these communications comprises three (3) letters from Mr Byrne to Mr Masters dated 20 and 21 September 2001 (our refs: 6330/1700, 6330/1736, 6330/1741), together with receipts signed by Mr Masters. These receipts detail the records communicated. A copy of these letters and receipts is attached: see Annexure "G". Each letter relevantly provided as follows:*

*The documentation contains lawfully obtained information communicated pursuant to section 67 of the Telecommunications (Interception) Act 1979 (the Act). Restrictions apply to the use, disclosure and reproduction of this document and any part thereof.*

24. *It was always the Commission's intention that no TI product provided to the ABC should be broadcast unless and until it had been adduced into evidence before a hearing of the Commission. This practice was intended to comply with advice obtained from the NSW Solicitor-General dated 22 February 2000 (our ref: 3537/14). A copy of this advice is attached: see Annexure "H".*
25. *Mr Masters was informed that notwithstanding that he had been afforded access to TI product prior to the commencement of the Operation Florida hearing, insofar as he desired to broadcast some of this information on his Four Corners program, he would only be permitted to make use of information that had first been exhibited in hearings of the Commission. At no time did the Commission provide Mr Masters or members of his Four Corners team with permission to broadcast any TI product it had provided other than that adduced into evidence before the Commission. As much is made apparent by the following clause in the variation order signed by Mr Sage on 8 October 2001:*

*The variation permitting use of material does not extend to lawfully obtained information as defined by the Telecommunication (Interception) Act 1979 other than lawfully obtained information which has been the subject of tender as a public exhibit during the course of a public hearing by the Police Integrity Commission in relation to Operation Florida.*

26. *Officers of the Commission, along with members of the Crime Commission, were afforded a preview of the Four Corners program by Mr Masters and his team on Friday 5 October 2001. During the preview Commission officer Paul Feltham made notes of any material (whether listening device, video or TI product) which to his knowledge was not to be aired during Counsel Assisting's opening the following Monday. A copy of the notes is attached at Annexure "I".*

27. *Subsequent to the preview, Mr Byrne and Mr Feltham went over a copy of the Four Corners script to check what was to be aired against the terms of the Commission's various disseminations. A copy of the script with Mr Byrne's handwritten notations is attached at Annexure "J".*
28. *In the course of preparing this response to your letter of 17 October 2001, it has come to my attention that a portion of one conversation intercepted under the TI Act was in fact broadcast on the Four Corners program without having first been adduced into evidence before the Operation Florida hearing. This tape is identified as E0786/0 04/06/00 19:44. The relevant passage appears on page 8 of the Four Corners script (b/c 5982061) and is as follows:*
- "I had to borrow money yesterday to pay fuckin you know who this afternoon you know ... that fucks me every week and I mean you've gotta have it otherwise its too risky you know ... "*
29. *I note that in the context of the video footage and voice recordings included in the program the passage's significance appears to have been slight.*
30. *Inquiries reveal that:*
- (a) *The tape in question was communicated from the NSW Crime Commission to the Police Integrity Commission pursuant to s 68 of the TI Act via a letter dated 9 October 2001 (Detrak 6330/2370). A copy of this letter is attached at Annexure "K".*
  - (b) *Commission records indicate that the tape was not delivered to it until 15 October 2001 – one week after the commencement of the Operation Florida hearings and the Four Corners broadcast: see Detrak summary sheet at 6330/2120 and the signed and dated receipt attached to the Crime Commission's letter at Annexure "K". A copy of the Detrak summary sheet is attached at Annexure "L".*
  - (c) *The Commission only ever received one (1) copy of this tape: see note in summary field on Detrak summary sheet at 6330/2120. (While the receipt prepared by the NSW Crime Commission and signed by Paul Feltham on 15 October 2001 at 10:25 indicates that two (2) copies of each audio tape was received, this is not a reliable indication as to what was actually received. Detrak accurately reflects what has been received.)*
  - (d) *The fact that the Commission received only one (1) copy of the tape in question was consistent with the procedure that had been adopted in relation to this operation. A second copy of each tape was retained by officers of the Crime Commission who had access to an operations room on level 6 of the Commission's Elizabeth Street premises. Mr*



*Masters had physical access to this room. An unbarcoded copy of the tape is among the material in this room. The fact that it is unbarcoded suggests that it is not the Commission's copy of the tape.*

- (e) *The tape in question is not specified in the receipts attached to the letters from the Commission to Mr Masters by which TI product was communicated under s 67 of the TI Act.*
- (f) *While Mr Byrne's notations on the draft script of the Four Corners program appear to indicate, by the remark "IN OP.", that the tape in question was to be referred to during the course of Counsel Assisting's opening (Annexure "J" b/c 5982061), this appears to have been in error. As I have said, the Commission's records indicate that the tape was not received until one week after the opening. The relevant conversation was also recorded in Mr Feltham's notes of the Four Corners preview as an item which to his knowledge was not included in Counsel Assisting's opening, albeit identified to the best of his ability at the time as: "- Caccamo borrow money TI with Markarian". (As it transpired the conversation was between Caccamo and Vanderlans). The tape was also absent from an index of "Exhibits for [the] Opening" prepared by Mr Hoy of counsel and provided to Mr Feltham on 5 October, in order that he could make arrangements for the relevant exhibits to be available for Counsel Assisting's opening the following Monday. A copy of Mr Hoy's index is attached at Annexure "M".*
31. *It seems likely that Mr Masters obtained access to the tape from the custody of the NSW Crime Commission, perhaps while Mr Masters and Crime Commission staff were present in the operations room on level 6 of the PIC's premises. The Commission is unaware of the precise circumstances of any such access. For example, whether it was formally disseminated to Mr Masters by an appropriate member of the Crime Commission, and if so the restrictions which might have been placed on its subsequent use by Four Corners. Moreover, while the Commission, in insisting that the TI product provided to the ABC could not be aired without its prior admission into evidence was acting on the advice of the Solicitor General, the Crime Commission may have taken a different approach to s 67 of the TI Act. In the circumstances it would be inappropriate for me to offer any view as to whether the provision of the tape, or its subsequent use in the Four Corners program, was in breach of the TI Act.*
32. *If the tape in question was informally communicated to Mr Masters by the Crime Commission prior to the broadcast such that a breach of the TI Act did occur, Mr Masters arguably should have made further inquiries before including it in the broadcast. It should be noted that Commission officers exhibited care in formulating and communicating the conditions upon which Four Corners was to use the TI product provided by the Commission. That*

*being so, I am reluctant to accept that the Commission had an additional onus to prevent Mr Masters or any other person from falling into breach of the TI Act, the more so where it concerned TI product obtained without the Commission's direct knowledge from another source. Moreover, there were opportunities for all parties to ensure that no breaches of the TI Act occurred and it cannot be said that the responsibility for any failure of the procedures should reside in the Commission alone.*

33. *Although the unique nature of the investigation initiative created a difficult environment for the co-ordination of the various agencies, the Commission accepts that the controls it had in place could have prevented a breach of the TI Act, if that is what occurred. Unfortunately, those controls failed.*
34. *In view of the uncertainty surrounding the provision of the relevant tape to Four Corners and the somewhat less than satisfactory state in which this leaves the Commission's response, I am minded to make further inquiries of Mr Masters and the Crime Commission. However, I am conscious that you may wish to make such inquiries for yourself, and will wait to hear from you before embarking upon any such course. "*

Before stating my conclusions, I make the following comments on the above material :

- a) As to paragraph 22, the Commission acknowledges that the tape of the conversation between the solicitor Mr Green and B5 recorded on 14 November 2000 was not exhibited *"before hearings of the Commission prior to its broadcast by the ABC"*.

I do not accept that, because the *Listening Devices Act* "is silent on the question of further dissemination of information and evidence obtained by the use of a listening device otherwise in contravention of s5 of the Act" that somehow this justified the Commission permitting its broadcast by the ABC, to whom it had provided the material, without such material being tendered in evidence prior to such broadcast.

In my view, procedural fairness required otherwise. Nor do I think that the Acting Commissioner, Mr Sage, for one moment intended the material provided to Mr Masters be published in the ABC program before such material was tendered in the Public Hearing of the investigation. It is this material to which I refer in my conclusions.

- b) As to paragraph 34, I am not satisfied that the Commission was a party to a breach of the TI Act.

I do not consider the functions which I have the legislative authority to fulfil require that I pursue any enquiries with Mr Masters or the Crime Commission

in this regard. It will be a matter for the Commission itself, should it see fit, to make such enquiries.

## Conclusions

The investigation of the Commission codenamed '*Operation Florida*' and the Public Hearings conducted as part of it is an investigation of first importance. It involves functions of the Commission central to purposes of the Police Integrity Commission Act 1996.

The decision to supply the subject material exclusively to the ABC for presentation on its *Four Corners* programme is an area of discretionary judgment. Certainly the decision to do so is not, in my view, one which no statutory body with the legislative responsibilities of the Commission could have arrived at. I determine that there were valid strategic purposes of '*Operation Florida*' for the Commission to do so.

Further, I accept that the Commission took steps to have appropriate undertakings that material would not be put to air which had not been introduced into evidence. The fact remains that whilst the program was published on *Four Corners* on the night of the opening of the hearing, the Commission had failed to ensure that all material which it had disseminated to the ABC and which was broadcast that night, had in fact been introduced into evidence during the opening at the hearing of the Commission that day.

The system introduced by the Commission to avoid this problem failed. Either the system was defective, or those responsible for its carriage were at fault. This, in my view, is the responsibility of the Commission. What happened should not have happened!

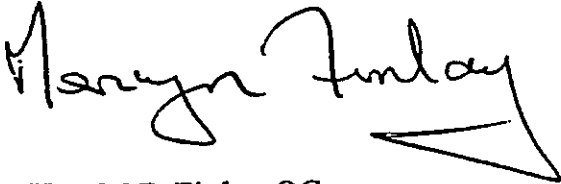
Clearly it was not done deliberately. But the risk was obvious and propriety required the Commission, in making the material available, to do so with a mechanism that it could effectively control to ensure no material was broadcast of which it was unaware, and that such material was only broadcast which had already been adduced into evidence.

It is not a matter calling for recommendations by this office, other than to try and ensure that it is not repeated on another occasion.

I make the following recommendations to the Commission:

1. That the Commission review the events leading to the publication of the material on the *Four Corners* programme on the night of 8 October 2001.
2. That from such review it formulate a mechanism to be put into operation on any such future occasion to reduce the risk of a recurrence of the problem the subject of this report.
3. That such consideration and proposals be advised to the Inspector.

Mr Les Tree, the Director General of the Ministry for Police, kindly drew my attention on 17 October 2001 to the fact of the censure motion in the Legislative Assembly the previous day, 16 October 2001. I certify that it is necessary in the public interest that a copy of this report be provided to the Director General, Mr Les Tree, and I so direct.

A handwritten signature in black ink, reading "Maryn Finlay". The signature is written in a cursive style with a large, sweeping initial 'M' and a long, horizontal tail stroke that ends in a sharp downward-pointing arrowhead.

The Hon M D Finlay QC  
Inspector of the Police Integrity Commission