

REPORT TO PARLIAMENT

OPERATION VAIL





ABN 22 870 745 340

The Hon Meredith Burgmann MLC
President
Legislative Council
Parliament House
SYDNEY NSW 2000

The Hon John Aquilina MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

Dear Madam President and Mr Speaker

In accordance with section 96(1) of the *Police Integrity Commission Act 1996*, the Commission hereby furnishes to you a Report regarding Operation Vail, being a Report in relation to a matter in which the Commission has conducted an investigation.

I draw your attention to section 103(2) of the *Police Integrity Commission Act 1996*, pursuant to which I recommend that this Report be made public forthwith.

Yours faithfully

T P Griffin
Commissioner

June 2005

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JUNE 2005

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EXECUTIVE SUMMARY

On 5 April 2004 a meeting took place at NSW Police headquarters in Sydney between Mr Malcolm Noad, the newly appointed Chief Executive Officer of the Bulldogs Rugby League Club, and the following senior police officers:

- Deputy Commissioner David Madden;
- Superintendent David Owens;
- Assistant Commissioner Robert Waites.

Two further police officers, Assistant Commissioner Peter Parsons and Superintendent David Swilks, participated by way of a telephone link between the meeting and Assistant Commissioner Parsons' office in Newcastle.

Discussions at the meeting concerned a police investigation into sexual assault allegations which had been made against a number of Bulldogs players, drug allegations against one of the players and crowd violence at recent Bulldogs matches. All of these issues had received significant publicity, the drug allegation being the most recent.

Following the meeting Mr Noad gave a briefing to the Bulldogs players and thereafter to the media. Deputy Commissioner Madden issued a media statement. Both made reference to information which had been supplied to Mr Noad at the meeting about the drug allegations. Both statements became the subject of further publicity.

On 7 April 2004 the Minister of Police received a written complaint referring to the media reports and alleging that Deputy Commissioner Madden had breached the *Telecommunications (Interception) Act 1979 (Cth)* in the meeting by supplying information to Mr Noad which was sourced from telephone intercepts. The complaint was also copied to the Executive Assistant for the Commissioner of Police. This allegation was referred to the Commission by the Commissioner of Police on 15 April 2005 and the Commission commenced an investigation with the following purpose:

To investigate whether there have been any breaches of the *Telecommunications (Interception) Act 1979* or other misconduct by persons who participated in a meeting at NSW Police Executive Offices commencing at 9.15 a.m. on 5 April 2004.

The substantial allegations made during the course of the investigation were as follows:

- (a) That at a meeting between certain senior officers of NSW Police and Mr Noad on 5 April 2004 at NSW Police Executive Offices, one or more of those officers made use of, or made a record of, or communicated to Mr Noad information obtained by an interception contrary to subs. 63(1) of the *Telecommunications (Interception) Act 1979*.
- (b) That later that day Mr Noad communicated information to players and/or representatives of the media in breach of the *Telecommunications (Interception) Act 1979*.

ASSESSMENTS AND OPINIONS

In the Commission's opinion police misconduct has occurred in that:

1. Deputy Commissioner Madden failed to manage the meeting in such a way as to remove any foreseeable risk of damage to the investigations or breaches of the *Telecommunications (Interception) Act 1979* and further that he made use of or communicated to Mr Noad information obtained by the interception of a telecommunications service;
2. Assistant Commissioner Parsons communicated to Mr Noad information obtained by the interception of a telecommunications service.

RECOMMENDATIONS

The Commission is of the opinion that consideration should be given to prosecution of Deputy Commissioner Madden and Assistant Commissioner Parsons for the specified criminal offence of communicating to another person or making use of lawfully obtained information, contrary to subs. 63(1) of the *Telecommunications (Interception) Act 1979*.

The Commission is not of the opinion that consideration should be given to the prosecution of any other person for a specified criminal offence.

The Commission is not of the opinion that consideration should be given to the taking of action for a specified disciplinary offence against any of these officers, pursuant to subs. 97(2)(b) of the *Police Integrity Commission Act 1996* (“the PIC Act”).

The Commission is also not of the opinion that consideration should be given to the taking of action (including the making of an order under s. 181D of the *Police Act 1990*) against any of these officers on specified grounds with a view to dismissing, dispensing with the services or otherwise terminating the services of these officers, pursuant to subs. 97(2)(c) of the PIC Act.

The Commission is however of the opinion that consideration should be given to the taking of reviewable action within the meaning of s. 173 of the *Police Act 1990* against each of Deputy Commissioner Madden and Assistant Commissioner Parsons, pursuant to subs. 97(2)(d) of the PIC Act.

1. INTRODUCTION

- 1.1 On 15 April 2005 Mr K.E. Moroney APM, Commissioner of Police, wrote to the Commission, enclosing correspondence dated 7 April 2004 which alleged that Deputy Commissioner David Madden had breached the *Telecommunications (Interception) Act 1979* (“the TI Act”). The Commissioner of Police requested that the Commission “undertake a detailed investigation of the original allegation”.
- 1.2 The correspondence forwarded by Mr Moroney referred to articles published in the *Daily Telegraph* on 6 April 2004 about a meeting attended by Mr Malcolm Noad on 5 April 2004 at New South Wales Police headquarters, and Mr Noad’s subsequent briefing of Bulldogs Rugby League Club players and the media.
- 1.3 Prior to its referral to the Commission, the complaint had been assessed by NSW Police and not further investigated. It was then identified by the Office of the Ombudsman as a matter that required further attention. Subsequently, the Commissioner of Police obtained independent legal advice. The tenor of that advice was that Deputy Commissioner Madden and other senior police may have committed offences against the TI Act.
- 1.4 A copy of the advice was included in the letter sent by Mr Moroney to the Commission. The facts recited in the advice included the following:

The Alleged Facts

5. Members of the Bulldogs rugby league team allegedly raped a woman at Coffs Harbour in February 2004. As part of the investigation of the alleged sexual assaults, members of NSW Police intercepted certain telephone conversations pursuant to the TI Act. I have not been briefed with the application for the warrant, the warrant or a transcript of the conversations intercepted, but I assume that the conversations were obtained lawfully pursuant to Part VI of the TI Act.
 6. On 5 April 2004 Deputy Commissioner Operations Madden, Assistant Commissioner Robert Waites, and Superintendent David Owens of NSW Police met with Mr Malcolm Noad, the CEO of the Bulldogs. I am instructed that “[d]uring the course of the meeting a telephone link was established with Assistant Commissioner Peter Parsons”. I am also instructed that “Inspector Swilks [sic Superintendent Swilks] joined them in a telephone link”.
- 1.5 The advice concluded as follows:
- Consequently, in my opinion, if the alleged facts are true, s.63(1) was breached by Deputy Commissioner Madden, Assistant Commissioner Parsons and the police officer who gave the “brief outline” recorded on the first page of the notes of the meeting on 5 April 2004.
- 1.6 Six persons (five of them senior police officers) took part (directly or indirectly) in the meeting at the NSW Police Executive Offices commencing at 9.15 a.m. Monday 5 April 2004. They were:
- Mr Malcolm James Noad, whose appointment as CEO of the Bulldogs Rugby League Club had been announced but was not due

1. INTRODUCTION

to come into effect until 13 April 2004. It was at Mr Noad's behest that the meeting took place.

- Deputy Commissioner David Barry Madden, then Acting Commissioner of Police in the absence of Mr Moroney, who had left that morning for the country.
- Superintendent David John Owens, who was acting Chief of Staff to Mr Madden and made notes of the meeting at Mr Madden's request.
- Assistant Commissioner Robert James Waites, Commander of the Inner Metropolitan Region, who was present at Mr Madden's request to deal with any questions regarding unruly crowd behaviour.
- Assistant Commissioner Peter Charles Parsons, Commander of the Northern Region, who participated via telephone hook up from his Newcastle office.
- Superintendent David Edwin Swilks, who was Mr Parson's Chief of Staff and present with Mr Parsons at Newcastle during the meeting.

- 1.7 On 10 May 2005, the Commission commenced a series of private hearings each of which had the following general scope and purpose:

To investigate whether there have been any breaches of the *Telecommunications (Interception) Act 1979* or other misconduct by persons who participated in a meeting at NSW Police Executive Offices commencing at 9.15 a.m. on 5 April 2004.

- 1.8 The witnesses who gave evidence at the private hearings of the Commission were as follows:

- Bradley David HOWELL
- David Barry MADDEN
- Malcolm James NOAD
- David John OWENS
- Peter Charles PARSONS
- David Edwin SWILKS
- Robert James WAITES.

2. THE EVIDENCE

FACTUAL BACKGROUND – THE COFFS HARBOUR INVESTIGATION

- 2.1 In February 2004 NSW Police commenced an investigation into allegations by a woman at Coffs Harbour that she had been sexually assaulted by a number of first grade players from the Bulldogs Rugby League Club.
- 2.2 As part of the investigation of the alleged sexual assault (“the Coffs Harbour investigation”), members of NSW Police intercepted certain telephone conversations pursuant to the TI Act. There is nothing in the material before the Commission which suggests that the intercepted telephone conversations were otherwise than lawfully obtained pursuant to Part VI of that Act.
- 2.3 The allegations received wide media coverage and it is apparent that sensitive details of the Coffs Harbour investigation were released to the media without authorisation.
- 2.4 It would also appear that members of the media became aware of the possibility that certain telephone intercepts were being utilised by police in their investigation of the alleged rape and that the intercepts may have revealed that an identified first grade Bulldogs player was involved in illegal drugs. For the purposes of this Report, the identified player will be referred to as “Player X”.

ASSISTANT COMMISSIONER PARSONS, DEPUTY COMMISSIONER MADDEN AND OTHERS DEVELOP A MEDIA STRATEGY

- 2.5 On the morning of 1 April 2004, Detective Chief Inspector Jason Breton who was then the Crime Manager of the Coffs/Clarence Local Area Command, was contacted by a journalist. Apparently Detective Chief Inspector Breton was informed by the journalist that he had been told by a Drug Squad detective that the task force investigating the sexual assault allegations “... *had Player X’s ‘phone off’, etc ...*”.¹
- 2.6 As later documents made clear, the information which the journalist possessed at that time included an allegation that at least one player was involved with illegal drugs. On the same day (i.e. 1 April 2004), Detective Chief Inspector Breton emailed a proposed strategy to the Acting Local Area Commander Coffs/Clarence Matthew Sponberg. Copies of the email were forwarded to Assistant Commissioner Parsons, Deputy Commissioner Madden and the Commissioner’s Executive Media Advisor, Ms Megan Miller. The strategy recommended by Detective Chief Inspector Breton was as follows:²

¹ PIC Exhibit AQJ2 “C”

² PIC Exhibit AQJ2 “C”

2. THE EVIDENCE

- 1 That a general “no comment” be the reply to any questions relating to the documents delivered to the [Office of the Director of Public Prosecutions].
- 2 That a general “no comment” be the reply to any questions relating to information, intelligence or methodology used in the investigation.
- 3 That there is “no comment” about a possible drug related charge or investigation against a high profile player.
- 4 That should Channel 9 go with the story about such an allegation, our standard reply be as follows:

“A relatively minor offence was identified during the course of the investigation. That offence has been referred to the Local Area Command in which that person resides.

Incidences like this are a common occurrence during major investigations and are usually dealt with after the major inquiry concludes.

The matter identified was referred to the State Crime Command. The matter was of such a minor nature that it did not fall within the charter of that organisation and was referred back for attention at the completion of this investigation.

As our investigation documents have now been forwarded to the ODPP, it is a prudent time to initiate this minor investigation and forward it to the relevant LAC.”

2.7 In response to this proposal, Acting Local Area Commander Sponberg, advised that he had “... *no objections to this release*”.³

2.8 At 2.18 p.m. on 1 April 2004, Assistant Commissioner Parsons emailed the following comments in relation to the proposal to Deputy Commissioner Madden:⁴

David,

Below is a summary of our discussions following the calls by [a journalist] to Megan and Jason Breton. We are agreed this is the best course of action. I have discussed same with Megan and she is happy to convey same to [the journalist].

Further information to hand is that should senior police not add credence to the “story” by not commenting, then the story will not go to air.

Will attempt to ring you re this.

Peter.

2.9 At 6.58 a.m. the following morning, Deputy Commissioner Madden responded as follows:⁵

Thanks Pete,

Remember what does not kill us only makes us stronger.

Hang in there.

Dave.

2.10 Both Deputy Commissioner Madden and Assistant Commissioner Parsons agreed in their evidence before the Commission that prior to 4 April 2004, a strategy had been developed to respond to any broadcast by TCN Channel 9

³ PIC Exhibit AQJ2 “C”

⁴ PIC Exhibit AQJ2 “C”

⁵ PIC Exhibit AQJ2 “C”

raising the allegations which were ultimately raised in its broadcast of 4 April 2004.⁶

THE BROADCAST – TCN CHANNEL 9 GOES TO AIR

- 2.11 At 6.00 p.m. on 4 April 2004, TCN Channel 9 broadcast a news item concerning information that a Bulldogs player was involved with illegal drugs. Relevantly, the broadcast was as follows:⁷

NEWSREADER “First, *National Nine News* can reveal exclusively tonight a Bulldogs first grade player has been under investigation for criminal activity involving drugs. Police have received information implicating the player in drug transactions but investigations are yet to establish the exact extent of his involvement.”

REPORTER “The latest inquiry started after detectives investigating gang rape accusations against six team members stumbled over evidence of a player’s involvement in drug transactions. His suspected activities were reported by the strike force to the drug squad for further investigation.

This bombshell comes as new Chief Executive Malcolm Noad prepares to meet players and coaching staff tomorrow after vowing to clean up the team’s off-field behaviour. His feelings about drugs were made very clear on the *Sunday* program this morning.”

- 2.12 There then followed some short extracts from an interview between Ms Jana Wendt and Mr Noad on the *Sunday* program earlier that day.

MR NOAD SEEKS A MEETING WITH THE COMMISSIONER

- 2.13 According to Mr Noad, the broadcast did not take him by surprise. He had been concerned at the thrust of certain questions put to him by Ms Wendt in the *Sunday* program concentrating as they did upon player drug use.⁸ Further, the journalist referred to at paras. 2.5 and 2.8 above had telephoned him at 5.45 p.m. the same evening to forewarn him that there would be a “... ‘revelation’, or something like that, ‘about a drug dealer in the Bulldogs’ camp’”.⁹
- 2.14 Mr Noad obtained a contact number for Ms Miller through the media manager of the National Rugby League.¹⁰ There then followed a number of conversations between Mr Noad and Ms Miller and by 11.00 p.m. on 4 April 2004, Mr Noad had organised a meeting at Police headquarters the next morning. Deputy Commissioner Madden would conduct the meeting in Commissioner Moroney’s absence.

⁶ PIC Transcript AQJ, PC Parsons, 11 May 2005, p. 8.4; PIC Transcript AQG, DB Madden, 11 May 2005, pp. 7.17-8.28

⁷ PIC Exhibit AQE3 “C”

⁸ PIC Transcript AQE, MJ Noad, 10 May 2005, p. 9.17

⁹ PIC Transcript AQE, MJ Noad, 10 May 2005, p. 9.34

¹⁰ PIC Transcript AQE, MJ Noad, 10 May 2005, p. 7.18

THE PURPOSE OF THE MEETING FROM MR NOAD'S PERSPECTIVE

2.15 Mr Noad told the Commission that to have a “*further story come out that there was perhaps a drug dealer in the team was extremely damaging for the Club ...*”.¹¹

2.16 Mr Noad gave the following evidence as to what it was he was seeking to achieve by meeting with the Commissioner of Police:¹²

Q. I don't want to interrupt you, but what was it that you thought you might be able to achieve by meeting with the Commissioner of Police?

A. Well, I knew that the following day, on the Monday, there would be an absolute media frenzy about there being an alleged drug dealer in the Bulldogs' camp. I had to try and do whatever I could to either find out that there was some truth to the story and then take whatever action I felt the Bulldogs had to take as early as possible to quell that media frenzy, or, indeed, find out whether perhaps it was a beat-up and whether in fact I had to try and, you know, answer questions to the media on the basis that it was felt that it was a beat-up. But I knew the next day that I would be under substantial scrutiny as the CEO-in-waiting of the Club to answer questions from the press about a drug dealer in the camp.

Q. Did you communicate to any person before meeting with Madden the fact that you would be meeting with him?

A. I had a number of calls from various media that evening, where I was asked what – just some background to that is that the other media picked up on it straight away. A story like that is a big story in the circumstances that prevailed at the time. So I started getting calls from a lot of people that night about what the Bulldogs would do. The only answer that I could come up with was, because it was true, that I was attempting to see the Commissioner the next morning to find out more about the story ...

THE NSW POLICE AGREED STRATEGY IS ABANDONED – THE PURPOSE OF THE MEETING FROM DEPUTY COMMISSIONER MADDEN'S PERSPECTIVE

2.17 The logic behind Deputy Commissioner Madden's decision to meet with Mr Noad following the TCN Channel 9 broadcast is less clear, involving as it did:

- (a) the abandonment of the agreed strategy; and
- (b) meeting with a party who had a direct interest in an investigation prior to its finalisation.

2.18 Both Assistant Commissioner Parsons and Deputy Commissioner Madden acknowledged that the agreed strategy was abandoned as a consequence of the meeting with Mr Noad.

2.19 Assistant Commissioner Parsons was unable to clearly articulate why the strategy had been abandoned and a meeting organised with Mr Noad. He gave the following evidence:¹³

¹¹ PIC Transcript AQE, MJ Noad, 10 May 2005, p. 8.15

¹² PIC Transcript AQE, MJ Noad, 10 May 2005, p. 9.45

Q. And we know that the material did go to air, and we also know that the strategy that had been agreed was not implemented. Now, would you mind turning your mind to this question: why was that so?

A. I can't be specific in my response other than to say that I wasn't aware that the Channel 9 aired information, on the, as I understand it, Sunday night. I became aware of that afterwards with a phone call from Deputy Commissioner Madden. To answer your question, I don't know why the strategy wasn't put in place, as I believed that there was no comment made at that time. I certainly wasn't, as the Region Commander, approached by any member of the media outside of the police and inside, for that matter, to comment in relation to the program on Sunday.

Q. No ...

A. So the decision – sorry.

Q. Please complete your answer.

A. So the decision as to why the strategy wasn't implemented, I can't recall if that was ever sought immediately after the airing of the program.

2.20 According to Assistant Commissioner Parsons, Deputy Commissioner Madden did not expressly indicate why he regarded it as being important to meet with Mr Noad.¹⁴ Nevertheless, Assistant Commissioner Parsons had his own “view” why Deputy Commissioner Madden was prepared to meet with Mr Noad. He said:¹⁵

That there certainly was an inordinate amount of pressure being placed, not only on the Executive, which included the Commissioner and the Deputy Commissioner, by the media, right from the word go, but equally so an inordinate amount of pressure being placed on my investigators who were tasked with trying to determine the truth or otherwise of the complaints, or complaint, of rape. That pressure, as I indicated from the word go, primarily commenced with the airing of a COPS event by Ray Hadley the day after the events had allegedly taken place in Coffs Harbour.

Now, it was my belief – and again I can't remember specifics of the conversation, but I believe that with Noad, I think he had only just taken up the position as the CEO. He was seeking information in relation to where the investigation was at. It may well have been the airing of the information on Channel 9 that night that instigated the conference the next day, but certainly from my – when I say “of equal importance”, I believe that there was an inordinate amount of pressure on a number of people, including Dave Madden, to continue to provide information in relation to where the investigation was at.

2.21 In substance, however, Assistant Commissioner Parsons was unable to explain why “pressure” necessarily meant that NSW Police was required to depart from the agreed strategy. Ultimately, he said:¹⁶

I can't answer that. I certainly was complying with the request of Mr Madden that I be present the next morning when Malcolm Noad and others would be called in an office.

2.22 Deputy Commissioner Madden although not referring to “pressure” as such, did refer to a media “feeding frenzy” and the fact that NSW Police were suffering from numerous media leaks within the actual investigation.¹⁷ He claimed that the

¹³ PIC Transcript AQJ, PC Parsons, 11 May 2005, p. 9.27

¹⁴ PIC Transcript AQJ, PC Parsons, 11 May 2005, p. 10.32

¹⁵ PIC Transcript AQJ, PC Parsons, 11 May 2005, p. 11.5

¹⁶ PIC Transcript AQJ, PC Parsons, 11 May 2005, p. 13.24

¹⁷ PIC Transcript AQG, DB Madden, 11 May 2005, p. 9.6

reason for meeting with Mr Noad was to take some heat out of complaints which he perceived Mr Noad would make against NSW Police as a result of the further leak of information to TCN Channel 9 which was reflected in the broadcast on 4 April 2004. He said:¹⁸

My reasoning for the meeting was – and I was the Acting Commissioner at the time – I thought that by actually meeting with Malcolm Noad I may take some of the heat out of complaints that he would make against the organisation; that he was suffering as a result of leaks that were occurring within my organisation, and I thought that by bringing him together, we might actually just, like, open the door between the two organisations, but take any complaints that he would have about the way in which the matter was being handled.

I was not content with either the investigation management or the media management from very early in the investigation.

- 2.23 The police investigation into the Coffs Harbour incident had engendered intense media interest and coverage, fed in part by leaks to the media of confidential police information, which information, said Mr Madden, obviously came *“from someone close to the investigation, but we couldn’t identify exactly who”*.¹⁹
- 2.24 There is no suggestion that any of the officers, the subjects of the Commission’s investigation, were responsible for any such “leaks” prior to the meeting with Mr Noad on Monday morning, 5 April 2004.

IDENTIFIABLE RISKS ASSOCIATED WITH DEPUTY COMMISSIONER MADDEN’S DECISION

- 2.25 It was completely within Deputy Commissioner Madden’s discretion to decide to meet with Mr Noad. Such a decision however needed to take into account at least two inherent risks.
- 2.26 First, to disclose to Mr Noad the substance of what the police had uncovered to date might prejudice any investigation of the player’s involvement in drugs. Further, if the information given to Mr Noad was such as to enable him to conclude more firmly that players’ telephones were intercepted, and he communicated this belief (as he did) to the players, then the wider investigation into the alleged sexual assault might also be compromised. The warrant in respect of Player X’s telephone service was in force until 22 April 2004. Although the police had forwarded documents to the Office of the Director of Public Prosecutions (“the ODPP”), this did not necessarily signal the end of the investigation.
- 2.27 Secondly, any discussion of what NSW Police had unearthed in relation to possible drug use posed a significant risk that those involved in any meeting with Mr Noad (and indeed Mr Noad himself) might infringe the provisions of the TI Act.
- 2.28 The first risk, namely, that of compromising the investigation, was a risk recognised by both Assistant Commissioner Parsons and Superintendent Swilks.

¹⁸ PIC Transcript AQG, DB Madden, 11 May 2005, p. 9.24

¹⁹ PIC Transcript AQG, DB Madden, 11 May 2005, p. 28.11

2.29 Assistant Commissioner Parsons gave the following evidence:²⁰

Q. Was there any discussion between you and Mr Madden as to what might be appropriate to disclose and what might be inappropriate to disclose?

A. Well, again, I can't recall specifics, and I certainly didn't make a note of the conversation on the Sunday night to that effect, and to elaborate even further, other than what I've written down. I was concerned, I have to say, whilst this is not indicated in my notes, I was concerned that I was going to be giving information to a person outside the investigation. I was unhappy with the situation. I advised Mr Madden as such. I can't – I certainly – no, I'm sorry, I'll withdraw that.

I can't recall if I said anything in relation to what extent the questioning would go. I can't recall that, I'm sorry, but I was concerned to the extent that I called my chief of staff into the teleconference the next morning to take notes.

Q. And that's Officer Swilks?

A. Superintendent Swilks.

Q. Would you mind just telling us why you were concerned and unhappy about the prospect of providing information to a person who was not part of the investigation?

A. Well, firstly, as a – my history, as I already explained to you, has been criminal investigation duties. I was concerned that somebody was going to be given information, albeit indirectly, or directly, that related to the investigation. I felt that that wasn't – primarily that wasn't on, or wasn't kosher, or wasn't bona fide.

Equally so, I again saw this as perhaps another added pressure that was being placed on the investigation indirectly on me, to give information to an outsider, albeit the new CEO of the organisation whose employees were the subject of investigation.

2.30 The evidence of Assistant Commissioner Parsons' Chief of Staff, Superintendent Swilks, was to similar effect. He said:²¹

A. I think Mr Parsons was a bit concerned about that discussion as well, just from his demeanour. His response I think, was hesitant, which indicates he was thinking pretty deeply about how to respond. Personally, not knowing the pressures that Mr Madden was under, I don't think it was a conversation that probably should have occurred in the presence of Noad.

Q. No. Can you tell us why you are of that view?

A. Well, we're talking about a current investigation, and he is an involved party – whether through association of the Club, or whatever.

Q. Are you saying there was some risk that the investigation might be compromised?

A. I think there would have to be a risk – a very great risk.

Q. Did that occur to you at the time?

A. That's what stuck in my mind.

Q. You say, do you, that Mr Parsons' demeanour indicated that he was a little uncomfortable about it too?

A. Yes.

²⁰ PIC Transcript AQJ, PC Parsons, 11 May 2005, p. 13.40

²¹ PIC Transcript AQK, DE Swilks, 13 May 2005, p. 12.6

2. THE EVIDENCE

- Q. Were you also perhaps uncomfortable because you understood at the time that there might be some restriction on disclosing material which had been obtained by way of intercept?
- A. I didn't know there was an intercept going at the time, that was going to be part of the conversation. I was more alarmed about the conversation in the presence of another party. It was quite an operational activity.
- Q. It is quite unusual, isn't it, to discuss operational issues with an interested party when there is an on-going investigation?
- A. Well, in my experience, it is, yes.
- Q. Would it be fair to say that, in your experience, you've never come across it?
- A. No.
- Q. Except for this incident?
- A. Yes.

2.31 Although Superintendent Swilks took notes of the conversation between Assistant Commissioner Parsons and the other meeting participants, his evidence was that those notes were unable to be located.²²

2.32 As to the second risk, the meeting created some difficulty, namely, that in talking about the recent allegations of drug use, Deputy Commissioner Madden might involve himself (and others, including Mr Noad), in breaches of the TI Act. In that regard, the Commission is satisfied that the only evidence available to NSW Police at that time that a particular player was involved in drugs had been obtained by way of telephone intercepts.²³ Both Mr Madden and Mr Parsons knew this to be so.

2.33 The tenor of Deputy Commissioner Madden's evidence was to the effect that the meeting would deal with a number of matters, in particular, the investigation into the alleged sexual assault and the recent problem of crowd violence at games. When asked whether Ms Miller had disclosed to him on 4 April 2004 the reason why Mr Noad wanted to meet, he said:²⁴

She indicated that he had wanted to, like, open a door, sort of meet the Commissioner at the time, and talk about general issues, including increasing crowd violence that was occurring at Bulldogs' games. Obviously he wanted to hear from the Commissioner of the day what was happening with the actual sexual assault investigation, and so she indicated those things to me.

2.34 No mention was made in this part of Deputy Commissioner Madden's evidence to the allegation of Player X's possible involvement in drugs. Deputy Commissioner Madden did not agree that this was the primary reason why Mr Noad wanted to meet. His evidence was as follows:²⁵

- Q. What do you say to the suggestion that at 9.30 p.m. on 4 April 2004 you telephoned Parsons at his home and told him that he would be involved in a teleconference with Noad in relation to the Channel 9 broadcast and telephone intercepts?

²² PIC Transcript AQK, DE Swilks, 13 May 2005, p. 9.38

²³ PIC Transcript AQG, DB Madden, 11 May 2005, p. 11.10; PIC Transcript AQJ, PC Parsons, 11 May 2005, p. 26.34

²⁴ PIC Transcript AQG, DB Madden, 11 May 2005, p. 9.41

²⁵ PIC Transcript AQG, DB Madden, 11 May 2005, p. 12.16

- A. It is quite possible that I said that in a telephone call at 9.30, but the – remembering that the meeting, Megan Miller had been trying to organise prior to that date, and so it was not only for the [Channel 9] story, but it was also for the sexual assault allegation and also crowd violence. I think the [Channel 9] story reaffirmed the importance of it in my own mind.
- Q. Wasn't that, as you understood it, the very reason why Mr Noad wanted to come and speak to you?
- A. No, as I indicated – my understanding from Megan Miller was that Malcolm Noad wanted to have a meeting to discuss a range of issues, and obviously with the [Channel 9] story on the Sunday night, that made it even more important. So no doubt he wanted to discuss that specific meeting and no doubt I indicated to Peter that he would want to discuss that specific investigation as well.

2.35 Both the evidence of other witnesses and certain contemporaneous documents strongly support a finding that Mr Noad intended to meet for a far more limited purpose. Mr Noad did not want to talk about “general issues”. The note made by Assistant Commissioner Parsons in his day book on 4 April 2004²⁶ further suggests that the purpose of the meeting was quite limited. The notation is as follows:

9.30 p.m. DBM – Channel 9 re TI's – Bulldogs player – [undecipherable] – teleconference – Malcolm Noad a.m. tomorrow.

2.36 Similarly, the entry made by Assistant Commissioner Waites in his diary concerning the meeting on 5 April 2004 which he also attended suggests a more limited agenda. It is as follows:²⁷

9.00 a.m.: meet with Deputy and Malcolm Noak [sic Noad] of Canterbury RLFC to discuss issues of player drug use and fan behaviour at matches till 10.30 a.m.

2.37 The note made by Assistant Commissioner Parsons in his day book on 5 April 2004 after the meeting suggests that the agenda was a limited one. It states:²⁸

9.15 a.m.: teleconference – DBM Bob Waites, Dave Evans (?) C of S – Malcolm Noad – Dave Swilks – re Bulldogs player – drug use. Basic info provided. Process to be followed.

2.38 Finally, the minutes of the meeting of 5 April 2004 taken by Superintendent Owens point very much to the conclusion that the discussion was, and was always intended to be, primarily concerned with the allegations which had been made on TCN Channel 9 on 4 April 2004 and recent crowd violence. More will be said in relation to those minutes later in this Report.

2.39 It is conceivable that Deputy Commissioner Madden and Mr Noad each had a different understanding about the purpose of the meeting. Whilst the belief held by the parties as to the reason for the meeting does not ultimately inform the Commission's assessment as to whether the alleged breaches of the TI Act may have occurred, it does however assist the Commission to make assessments about the intentions which at least Deputy Commissioner Madden and Assistant Commissioner Parsons may have had going into the meeting.

²⁶ PIC Exhibit AQJ3 “C”

²⁷ PIC Exhibit AQH2 “C”

²⁸ PIC Exhibit AQJ8 “C”

THE RISK OF POSSIBLE BREACHES OF THE TELECOMMUNICATIONS (INTERCEPTION) ACT 1979 MATERIALISES

- 2.40 It is not known whether what was communicated to Mr Noad at the meeting of 5 April 2004 compromised either the investigation of the sexual assault allegations or the alleged involvement of Player X in illegal drugs. It is likely however that by the afternoon of 5 April 2004, the intercept of Player X's telephone service would have had little further utility. Following his meeting with Deputy Commissioner Madden and others, Mr Noad informed the players at Belmore Oval of his belief that their telephones were being tapped.²⁹

NO WITNESS SUGGESTED THAT THE NOTES WERE INACCURATE

- 2.41 The summaries of the calls intercepted³⁰ and full transcripts of two of the calls³¹ obtained by the Commission indicate that there are a number of matters in the notes prepared by Superintendent Owens³² which evidence both the making use, and communication to Mr Noad, of information obtained by intercepting a telecommunications service. To their credit, no witness suggested otherwise.
- 2.42 Those matters contained in the notes which can be directly linked to the intercept of Player X's telephone are as follows:
- (a) The reference to a conversation where one person was identified (i.e. Player X) but others were unidentified.
 - (b) The reference to the same conversation during which the person identified was using "pinners" (pills).
 - (c) The reference to identification of recreational use rather than dealing.
 - (d) The reference to the proposed taking of drugs on a bye.
 - (e) The reference to the identified person being specific about the bye but not specific as to what drugs would be taken.
- 2.43 Both Assistant Commissioner Parsons and Deputy Commissioner Madden recognised that what had been said during the meeting on 5 April 2004 was problematic. Indeed, they agreed that the disclosures made were "inappropriate" although Deputy Commissioner Madden sought to apply the test of "hindsight".
- 2.44 Assistant Commissioner Parsons did not doubt the veracity of Superintendent Owens' notes.³³ He agreed that the notes suggested that he may possibly have had either the transcripts of the telephone intercepts or a summary of the

²⁹ PIC Transcript AQE, MJ Noad, 10 May 2005, p.21.29

³⁰ PIC Exhibit AQK2 "C"

³¹ PIC Exhibits AQK3 "C" and AQK4 "C"

³² PIC Exhibit AQJ9 "C"

³³ PIC Transcript AQJ, PC Parsons, 11 May 2005, p. 38.17-33

transcripts in front of him when he joined the meeting by way of teleconference.³⁴ He gave the following evidence:³⁵

Q. It was inappropriate to disclose that information, wasn't it?

A. Look, to answer your question, yes. I cannot recall saying this to the detail that it is so recorded.

2.45 As to the reason why he had provided the information attributed to him in the notes, he said:³⁶

A. I believe there may have been some – I felt it was – I was responding to Deputy Commissioner Madden and giving him information which I was expecting, which was my concern, from the start. Why have I gone further and not – and you indicated earlier, why didn't I raise this with Commissioner Moroney, I think you posed the question. I suppose I was in a situation where – again, supposition. I suppose I was in [a] position where I felt I was in a corner, perhaps, given the people who were on the other end of the phone. I can't – it's supposition. I was uncomfortable with it before and probably during, and more so now, with the position I was placed in. But at the end of the day I accept what I have said is inappropriate.

2.46 Deputy Commissioner Madden sought to explain what had happened by suggesting that what was said was “*already public, not that he was using pinnars, but that a player was using drugs*”.³⁷ This explanation should be approached with some caution. What was in the public arena was an unsubstantiated allegation that a player had been involved in drug transactions. The limited extent to which the player identified was in fact involved in drugs was put into the public arena by Deputy Commissioner Madden and Assistant Commissioner Parsons. This appears to have been acknowledged by Deputy Commissioner Madden in the following evidence:³⁸

Q. But when it did go into the public domain that in fact his involvement was very limited, and in fact it wasn't very serious, the source of that information was you and Parsons, wasn't it?

A. Yes, the source of the information was that meeting, yes.

Q. Your source, the information so conveyed, was the TI product?

A. My source was Peter Parsons.

Q. Your source was Peter Parsons, but what you understood he was conveying to you or had conveyed to you either on the morning of the 5th or the evening of the 4th was information that he or somebody else had derived from TI product?

A. That's correct.

Q. So can I suggest this to you, it wasn't really an issue of the matter being in the public domain; you and Parsons put it there?

Mr Greenhill:

Q. Sorry, “you and Parsons”?

Mr Rushton:

³⁴ PIC Transcript AQJ, PC Parsons, 11 May 2005, p. 37.35-38

³⁵ PIC Transcript AQJ, PC Parsons, 11 May 2005, p. 38.9

³⁶ PIC Transcript AQJ, PC Parsons, 11 May 2005, p. 40.11

³⁷ PIC Transcript AQQ, DB Madden, 11 May 2005, p. 14.22

³⁸ PIC Transcript AQQ, DB Madden, 11 May 2005, p. 23.23

2. THE EVIDENCE

Q. Put it there?

A. I believe we clarified what was in the papers. We clarified to the CEO what had emerged on the [Channel 9] story, and what had been in the papers that morning. We lessened the extent of it in that it wasn't drug dealing.

Q. And you did that exercise, I suggest, by reference to what you knew to be TI product?

A. From what Peter Parsons had told me was product, yes.

2.47 Deputy Commissioner Madden agreed that Superintendent Owens' notes contained the substance of what had been said at the meeting.³⁹

2.48 Ultimately, Deputy Commissioner Madden agreed that the disclosures made by him and Assistant Commissioner Parsons, although perhaps well intentioned, were inappropriate. He gave the following evidence:⁴⁰

Q. Officer, that may have been an explanation and indeed it may have been well intentioned, but looking at it now, do you see that that disclosure was utterly inappropriate?

A. In hindsight, yes.

Q. And indeed, do you agree with the proposition that for Parsons to disclose the information that he disclosed was utterly inappropriate?

A. In hindsight, yes.

2.49 Superintendent Owens stands in a different position to Mr Madden and Mr Parsons due to the following matters.

2.50 Prior to the meeting commencing, Deputy Commissioner Madden requested Superintendent Owens attend and make notes of what was said by the participants. Superintendent Owens was relieving in the position of Staff Officer to Deputy Commissioner Madden.

2.51 Superintendent Owens had not been privy to the content of the telephone intercepts prior to the meeting and had an extremely limited understanding of what was to be discussed by the personnel during the meeting. This placed him in a difficult position. Without any knowledge of the content of the telephone intercepts, he would have difficulty selecting what he should, or should not, write down.

2.52 Superintendent Owens only became aware of the proposed meeting at "*about 8 o'clock that morning.*"⁴¹ It appears that his understanding of the purpose of the meeting was limited to Mr Noad wanting to discuss the "*rumours and innuendo ... that was going around ... that a Canterbury player had been implicated in drugs in some way.*"⁴²

2.53 Before the meeting commenced he was aware of the identity of the relevant player (Player X) and that this player had been involved in drugs in some way.⁴³

³⁹ PIC Transcript AQG, DB Madden, 11 May 2005, p. 24.19

⁴⁰ PIC Transcript AQG, DB Madden, 11 May 2005, p. 17.22

⁴¹ PIC Transcript AQF, DJ Owens, 10 May 2005, p. 13.8

⁴² PIC Transcript AQF, DJ Owens, 10 May 2005, p. 10.14-20

⁴³ PIC Transcript AQF, DJ Owens, 10 May 2005, p. 9.21-32

He said that this knowledge came from “*speculation in the media and that as to who it was.*”⁴⁴ He was unable to recall if the aspect of the identity of the player had been obtained “*by way of telephone intercepts.*”⁴⁵

2.54 As to his knowledge of the content of the relevant telephone intercepts he was asked:⁴⁶

Q. All right. Did you have any awareness at all, before 5 April, 2004, that telephone intercepts had produced product indicating that (Player “X”) may have been involved in the use of illegal drugs?

A. No, I don’t think I did. I think that morning was the first time I became aware.

2.55 Superintendent Owens was asked if he was aware he may have committed an act contrary to the TI Act:⁴⁷

Q. Were you aware that at the time of making these notes, the Act, in section 63(1)(a) prohibits the making of a record of information obtained by intercepting a communication?

A. At the time of making the notes, no, I did not.

Q. Now, I have to put this to you as a matter of fairness: do you think now, looking back at the notes you took, particularly in the early part of the conversation where Parsons and Madden were speaking about the information they had, that that is in fact what you did?

A. That I made a record of the conversation they had? Yes sir.

Q. No, that you made a record of information obtained by the interception of a communication?

A. If a listening – telephone intercept was used, well, then, yeah, I did.

2.56 He did not concede that he was aware that the information being referred to by Assistant Commissioner Parsons and Deputy Commissioner Madden was from a telephone intercept. Arguably, however, the details of the conversations he noted were sufficient to put an experienced police officer on notice that such information may have emanated from telecommunications interception.

2.57 During the latter part of his examination, Superintendent Owens described the position in which he might have been placed had he not made his notes as complete as possible.⁴⁸

Q. I think your position is, officer, that certainly at the time you did that, you had no understanding that what you did might be wrong.

A. No, definitely not. Nor, just clarifying that, no, though, would I – I was making minutes of a meeting which occurred. If I didn’t record what was said, then I wasn’t doing my job, and then I could later get accused of deleting things that were said, to try and cover what was allegedly said.

2.58 This evidence highlights the difficulty of the situation in which Superintendent Owens was placed.

⁴⁴ PIC Transcript AQF, DJ Owens, 10 May 2005, p. 17.35

⁴⁵ PIC Transcript AQF, DJ Owens, 10 May 2005, pp. 17.47 and 18.1

⁴⁶ PIC Transcript AQF, DJ Owens, 10 May 2005, p. 10.29

⁴⁷ PIC Transcript AQF, DJ Owens, 10 May 2005, p. 29.18

⁴⁸ PIC Transcript AQF, DJ Owens, 10 May 2005, p. 29.37

THE AFTERMATH OF THE MEETING

2.59 It is common ground that, to some extent, Mr Noad was seeking to obtain approval from Deputy Commissioner Madden of what he would say to the media in relation to the limited drug use uncovered by NSW Police concerning Player X. In this regard, Mr Noad gave the following evidence:⁴⁹

Q. Can you tell us what, if anything, further was said at this meeting?

A. I asked to be able to use a number of quotes and attribute those to Mr Madden in any press conference I may subsequently have, and he agreed with that.

Q. Would you mind telling us what were the matters that you wanted to source back to him?

A. I wanted particularly to be able to say that it was of a low level nature, which he agreed to, and I subsequently used in the press conference. And that – I think that was the main one. I wanted to be able to say that I could attribute that quote to Mr Madden, and that was agreed to. Because it was, you know – from the Club’s point of view it was extremely important to be able to describe to the media that it wasn’t just me saying it was a low level nature but it was the police saying it was a low level nature.

2.60 Deputy Commissioner Madden gave similar evidence. It was as follows:⁵⁰

Q. And he wanted to be able to source back what he said to you, didn’t he?

A. He didn’t indicate that, but obviously he would say that in the media, yes.

Q. And interview that at the time?

A. That’s right, and I gave some suggestions.

Q. Yes. In fact he said to you at some point, didn’t he, that he wanted to say there was no indication of a person dealing, and you wanted to qualify that by saying “at this stage, but there was a reasonable belief a player had used recreational drugs”, or had personally used recreational drugs?

A. Yes, yes.

2.61 Mr Noad followed up his meeting at the Executive Offices of NSW Police by meeting with the players at Belmore Oval. In substance, Mr Noad told the Commission that he had conveyed a number of matters to the players including that he had met with NSW Police, that if a drug transaction had taken place at all, it was of a very low level nature, that there may be an investigation and that it had been passed onto the Drug Squad and the Local Area Command, and that he believed that the players’ telephones were being tapped. They needed to be very careful about what they said on the telephone.⁵¹ Later that afternoon he gave a press conference at which he estimated that there were probably 40 or 50 people present.⁵² Mr Noad said that he had used notes made by him at the meeting and had used quotes which had been approved by Deputy Commissioner Madden.⁵³ He told the Commission:⁵⁴

⁴⁹ PIC Transcript AQE, MJ Noad, 10 May 2005, p. 15.37

⁵⁰ PIC Transcript AQG, DB Madden, 11 May 2005, p. 19.40

⁵¹ PIC Transcript AQE, MJ Noad, 10 May 2005, p. 21

⁵² PIC Transcript AQE, MJ Noad, 10 May 2005, p. 22.36

⁵³ PIC Transcript AQE, MJ Noad, 10 May 2005, p. 22.40

I basically used – well, I told them that I had met Mr Madden that morning. I told them that we had discussed the news report from the night before and that – and when I used the quotes that he allowed me to use, which were “low level inquiry or investigation”, that it had been passed onto to – from – well, it had been passed on – I’m not sure how I described where it had been passed on from, but I said that it had been – the information had been passed to the Drug Squad who had had a look at it and they were convinced that it was of such a low level nature it wasn’t worth their time investigating it, they passed it on to a Local Area Command, and I was asked how long the investigation may take and I said that I had been told that it could take three weeks. And that was pretty much it. I mean, that press conference took, sort of, 15 minutes or something, 20 minutes, but that was pretty much what I tried to convey.

- 2.62 Mr Noad said that at no time during his interview with the media did he disclose that the information which had been obtained by the police had been obtained through the use of telephone taps.⁵⁵ This is consistent with newspaper articles which appeared on 6 April 2004.⁵⁶ References to telephone taps and intercepts in these articles are not attributed to Mr Noad. The meeting notes made by Superintendent Owens reveal that the words “telephone taps” or “telephone intercept” were not used by the police at the meeting. Rather, Assistant Commissioner Parsons is recorded as making reference to information obtained from an “investigative tool”.⁵⁷
- 2.63 A media release was issued by NSW Police which media release was authorised by Deputy Commissioner Madden. The media release was issued at 11.30 a.m. on 5 April 2004 and was in the following form:

New South Wales Police Deputy Commissioner, Dave Madden, today met with Bulldogs’ Chief Executive Officer, Malcolm Noad, to discuss allegations of drug use within the Canterbury Bulldogs team.

Deputy Commissioner Madden said police are investigating the possible use of recreational drugs by one player. He said the investigation is on-going.

Deputy Commissioner Madden said the identity of the player would not be disclosed by police.

Deputy Commissioner Madden said the meeting with Mr Noad was positive and he looked forward to working closely with the CEO and Club officials

⁵⁴ PIC Transcript AQE, MJ Noad, 10 May 2005, p. 22.46

⁵⁵ PIC Transcript AQE, MJ Noad, 10 May 2005, p. 23.47

⁵⁶ PIC Exhibit AQE4 “C”

⁵⁷ PIC Exhibit AQJ9 “C”

3. STATUTORY BACKGROUND – THE TELECOMMUNICATIONS (INTERCEPTION) ACT 1979

3.1 Section 63 of the TI Act provides as follows:

No dealing in intercepted information or designated warrant information

- (1) Subject to this Part, a person shall not, after the commencement of this Part:
 - (a) communicate to another person, make use of, or make a record of; or
 - (b) give in evidence in a proceeding;
lawfully obtained information or information obtained by intercepting a communication in contravention of sub-section (7)(1).
- (2) Subject to this Part, a person must not, after the commencement of this sub-section:
 - (a) communicate designated warrant information to another person; or
 - (b) make use of designated warrant information; or
 - (c) make a record of designated warrant information; or
 - (d) give designated warrant information in evidence in a proceeding.

3.2 The expression “designated warrant information” is defined in s. 6EA of the TI Act as follows:

A reference in this Act to **designated warrant information** is a reference to:

- (a) information about any of the following:
 - (i) an application for a warrant;
 - (ii) the issue of a warrant;
 - (iii) the existence or non-existence of a warrant;
 - (iv) the expiry of a warrant; or
- (b) any other information that is likely to enable the identification of:
 - (i) the telecommunications service to which a warrant relates; or
 - (ii) a person specified in a warrant as a person using or likely to use the telecommunications service to which the warrant relates.

3.3 Section 5 of the TI Act provides that “*communicate in relation to information, includes divulge*”. The word “divulge” is not defined. Its ordinary and natural meaning is “*make known*” (*Oxford Concise English Dictionary*).

3.4 Sub-section 6E(1) and (2) provide as follows:

- (1) Subject to sub-sections (2) and (3), a reference in this Act to lawfully obtained information is a reference to information obtained (whether before or after the commencement of this section) by intercepting, otherwise than in contravention of sub-section 7(1), a communication passing over a telecommunication system.
- (2) A reference in this Act to lawfully obtained information that was originally obtained by an agency, or by an eligible authority of a State, is a reference to:
 - (a) information obtained, whether before or after the commencement of this section, by intercepting a communication under a warrant issued to the agency or authority; or

3. TELECOMMUNICATIONS (INTERCEPTION) ACT 1979

- (b) information communicated to the agency or authority in accordance with section 65A.

3.5 Sub-section 67(1) being a provision found in Part VII, provides:

- (1) 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.

3.6 The definition of “permitted purpose” in s. 5 includes the following:

permitted purpose, in relation to an agency, an eligible Commonwealth authority or an eligible authority of a State, means a purpose connected with:

- (a) in any case:
 - (i) an investigation by the agency or eligible authority of a prescribed offence; ...

3.7 Evidence given before the Commission does not suggest that if there was communication of information in circumstances which may have amounted to a breach of either subs. 63(1) or (2) of the TI Act that it was communicated for a purpose connected with either the sexual assault investigation, or in connection with the investigation of any other “prescribed offence”. At its highest, the information was communicated in good faith to “*smooth over*” the rather fragile relationship which had developed between NSW Police and the Bulldogs Rugby League Club.

3.8 The definition of “prescribed offence” in s. 5 includes:

- (d) any other offence punishable by imprisonment for life or for a period, or maximum period, of at least three years; ...

3.9 To the extent that there were communications of information which may have been derived from telephone intercepts in the meeting of 5 April 2004, the communications concerned the possible recreational use of “pinner” which was understood to be a reference to “ecstasy”.

3.10 Ecstasy is the commonly understood street name for either 3,4-methylenedioxyamphetamine or 3,4-methylenedioxymethylamphetamine in Schedule 1 of the *Drug Misuse and Trafficking Act 1985 (NSW)*. Such a drug is a “prohibited” drug (s. 3) and possession and use are offences (subss. 10(1) and 12(1)). However, the maximum term of imprisonment which can be imposed for possession or use is two years (see s. 21 of the *Drug Misuse and Trafficking Act 1985*). Accordingly, the possibility that information may have been communicated for a “permitted purpose”, namely, the investigation of a drug-related “prescribed offence”, does not arise.

3.11 Offences against s. 63 of the TI Act are indictable offences. Section 105 of the TI Act provides as follows:

Contravention of section 7 or 63

- (1) A person who contravenes sub-section 7(1) or section 63 is guilty of an offence against that sub-section or section.
- (2) An offence against sub-section 7(1) or section 63 is an indictable offence and, subject to this section, is punishable on conviction by imprisonment for a period not exceeding 2 years.
- (3) Notwithstanding that an offence against sub-section 7(1) or section 63 is an indictable offence, a court of summary jurisdiction may hear and determine proceedings in respect of such an offence if, and only if:
 - (a) the proceedings are brought in the name of the Attorney-General or the Director of Public Prosecutions;
 - (b) the defendant and the prosecutor consent; and
 - (c) the court is satisfied that it is proper for the court to hear and determine proceedings in respect of the offence;
- (4) Where, in accordance with sub-section (3), a court of summary jurisdiction convicts of a person of an offence against sub-section 7(1) or section 63, the penalty that the court may impose is imprisonment for a period not exceeding 6 months.

- 3.12 As the relevant offences created by the TI Act are indictable offences, then it is clear that the legislature considered any breach of the strict obligations imposed upon persons having lawful access to the product of an intercepted communication to be serious. Time and again the Courts have recognised that the interception of telecommunications is intrusive. They necessarily involve a significant infringement of the right to privacy (see e.g. *Grollo v Palmer* (1995) 184 CLR 348 at 367 and 384). As was stated by Sackville J in *Taciak v Commissioner of Australian Federal Police* (1995) 131 ALR 319 at 330-32;

As has been seen, the Act does not merely restrict the circumstances in which a communication may be intercepted, it also restricts the use that can be made of lawfully obtained intercept information. Section 67 protects individuals against the use of such information, except in the specific circumstances identified in the definition of “permitted purpose”, thereby reinforcing the statutory recognition of privacy as a basic community value ... The recognition and protection of privacy in the Interception Act, in my view justifies a restrictive approach to the construction of the statutory exceptions to the prohibitions on the interception of telecommunications and on the law of lawfully obtained intercept information. There is room for argument as to whether the principle of construction articulated in *Coco v R.* should be applied with all its rigour, to the definition of “permitted purpose” in the Interception Act. But where there is genuine doubt as to whether the statutory language authorises the use of intercept information for a particular purpose, that doubt should be resolved in favour of a narrow, rather than a broad construction of the statutory authorisation.

ELEMENTS OF AN OFFENCE INVOLVING CONTRAVENTION OF SECTION 63 OF THE TELECOMMUNICATIONS (INTERCEPTION) ACT 1979

- 3.13 In respect of offences under Commonwealth legislation, the *Criminal Code Act 1995* (“the Code Act”) makes specific provision as to whether a particular offence is an offence requiring proof of any particular intention (“fault

element”), or is to be considered an offence of strict or absolute liability.⁵⁸ Section 5.6 of the Code Act provides:

Offences that do not specify fault elements

- (1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.
- (2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

- 3.14 The TI Act is Commonwealth legislation. Neither s. 63 nor s. 105 of that Act make express provision for a fault element. Accordingly, s. 5.6 of the Code Act must be applied.
- 3.15 The relevant conduct proscribed by s. 63 of the TI Act with which the Commission is concerned in this case is to “*communicate to another person, make use of, or make a record of... lawfully obtained information*”.
- 3.16 In applying s. 5.6 of the Code Act to that activity, the question arises as to whether the physical element in question consists of conduct alone (subs. 5.6(1)), or whether the physical elements consist of conduct coupled with a circumstance or result as well (subs. 5.6(2)). That is, does the act of communicating, making use of or making a record of lawfully obtained information consist of one physical element or two? Section 4.1 of the Code Act provides:

4.1 Physical elements

(1) A physical element of an offence may be:

- (a) **conduct; or**
- (b) a result of conduct; or
- (c) a circumstance in which conduct, or a result of conduct, occurs.

(2) In this Code:

conduct means an act, an omission to perform an act or a state of affairs.

engage in conduct means:

- (a) do an act; or
- (b) omit to perform an act.

- 3.17 It could be argued that the physical acts of communicating, making use of or making a record of relevant information cannot be sensibly separated from the nature of the information being communicated. It is all the one act and cannot be separated into two elements. If that view is right, then intention is the relevant fault element which must be established for an offence under s. 63 (such intention being to do the whole act that is prohibited, namely communicating, making use of or making a record of information with knowledge that such information was obtained by telecommunication interception).
- 3.18 On the other hand, a person could form the bare intention to communicate, make use of or make a record of certain information without the knowledge that such

⁵⁸ s 4A *Telecommunications (Interception) Act 1979*

information was telephone intercept information (“TI information”), in which case the characterisation of the information as lawfully obtained information would be a “circumstance” for the purposes of subs. 5.6(2) of the Code Act. The result of this approach would be that even if a person consciously communicated, made use of or made a record of lawfully obtained information, that person would not have contravened s. 63 of the TI Act unless he or she could be shown to have not only intended to make the communication, but was reckless to the circumstance of the information being obtained from a telecommunication interception.

3.19 The Code Act defines recklessness, knowledge and intention as follows:

5.2 Intention

- (1) A person has intention with respect to conduct if he or she means to engage in that conduct.
- (2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.
- (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

5.3 Knowledge

A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

5.4 Recklessness

- (1) A person is reckless with respect to a circumstance if:
 - (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (2) A person is reckless with respect to a result if:
 - (a) he or she is aware of a substantial risk that the result will occur; and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (3) The question whether taking a risk is unjustifiable is one of fact.
- (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

3.20 In the Commission’s assessment, the above definitions do not resolve the uncertainty as to whether the actions proscribed by s. 63 of the TI Act consist of one physical element or two. There is no judicial authority on the question in respect of s. 63, although the application of s. 5.6 of the Code Act has been considered in respect of another Commonwealth offence.⁵⁹

3.21 The Commission finds it unnecessary to come to any concluded opinion on the issue for present purposes. Its task lies in forming a view as to whether evidence obtained in its investigations might be referred for consideration of prosecution (or other action).

3.22 Where a question of law might arise in respect to any particular offence or the elements thereof, the Commission need satisfy itself only that there is a

⁵⁹ *R v Saengsai-Or* (2004) 61 NSWLR 135; 147 A Crim R 172; [2004] NSWCCA 108

reasonable legal basis for considering that an offence is open before referring the matter for consideration of prosecution. It need not be satisfied that that basis is the only reasonable interpretation of the offence open, or come to any decided view as to which of a number of competing interpretations is to be preferred. Nor would it be appropriate for the Commission to do so, those being properly matters for the relevant prosecutorial authority and ultimately the courts to decide.

- 3.23 In this case, the Commission has formed its views about the actions of the individuals in question and its conclusions remain the same regardless of whether the alleged breaches of s. 63 are considered as consisting of one physical element or two. The Commission's assessments and opinions are discussed in Chapter 4 herein.

4. THE COMMISSION'S RELEVANT FUNCTIONS

- 4.1 Pursuant to para. 16(1)(a) of the *Police Integrity Commission Act 1996* (“the PIC Act”), the Commission is empowered to make assessments and form opinions on the basis of its investigations as to whether police misconduct or other misconduct has or may have occurred.
- 4.2 The expression “police misconduct” is defined in subs. 5(1) of the PIC Act to mean “... *misconduct (by way of action or inaction or alleged action or inaction) of a police officer ...*”. Certain examples are provided in subs. 5(2) of the PIC Act. These include the commission of a criminal offence by a police officer (para. 5(2)(b)) or misconduct in respect of which the Commissioner of Police may take action under Part 9 of the *Police Act 1990* (para. 5(2)(b1)).
- 4.3 The word “misconduct” ought to be given its ordinary and natural meaning, namely, “*unacceptable or improper behaviour*” (*Oxford Concise English Dictionary*).
- 4.4 Section 97 of the PIC Act deals with the contents of the Commission’s Report to Parliament. The Commission is authorised to include in such Report:
- (a) statements as to any of its assessments, opinions and recommendations (para. 97(1)(a));
 - (b) statements as to the Commission’s reasons for any such assessments, opinions and recommendations (para. 97(1)(b)).
- 4.5 A limitation exists in relation to the making of assessments and the forming of opinions or their publication in the Commission’s Report, namely, that the Commission is not entitled to make a finding or form an opinion that a specified person is guilty of or has committed a criminal offence (para. 16(2)(a)). However, this limitation needs to be read in its proper context. Pursuant to para. 16(3)(a), an opinion that a person has engaged in police misconduct (which by virtue of para. 5(2)(b) includes the commission of a criminal offence by a police officer) is not a finding or opinion that the person is guilty of or has committed a criminal offence.

STANDARD OF PROOF

- 4.6 The Commission does not make binding findings of fact. Nevertheless, the opinions it expresses and, in particular, any opinion as to whether police or other misconduct may have occurred pursuant to para. 16(1)(a) of the PIC Act may have very serious consequences in relation to the reputation of any person referred to in such an opinion. As has already been noted, pursuant to para. 97(1)(a) of the PIC Act, the Commission is authorised to include in its Report statements as to any of its assessments, opinions and recommendations. It is also authorised to include statements as to the Commission’s reasons for any of its assessments, opinions and recommendations (para. 97(1)(b)).
- 4.7 Before expressing any opinion that “police misconduct” or “other misconduct” may have occurred (subs. 16(1)) or that in all the circumstances it is of the

opinion that consideration should be given to the prosecution of any person for a specified criminal offence (para. 97(2)(a)) or that consideration should be given to the taking of disciplinary action (para. 97(2)(b)), the Commission should be comfortably satisfied of the relevant facts applying the civil standard of proof in the manner suggested by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336. His Honour there said (p. 361):

The seriousness of an allegation made, the inherent unlikelihood of the occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the Tribunal. In such matters, "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

- 4.8 The Commission is not bound by the rules of evidence. Indeed, it can inform itself of any matter in such manner as it considers appropriate (subs. 20(1)). Nevertheless, considerations of fairness require that the Commission deal with the evidence before it with great care. In the present investigation, this is not a particularly complicated task because there are few, if any, significant facts which are seriously in dispute.

ASSESSMENTS AND OPINIONS

- 4.9 The Commission is of the opinion that police misconduct has occurred (subs. 16(1)) in that:
- (a) Deputy Commissioner Madden failed to manage the meeting with Mr Noad in such a way as to remove any foreseeable risk of damage to investigations or breaches of the TI Act. Further, that Deputy Commissioner Madden made use of or communicated to Mr Noad information obtained by interception of a telecommunications service.
 - (b) Assistant Commissioner Parsons made use of or communicated to Mr Noad information obtained by an interception of a telecommunications service.
- 4.10 That Deputy Commissioner Madden recognised or ought to have recognised the risks involved in his conduct is reflected in the following evidence:⁶⁰

Q. Well, did you tell him that there were certain things that he shouldn't say?

A. I don't have, again, an independent recollection of saying that, but I believe I probably would have.

Q. And why do you believe you probably would have?

A. Because I have made a habit of always advising people about what they can and can't say, in the sense of "I don't want you to disclose to me things that you should not". I am usually very careful about investigators telling me, or things that I say in the media. So, for instance, before I do most media conferences I would talk to the investigators and say to them specifically, "what can I say to them without damaging your investigation?"

⁶⁰ PIC Transcript AQG, DB Madden, 11 May 2005, p. 13.17

- Q. Putting the issue of damaging the investigation to one side, it must have been pretty apparent to you that because the only evidence in relation to the possible involvement of this player in drugs was TI product, I suggest you must have realised that there was a risk that if Parsons discussed that matter, he would breach the Act – and by that I mean the *Telecommunications (Interception) Act of 1979*?
- A. I believe there would be a risk if he spoke about the issue in any specific sense.

4.11 It is clear that whatever else Deputy Commissioner Madden may have said to Assistant Commissioner Parsons, he did not seek to restrain him from communicating the matters which were in fact communicated the next day. He felt no sense of discomfort in relation to what Assistant Commissioner Parsons said. Indeed, he joined the conversation making direct reference to the bye. The following evidence is relevant:⁶¹

- Q. And you were content to allow that to happen?
- A. I think once it was said, you couldn't take it back. He gave a very brief overview of where the investigation was. Yes.
- Q. As you were sitting there listening to what he was saying on the telephone, was it causing you some concern?
- A. I don't believe at the time, no.
- Q. Because, indeed, you participated, didn't you, and it was you who let Mr Noad know that the player had been very specific about identifying a weekend of a bye as being an occasion upon which he would take drugs?
- A. I do identify that it was a weekend of a bye that a player had intended to take the drugs. It was done in the context of a conversation about the Club's drug testing regime, and whether in fact they actually had a regime that included weekends of byes, yes, as against weekends where there was an actual game.

4.12 Whilst Superintendent Owens in fact made a record of information obtained by an interception, the Commission is not of the opinion that his doing so, in all the circumstances, constituted police misconduct by him. Similarly, the Commission does not consider that the taking of notes by Superintendent Swilks (which notes cannot now be found) constituted police misconduct. The Commission also does not consider that Superintendent Waites engaged in police misconduct.

4.13 The evidence does not support a finding that police misconduct may have occurred on the basis that one or more of the above officers may have communicated, made use of or made a record of "designated warrant information" contrary to subs. 63(2) of the TI Act. The Commission is not satisfied that Assistant Commissioner Parsons' use of the expression "*investigative tool*" necessarily imparted to Mr Noad "designated warrant information".

⁶¹ PIC Transcript AQG, DB Madden, 11 May 2005, p. 16.30

5. AFFECTED PERSONS

- 5.1 Sub-section 97(2) of the PIC Act requires the Commission in relation to each “affected person”, to include in its Report a statement as to whether or not, in the circumstances, it is of the opinion that consideration should be given to either the prosecution of a person for a specified criminal offence or the taking of what might generally be described as disciplinary action.
- 5.2 An “affected person” is a person against whom, in the Commission’s opinion, substantial allegations have been made in the course of, or in connection with, the investigation concerned (subs. 97(3)).
- 5.3 The substantial allegations which have been made in the course of, or in connection with, the Commission’s investigation may be summarised as follows:
- (a) That at a meeting between certain senior officers of NSW Police and the newly-appointed Chief Executive Officer of the Bulldogs Rugby League Club, Mr Malcolm James Noad, which meeting took place on 5 April 2004 at NSW Police Executive Offices, one or more of those officers made use of, or made a record of, or communicated to Mr Noad information obtained by an interception contrary to subs. 63(1) of the TI Act.
 - (b) That later that day Mr Noad communicated information to players and/or representatives of the media in breach of the TI Act.
- 5.4 The following persons are “affected persons” within the meaning of the PIC Act:
- (a) Deputy Commissioner David Barry Madden.
 - (b) Superintendent David John Owens.
 - (c) Assistant Commissioner Peter Charles Parsons.
 - (d) Superintendent David Edwin Swilks.
 - (e) Mr Malcolm Noad.
- 5.5 Two further witnesses gave evidence before the Commission, namely, Detective Inspector Bradley David Howell (“Detective Inspector Howell”) and Assistant Commissioner Robert James Waites (“Assistant Commissioner Waites”). It is not the Commission’s opinion that either of those officers are “affected persons” within the meaning of the PIC Act for the purposes of the current investigation. Detective Inspector Howell was not present at the meeting on 5 April 2004. His evidence was taken to enable the Commission to ascertain whether, in carrying out an assessment of the complaint made on 7 April 2004, Howell had access to material beyond the Commission’s holdings. As to Assistant Commissioner Waites, although he was present at the meeting on 5 April 2004, on no view of the evidence could it be said that he may have been involved in breaches of the TI Act. By and large, his contribution to the meeting was to discuss with Mr Noad recent crowd violence at games between the Bulldogs first grade team and first grade teams from other football clubs.

SECTION 41 OF THE POLICE INTEGRITY COMMISSION ACT 1996

- 5.6 In complying with s. 97 of the PIC Act, it is proper to consider that each of the witnesses gave evidence after a declaration had been made pursuant to s. 41.
- 5.7 All answers given at the hearing and documents produced by each witness must be regarded as having been given or produced on objection. Accordingly, that material is not admissible against the person who gave the evidence or produced the document or documents in any subsequent criminal or civil proceedings. Such evidence is admissible, however, against the person who gave the evidence or produced the document or documents in relation to the disciplinary measures contemplated by paras. 97(2)(b), (c) or (d) of the PIC Act or in proceedings for offences against the PIC Act (subs. 40(3)). The issue of possible offences against the PIC Act does not arise in this investigation.
- 5.8 The evidence of each of the relevant officers is however admissible against each other officer and, arguably, so are the notes of the meeting taken by Superintendent Owens.

SECTION 97(2) STATEMENTS

DEPUTY COMMISSIONER MADDEN, ASSISTANT COMMISSIONER PARSONS, SUPERINTENDENT OWENS AND SUPERINTENDENT SWILKS

- 5.9 In forming the opinions required of it by subs. 97(2) of the PIC Act, the Commission has had regard to a number of competing considerations. On the one hand the seniority of the involved officers and the seriousness of the offences alleged cannot be overlooked. However, the events of the moment, the lack of mala fides and the broadly proper ends sought to be achieved by the meeting in question also need to be considered.
- 5.10 In the case of Superintendent Owens, whilst it is acknowledged that the details of the conversation he recorded were arguably sufficient to put an experienced police officer on notice that such information may have emanated from telecommunications interception, the Commission is not satisfied that circumstances permitted Superintendent Owens to consciously form that view. He was merely complying with a direction to record what was said.
- 5.11 The Commission is satisfied that Superintendent Owens formed the intention to make the notes but not the intention to make a record of TI information. As discussed in Chapter 3 above, s. 5.6 of the Code Act must be applied to the relevant TI Act offences, and this may require consideration not only of intention but whether there is an element of recklessness involved in the act of communicating or making a record of TI information if a risk of doing so existed. If the element of recklessness arises for consideration, the Commission does not consider that Superintendent Owens was aware that there was a substantial risk that the information was from a telecommunications interception and that he was reckless in relation thereto.

- 5.12 The Commission is not of the opinion that consideration should be given to the prosecution of Superintendent Owens for the offence of making a record of lawfully obtained information contrary to subs. 63(1) of the TI Act.
- 5.13 Like Superintendent Owens, Superintendent Swilks made notes of the discussion at the request of his superior officer. The Commission is satisfied that Superintendent Swilks formed the intention to make the notes but not the intention to make a record of TI information. If the element of recklessness arises for consideration, the Commission does not consider that Superintendent Swilks was aware that there was a substantial risk that the information was from a telecommunications interception and that he was reckless in relation thereto.
- 5.14 The Commission is not of the opinion that consideration should be given to the prosecution of Superintendent Swilks for the offence of making a record of lawfully obtained information contrary to subs. 63(1) of the TI Act.
- 5.15 In relation to Deputy Commissioner Madden and Assistant Commissioner Parsons, the Commission is of the opinion that each formed the intention to make use of or communicate TI information in the meeting with Mr Noad. If the element of recklessness arises for consideration, the Commission is satisfied that both officers were at least aware there was a substantial risk that the information was from telecommunications interception.
- 5.16 The Commission is of the opinion that consideration should be given to the prosecution of Deputy Commissioner Madden and Assistant Commissioner Parsons for the specified criminal offence of communicating to another person or making use of lawfully obtained information contrary to subs. 63(1) of the TI Act.
- 5.17 The Commission notes that once it has reached such a conclusion, any further decisions, including decisions about how the public interest will be best served, are, quite properly, solely matters for the appropriate prosecutorial authority.
- 5.18 The Commission is not of the opinion that consideration should be given to the taking of action for a specified disciplinary offence against any of these officers, pursuant to subs. 97(2)(b) of the PIC Act.
- 5.19 The Commission is also not of the opinion that consideration should be given to the taking of action (including the making of an order under s. 181D of the *Police Act 1990*) against any of these officers on specified grounds with a view to dismissing, dispensing with the services or otherwise terminating the services of these officers, pursuant to subs. 97(2)(c) of the PIC Act.
- 5.20 The Commission is however of the opinion that the significant errors of judgement which occurred warrant consideration of the taking of reviewable action within the meaning of s. 173 of the *Police Act 1990* against each of Deputy Commissioner Madden and Assistant Commissioner Parsons, pursuant to subs. 97(2)(d).

MR NOAD

- 5.21 It is common ground that after the meeting with the police Mr Noad addressed the Bulldogs players and made use of information he had received at the meeting. In fact he sought and obtained Deputy Commissioner Madden's agreement to what he could tell the players (eg that the drug use was of a low level nature). Mr Noad did not tell the players that the information came from telephone intercepts, indeed he had never been told by the police that it did. The term telephone intercept was not mentioned at the meeting, but rather Assistant Commissioner Parsons had said that information had been obtained from an "investigative tool".
- 5.22 Nevertheless, Mr Noad formed his own view that the players' telephones had been tapped, and he told them so when he met with them after the meeting. (Such a suggestion was not new, having already been the subject of significant media speculation).
- 5.23 The Commission is satisfied that the information Mr Noad conveyed about low level use was lawfully obtained information. However, while Mr Noad had the intention to convey the information, he had not been told that it came from a telephone intercept nor that there was any impediment to passing it on. In fact he obtained the approval of Deputy Commissioner Madden before doing so. In the circumstances, the Commission does not consider that Mr Noad could be said to have been reckless in relation to the substantial risk that that circumstance existed.
- 5.24 The Commission is not of the opinion that consideration should be given to prosecution of Mr Noad for an offence against subs. 63(1) of the TI Act.

REVIEW OF PROCEDURES

- 5.25 Existing police procedures for the handling of TI material were not examined at length in Operation Vail.
- 5.26 However the investigation has prompted the Commission to open a dialogue with the Commissioner of Police concerning the efficacy of current measures to achieve full compliance with the stringent requirements of the TI Act.
- 5.27 The Commission expects that senior officers would handle interception material within NSW Police consistent with procedures that establish protocols for its protection, and ensure that all officers in receipt of such material are held accountable for their handling of it. As in the case of all policing matters where a high level of professional practice is to be established, the Commission regards senior police as having a critical role in modelling correct behaviour.

APPENDICES

APPENDIX 1 – ROLE AND FUNCTIONS OF THE COMMISSION

- A1.1 The Police Integrity Commission was established under the *Police Integrity Commission Act 1996* (“the PIC Act”) on the recommendation of the Royal Commission into the NSW Police Service (the “Police Royal Commission”). The principal functions of the Commission, set out in s. 13 of the PIC Act, are:
- (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 PIC Act, and to deal with records of the Police Royal Commission as provided by the PIC Act.
- A1.2 Other functions of the Commission in regard to police activities and education programs are set out in s. 14 of the PIC Act.⁶² These include:
- (a) to undertake inquiries into or audits of any aspect of police activities for the purpose of ascertaining whether there is police misconduct or any circumstances that may be conducive to police misconduct;
 - (b) in particular, to monitor the quality of the management of investigations conducted within NSW Police and to undertake audits of those investigations;
 - (c) to make recommendations concerning police corruption education programs, police corruption prevention programs, and similar programs, conducted within NSW Police or by the Ombudsman or the Independent Commission Against Corruption for NSW Police; and
 - (d) to advise police and other authorities on ways in which police misconduct may be eliminated.
- A1.3 As far as practicable, the Commission is required to turn its attention principally to serious police misconduct (subs. 13(2) of the PIC Act).

POLICE MISCONDUCT

- A1.4 “Police misconduct” and “serious police misconduct” are not explicitly defined by the PIC Act, but include the following (see subs. 5(2)):

⁶² Further functions of the Commission are set out in s. 14A (functions relating to the special audit of the reform process) and s. 15 (functions relating to the collection of information and evidence) of the PIC Act.

- (a) police corruption;
- (b) the commission of a criminal offence by a police officer;
- (b1) misconduct in respect of which the Commissioner of Police may take action under Part 9 of the *Police Act 1990*;
- (c) corrupt conduct within the meaning of the *Independent Commission Against Corruption Act 1988* involving a police officer;
- (d) any other matters about which a complaint can be made under the *Police Act 1990*.

A1.5 There is no defined limit on the type of misconduct in respect of which disciplinary action may be taken by the Commissioner of Police under Part 9 of the *Police Act 1990*. In addition to corrupt and/or criminal conduct, “police misconduct” may therefore include minor disciplinary breaches, such as may be appropriately dealt with, for example, through training and development.

ACQUIRING INFORMATION

A1.6 The Commission has a wide range of means at its disposal for acquiring information. In addition to research of material in the public domain and audits or inquiries into police activities, in matters where the Commission determines to carry out an investigation it has special powers to:

- require public officials and public authorities to produce statements of information (s. 25);
- require any person (whether or not a public official or public authority) to produce documents or other things (s. 26);
- enter public premises (s. 29);
- obtain search warrants (s. 45);
- obtain warrants under the TI Act;
- obtain warrants under the *Listening Devices Act 1984* (s. 50 of the PIC Act); and
- require persons to attend and give evidence or produce documents or other things before a hearing of the Commission, either in public or in private (s. 38).

A1.7 The Commission may conduct an investigation even though no particular police officer or other person has been implicated and even though no police misconduct is suspected (subs. 23(2)). Further, the Commission is not bound by the rules or practice of evidence, and can inform itself on any matter by means it considers appropriate (s. 20(1)). Such means might include, for example, interviews, focus groups or private hearings with experts, police officers or others. These might be conducted for the purposes of gathering information which is relevant to NSW Police policies and procedures or other topics bearing on the prevention of police misconduct, circumstances conducive to police misconduct, or other matters related to the Commission’s functions.

REPORTS TO PARLIAMENT

When Does The Commission Submit A Report To Parliament?

- A1.8 The Commission may prepare a report to Parliament in relation to any matter that is or has been the subject of an investigation (s. 96(1)). The Commission may also make a special report on any administrative or general policy matter relating to the functions of the Commission (s. 98). A report to Parliament must be provided to the Presiding Officer of each House of Parliament as soon as possible after the Commission has concluded its involvement in the matter, unless it is considered desirable, in the public interest, for the making of the report to be deferred (subss. 96(4) and (5)). Where the Commission has conducted a public hearing for the purpose of an investigation, it must prepare a report to Parliament on that matter (subs. 96(2)).

What Is Included In A Report To Parliament?

- A1.9 The contents and structure of a report to Parliament will vary according to whether it reports on an investigation, an audit, another type of inquiry or a combination of these. Generally, a report will first present the relevant information and/or evidence acquired. The Commission assesses this information to reach opinions on whether there is or has been police misconduct or any circumstances that may be conducive to police misconduct. On the basis of the Commission's assessments, the report may include a number of recommendations (subss. 16(1) and 97(1)). These may include recommendations as to whether consideration should or should not be given to the prosecution of persons (including police officers) for criminal or disciplinary⁶³ offences and, in the case of police officers, other forms of disciplinary action (subss. 16(1)(b) and 97(2)). Opinions and recommendations regarding individuals are discussed further in the following section.
- A1.10 The Commission may also recommend other measures which it considers should be taken in relation to its opinions and assessments (para. 16(1)(c)). Such recommendations may relate, for example, to law reform or to changes in NSW Police policies and procedures which impact on the prevention or detection of misconduct or on circumstances which are conducive to misconduct.

OPINIONS AND RECOMMENDATIONS REGARDING INDIVIDUALS

Assessments and Opinions About Misconduct

- A1.11 The standard of proof applied by the Commission to the formation of an opinion as to whether a person has engaged in police misconduct or other misconduct is the balance of probabilities. Such an opinion will be reached having regard to the

⁶³ While the PIC Act refers to “disciplinary offences”, this definition no longer applies in practice to police officers. The power of the Commissioner of Police to prefer a departmental charge against a police officer for a disciplinary offence was repealed in 1999. Since that date, the powers and obligations of the Commission to recommend whether consideration should be given to the prosecution of an officer for a specified “disciplinary offence” (sections 16(1)(b), 97(2)(b)) has no effective application.

principles in *Briginshaw v Briginshaw* (1938) 60 CLR 336. That is, the more serious the matters under consideration, the more stringent will be the requisite degree of satisfaction.

- A1.12 The Commission may form opinions as to whether police misconduct or other misconduct has or may have occurred, is or may be occurring, is or may be about to occur, or is likely to occur (para. 16(1)(a)). Such opinions about police misconduct are not equivalent to findings (such as a court may make) about whether an offence has been committed (subs. 16(3)). The Commission is not a court or tribunal and may not make a finding or form an opinion that a specified person is guilty of or has committed, is committing or is about to commit an offence (para. 16(2)(a)).

Recommendations to Consider Prosecution

- A1.13 If, in the Commission's opinion, the available evidence is sufficient to establish a *prima facie* case in respect of a criminal offence then it is generally the practice of the Commission to recommend that consideration be given to the prosecution of a person for a specified criminal offence. Such a recommendation will be made to the relevant prosecutorial authority, for example, the Office of the NSW Director of Public Prosecutions. In deciding whether to make such a recommendation, the Commission generally does not have regard to discretionary considerations, such as whether there is a reasonable prospect of conviction.⁶⁴ Such discretionary considerations are appropriately matters for the relevant prosecutorial authority.

Recommendations Regarding Action Against "Affected Persons" And Others

- A1.14 The Act defines an "affected person" as a person against whom, in the Commission's opinion, substantial allegations have been made in the course of, or in connection with, the investigation (subs. 97(3)). Where the Commission reports to Parliament on an investigation involving affected persons, the report must include a statement as to whether or not the Commission is of the opinion that consideration should be given to prosecution of the person for a specified criminal or disciplinary offence and, if the person is a police officer, whether consideration should be given to:
- action against the person as a police officer on specified grounds (including action for the loss of the Commissioner's confidence under s. 181D of the *Police Act 1990*) with a view to dismissing or otherwise terminating the services of the police officer (para. 97(2)(c))
 - "reviewable action" under s. 173 of the *Police Act 1990* against the police officer (para. 97(2)(d)).
- A1.15 "Reviewable action" within the meaning of s. 173 of the *Police Act 1990* refers to forms of disciplinary action that would ordinarily apply to more serious misconduct. These include:

⁶⁴ The only circumstance in which the Commission may, despite the existence of a *prima facie* case against a person, decide not to recommend that consideration be given to their prosecution is where it considers that to do so would be inconsistent with the functions of the Commission.

- a reduction in a police officer's rank or grade;
- a reduction in the police officer's seniority;
- a deferral of the police officer's salary increment; and
- any other action (other than dismissal or the imposition of a fine) that the Commissioner of Police considers appropriate.

A1.16 These types of action are reviewable, since, owing to their seriousness, a police officer may appeal the imposition of any of these penalties to the Industrial Relations Commission of New South Wales.

A1.17 The Commission may also recommend that prosecution or (in the case of a police officer) any of the disciplinary actions above be considered in the case of a person who is not an "affected person" (subs. 97(4)).

A1.18 For both "affected persons" and any other persons, the Commission may also recommend the consideration of other disciplinary actions (subs. 97(4)). Such actions may include "non-reviewable action" within the meaning of s. 173 of the *Police Act 1990*. Non-reviewable action would generally apply to less serious breaches of discipline. It includes:

- coaching
- mentoring
- training and development
- increased professional, administrative or educational supervision
- counselling
- reprimand
- warning
- retraining
- personal development
- performance enhancement agreements
- non-disciplinary transfer
- change of shift (but only if the change results in no financial loss and is imposed for a limited period and is subject to review)
- restricted duties, and
- recording of adverse findings.

A1.19 There is no avenue of appeal to the Industrial Relations Commission against the imposition of non-reviewable action.

APPENDIX 2 – INSTRUMENT OF APPOINTMENT, DIRECTION AND DELEGATION



INSTRUMENT OF APPOINTMENT, DIRECTION AND DELEGATION

Whereas:

- A. It is intended that The Hon Mervyn David Finlay QC be appointed an Assistant Commissioner for the Police Integrity Commission (“the Commission”) for the purpose of exercising some of the functions and powers of the Commission and the Commissioner for the Police Integrity Commission (“the Commissioner”) in connection with the investigation codenamed “Operation Vail” (“the Investigation”);
- B. The Hon Mervyn David Finlay QC has special legal qualifications within the meaning of subsection 4(2) of the *Police Integrity Commission Act 1996* (“the Act”); and
- C. Hearings are to be held for the purpose of the Investigation (“the Hearings”).

APPOINTMENT, DIRECTION AND DELEGATION

I, **Terence Peter Griffin**, being Commissioner and Chief Executive Officer of the Commission hereby:

- (a) Pursuant to subsection 8(1) of the Act, appoint **THE HON MERVYN DAVID FINLAY QC** as an Assistant Commissioner for the Police Integrity Commission;
- (b) Pursuant to subsection 32(2) of the Act, determinate that the Hearings shall be conducted by **THE HON MERVYN DAVID FINLAY QC**;
- (c) Pursuant to subsection 9 of the Act, direct **THE HON MERVYN DAVID FINLAY QC** to exercise, for the purposes of the Hearings, the functions of the Commissioner delegated by paragraph (d) below as he considers appropriate and desirable;
- (d) Pursuant to subsections 11(1) and 2 of the Act, delegate to **THE HON MERVYN DAVID FINLAY QC** for the purposes of the Investigation and Hearings:
 - (i) The powers of the Commission or Commissioner, as the case may be, under Divisions 4, 5 and 8 of Part 3 of the Act at or in connection with a hearing, including the power to issue a warrant for the arrest of a person under section 39 of the Act;



- (ii) The powers of the Commissioner under Part 10 of the Act at or in connection with a hearing;
- (iii) The power of the Commissioner to require a public authority or public official to produce a statement of information under section 25 of the Act; and
- (iv) The power of the Commission to require a person to attend and produce a document or other thing under section 26 of the Act.

TERM OF APPOINTMENT, DIRECTION AND DELEGATION

This Instrument shall remain in force until such time as it is revoked or the functions of the Commission in relation to Operation Vail, including the making of any report to Parliament, are discharged, whichever occurs sooner.



T P Griffin
Commissioner

A handwritten signature in black ink, appearing to read 'T P Griffin', is written over the printed name and title.

Dated: 26 April 2005

APPENDIX 3 – WITNESS LIST

Name	Date of Appearance before the Commission
Malcolm James NOAD	10 May 2005
David John OWENS	10 May 2005
Peter Charles PARSONS	11 May 2005
David Barry MADDEN	11 May 2005
Bradley David HOWELL	12 May 2005
Robert James WAITES	12 May 2005
David Edwin SWILKS	13 May 2005