Special report concerning certain operations in 2013

Pursuant to section 162 of the *Independent Broad-based Anti-corruption Commission Act* 2011

November 2013

ibac independent broad-based anti-corruption commission
Victoria

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Letter of transmittal

To: The Honourable President of the Legislative Council
The Honourable Speaker of the Legislative Assembly

As foreshadowed in the *Independent Broad-based Anti-corruption Commission (IBAC) Annual Report 2012–13* tabled in Parliament in October 2013, this report dealing with certain IBAC operations in 2013 is presented to Parliament pursuant to section 162(1) of the *Independent Broad-based Anti-corruption Commission Act 2011(Vic)* (IBAC Act).

The principal purpose of this report is to explain IBAC's handling of various matters where most or all key events took place before IBAC took full jurisdiction in February 2013. Some of these were investigations that the Office of the Police Integrity (OPI) was unable to complete by the time it ceased to exist in February 2013, and which IBAC decided it should complete.

This report is otherwise desirable in the interests of transparency and, in relation to some matters, of fairness to persons publicly named as being the subject of a complaint to, or possible investigation by, IBAC. IBAC's approach in this latter regard is described in Appendix A and relevant formal requirements prescribed for its special reporting in section 162 of the IBAC Act are addressed in Appendix B.

Yours sincerely



Stephen O'Bryan SC
Commissioner

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1. Introduction

This report addresses certain matters IBAC has dealt with since it became fully operational on 10 February 2013, some of which were taken over by IBAC from OPI when it ceased to exist on the same date.

It is timely that IBAC demonstrates to Parliament and the public that it has acted – and is acting – upon the meaning and intent of relevant legislation[1], both in respect of matters first taken up by OPI and subsequently addressed by IBAC, and of matters that have arisen since IBAC assumed its powers.

Accordingly, this report addresses the following matters:

- IBAC's early operations, and in particular some of the organisational, legislative, operational and other issues facing the Commission
- a standing 'own motion' investigation that IBAC has commenced into deaths or serious injury (or risk thereof) associated with police contact
- IBAC's response to the announcement of Taskforce Keel, a Victoria Police investigation to explore links between some police personnel and criminal elements including, in particular, members of outlaw motor cycle gangs
- the results of direct notifications by other agencies or information received from government since IBAC assumed its full powers and which have been the subject of public commentary
- a number of 'legacy' matters in which IBAC has completed sensitive and complex matters commenced by the former OPI or where OPI otherwise had some involvement. Most of these cases, involving allegations of police misconduct, have previously been the subject of significant public comment and interest.

Importantly, this report foreshadows outcomes from a number of investigations in the police and public sector jurisdictions commenced since IBAC assumed full powers in February 2013. This report notes that at present, IBAC's police and other public sector investigations are roughly even in number.

Finally, this report underscores the determination of IBAC to build a reputation for professionalism, adherence to both the spirit and letter of the legislation passed by Parliament, and respect and responsiveness in its dealings with clients and stakeholders, in particular the Victorian public.

[1] Especially the *Independent Broad-based Anti-corruption Commission Act 2011 and Protected Disclosure Act 2012.*

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2. IBAC's early operations

Building the organisation

As a new organisation, a particular early priority for IBAC has been to establish and build the organisation, with strong executive leadership, management capacity and technical expertise, as well as sound organisational structure, systems, policies and practices.

In this respect, the establishment of IBAC has been a mix of start-up activity for a new organisation, as well as change management in transitioning resources, in particular many staff from OPI. IBAC has taken a deliberately measured approach to recruitment and other establishment activities.

Strong organisational foundations for IBAC will benefit the State of Victoria into the future and patience is required to see its potential fulfilled. As recently noted by the Chief Commissioner of the Integrity Commission in Tasmania, interstate experience demonstrates that it takes time to establish a new organisation like IBAC, with a new and broad jurisdiction. Moreover, it is difficult to make comparisons at this stage of IBAC's operations with the performance of anti-corruption agencies in NSW and Queensland, which have decades of experience to draw on, and which have differing powers and jurisdictions[2]. In a similar vein, the federal Integrity Commissioner recently observed in his annual report that 'it takes perhaps a decade to embed an effective integrity system'[3].

The organisational performance of IBAC will be covered in further special reports, and in statutory annual reporting following the end of each financial year, as well as in fulfilling specific statutory reporting obligations to the Victorian Inspectorate (VI).

The new integrity legislation

During 2013, IBAC and other Victorian agencies have been navigating new and complex integrity scheme legislation, which involves fully understanding and making the legislation work in practice. IBAC intends to further report to Parliament on important aspects of its interpretation and application of the legislation after IBAC's first twelve months of full operation[4]. This will include a detailed update about the performance of IBAC's important prevention and education role.

IBAC's role

It is timely to clear up possible misunderstandings concerning the fact that IBAC only investigates a small proportion of the many complaints from the public and notifications from other statutory bodies that it receives.

IBAC assesses all complaints and notifications on their merits. IBAC will only commence an investigation when the subject matter involves credible allegations or evidence of serious misconduct within Victoria Police, or of serious corrupt conduct in the public sector. Other complaints and notifications of police or public sector misconduct are able to be referred by IBAC to other integrity, statutory or law enforcement bodies[5]. IBAC's powers, expertise and resources are appropriately focused on investigating the more serious matters, as well as its other functions[6].

This approach is consistent with IBAC's role as Victoria's central integrity agency and the approach of its interstate counterparts[7]. In receiving and assessing a wide range of complaints and notifications, IBAC plays an important 'clearing house' role in collecting comprehensive information on potential corruption issues and risks facing the public sector. This information and intelligence may inform prevention and education functions, and future investigations.

[2] *Integrity Commission Annual Report 2012–13*, page 7.

[3] Australian Commission for Law Enforcement Integrity, *Annual Report of the Integrity Commissioner 2012–13,* page 6.

[4] ie. after 10 February 2014.

[5] Such matters may also be dismissed for prescribed or other appropriate reasons.

[6] IBAC's principal functions include coordination of investigations concerning possible corrupt conduct by other bodies, prevention and education, operational and strategic intelligence, and *Protected Disclosure Act 2012* assessment and administration across the whole public sector.

[7] For example, research advice provided by the Australian National University, based on published data for 2011–12, shows that of the total 2,978 complaints received by the NSW Independent Commission Against Corruption, 0.7 per cent were subject to full investigation; with a further two per cent subject to preliminary investigation.

IBAC's early operations

A question that is sometimes raised is why an integrity agency like IBAC might refer a matter back to the agency or body where the problem lies. This depends on how serious the conduct is and, in particular, at what seniority level any alleged wrongdoing is occurring. Moreover, it is important that public sector bodies do not abrogate their primary responsibility for maintaining integrity and ensuring good governance and ethical conduct, and are able to maintain their own preventative and investigative capacity.

When IBAC refers matters to the public body involved or to other integrity agencies, it may include a requirement that IBAC be kept advised on how these matters are being handled. IBAC may also withdraw a referral in appropriate circumstances[8].

It has been further suggested that IBAC's 'clearing house' role for protected disclosures and for corrupt conduct and police misconduct complaints may lead to inefficiencies and delays, and possibly prejudice a matter for investigation. IBAC is working closely with other integrity agencies to ensure that this does not occur, and that IBAC's central role means effective coordination, gathering of intelligence, and prevention efforts across the public sector.

Protected disclosure guidelines and training

Under the *Protected Disclosures Act 2012 (Vic)* (PD Act), IBAC is required to issue guidelines for prescribed statutory bodies to manage prospective protected disclosures, their notification to IBAC, and the welfare and protection of persons who make or are otherwise affected by protected disclosures, including from possible detrimental action.

These guidelines are available on the IBAC website at www.ibac.vic.gov.au

To support implementation of the new protected disclosure regime, IBAC provided training to over 100 protected disclosure coordinators and other staff from state and local government in June and July 2013. Regional sessions were conducted to ensure accessibility for public sector employees in rural and regional locations.

New investigations

IBAC has commenced a number of new investigations involving both police and public sector personnel.

The police jurisdiction investigations include allegations of serious assault, improperly or unlawfully supplying information to criminals, rorting in relation to property, systemic duty failures (or worse) concerning the handling of certain kinds of penalty notices and unauthorised or inappropriate access to government databases.

The broader public sector jurisdiction investigations, which relate to departments, statutory authorities and local government, include allegations of personnel improperly supplying confidential information to criminal organisations, fraud, theft and bribery.

Some IBAC investigations have already concluded with open findings, whilst others appear headed towards adverse findings. Details cannot be given at this stage, for both legal and operational reasons (the latter being to maintain the integrity of investigations).

IBAC expects to be in a position to report publicly on a number of these investigations in its further special report to Parliament in the first quarter of 2014.

[8] See sections 78(2) and 79(2) respectively of the IBAC Act.

IBAC's early operations

Own motion investigation into deaths or serious injury associated with police contact

Death or serious injury, or the risk of death or serious injury, as a result of contact with Victoria Police is a serious matter that warrants ongoing scrutiny and review. It is an important, if not critical, element of IBAC's police oversight role.

Consistent with the former OPI practice, in May 2013 the IBAC Commissioner committed to active oversight of such matters and pursuant to subsection 64(1)(c) of the IBAC Act, commenced an 'own motion' investigation into deaths, serious injury or risk of death or serious injury associated with police contact (serious incident notifications).

The key objective is to ascertain whether any death or serious injury associated with police contact was a result of action or inaction by police that constituted a failure to discharge the duties and responsibilities of the state, and whether or not anything could have been done to prevent the death or serious injury.

At the commencement of IBAC taking full jurisdiction in February 2013, a total of 19 serious incident notifications were carried over from OPI to IBAC. As at September 2013, eleven police investigations relating to those matters had been reviewed and finalised by IBAC, with no further action required by Victoria Police. The remainder are currently being monitored and will be reviewed by IBAC upon completion.

As at 30 October 2013, IBAC itself had received 25 serious incident notifications from Victoria Police, from which 18 matters were selected by it for active monitoring and review. The remaining seven matters were assessed as requiring no further action. The selection of matters for monitoring and review is informed by considerations such as:

- the time and nature of police contact with the person before or after the death or serious injury or risk thereof
- whether it is in the public interest (eg. high speed pursuits)
- an indication or perception that police actions or inactions may have caused or contributed to the death or serious injury or risk thereof.

The criteria currently employed by IBAC in the selection of which matters it determines to actively monitor and review are directly aligned with ensuring public confidence and assisting to build the capacity of Victoria Police to respond to and reduce the risk of serious incidents.

Over time, IBAC expects to be able to report in more detail in this area, both in terms of individual cases and on broader issues. The continued involvement of IBAC can give the public confidence these matters will be subject to the highest levels of scrutiny, accountability and transparency.

Victoria Police Taskforce Keel

Earlier this year, Chief Commissioner of Victoria Police, Ken Lay APM, publicly announced Taskforce Keel, an investigation to explore links between some police personnel and criminal elements including members of outlaw motor cycle gangs.

Issues of particular concern included an apparent unlawful disclosure of a large number of sensitive police documents to criminal elements by one or more members of police personnel. Alarmingly, some leaked documents contained the names of police informants in other investigations into serious unlawful activities.

Taskforce Keel has involved over 30 experienced Victoria Police investigators, as well as having representation from members of Victoria Police's Professional Standards Command (PSC) for internal police oversight purposes.

The documents in question were found in the course of a police search relating to other matters. Under the current legislative regime, Victoria Police was fully entitled to conduct its own investigation into the unlawful disclosures, something the Chief Commissioner publicly stated he was determined to do in a prioritised and comprehensive way. The Chief Commissioner noted that the matter involved significant risks to the safety of informants and integrity of pending prosecutions. In light of the urgency of the situation, and Victoria Police's substantial relevant intelligence holdings and resources, it was essential for police to investigate these matters.

IBAC intends to review the outcome of Taskforce Keel. IBAC is otherwise separately investigating a serious allegation that came to light through Taskforce Keel and which is more appropriately dealt with by IBAC. No more detail can be given at this stage to ensure the integrity of this investigation.

IBAC's early operations

Information provided to IBAC by the Hon Ted Baillieu MP

In March this year, IBAC received a letter from the then Premier of Victoria, the Hon Ted Baillieu MP, referring to information in an edition of the *Herald Sun* newspaper and to audio material on the *Herald Sun* website. The information, said to be provided under section 56 of the IBAC Act, was based on covert recordings of conversations involving former police personnel member Tristan Weston and other persons. At the time Mr Weston was a ministerial adviser to the Deputy Premier of Victoria the Hon Peter Ryan MP. The other persons were former Chief of Staff to the Premier, Anthony Nutt, and the Victorian Liberal Party President, Damien Mantach.

After a careful review of the information, it was decided that investigation by IBAC was not warranted, and the persons with the most direct interest in the matter were so advised in correspondence. In particular, IBAC investigators reviewed the material and determined that there was no new information regarding Mr Weston's conduct that had not previously been available to OPI investigators and which culminated in OPI's report to Parliament *Crossing the Line* published in October 2011.

Furthermore, as none of this material impugned the integrity of that report, there was no basis for any fresh 'own motion' investigation by IBAC into the matter. Indeed, section 60(5) of the IBAC Act, which places significant restrictions on IBAC from investigating matters that have previously been the subject of investigation by other prescribed bodies, prohibited any such investigation in IBAC's corrupt conduct jurisdiction.

The material concerning a payment to Mr Weston from the Liberal Party as reimbursement for a motor vehicle lease he had entered into (on the expectation of his position as a ministerial adviser continuing), as well as general assurances of assistance upon termination of his position, was not regarded as engaging IBAC's investigation jurisdiction. In particular, there was no evidence that a prescribed indictable offence might have been committed, nor for that matter was there evidence of any other wrongdoing.

The IBAC Commissioner subsequently raised concerns IBAC had about provision of the information to IBAC with Mr Baillieu's successor, Premier of Victoria the Hon Denis Napthine MP. In particular, no attempt had been made by government to explain why the material was thought to be relevant to the carrying out of IBAC's investigative functions. The need for fairness in respect of the persons with a direct interest in the matter, and the effects of the significant media coverage at the time, was also raised.

The view of Premier Napthine was invited regarding a possible recommendation that government normally not publicise any future provision of information to IBAC under section 56 of the IBAC Act, as doing so risks compromising any assessment and investigations that may follow. A formal recommendation is yet to be made, however IBAC's view remains that whenever possible, the heads of public bodies should provide such information, with an explanation as to its possible relevance to IBAC's functions, privately.

IBAC's early operations

Notification to IBAC under section 16E of the *Ombudsman Act 1973* concerning the Hon Matthew Guy MLC

In March this year, IBAC was notified by the Victorian Ombudsman's office under section 16E(1) of the *Ombudsman Act 1973* (VO Act) of a complaint that it considered to appear to involve corrupt conduct by the Hon Matthew Guy MLC in his capacity as Minister for Planning. The notification was based on a letter to the Victorian Ombudsman from Brian Tee MLC in his capacity as Shadow Minister for Planning, itself based on a newspaper article in *The Age* about Liberal Party fundraising dinners. The Minister was alleged to have attended one or more such events with property developers who had subsequently gained the benefit of planning application interventions by or on his behalf.

Mr Tee's letter effectively asked the Ombudsman to exercise his 'own motion' jurisdiction to investigate Opposition concerns involving administrative actions that might be regarded as giving rise to a conflict of interest, lack of transparency and, at its highest, inappropriate interference by the Minister. Relying as it did on *The Age* article and enclosing an extract from Hansard, Mr Tee's letter was not expressed as a complaint and was not one within the meaning of the VO Act.

Importantly, *The Age* article expressly disavowed any suggestion of the Minister being influenced by such donations in his relevant decision making. Furthermore, Mr Tee's letter to the Ombudsman did not allege, nor raise as a concern, possible corrupt conduct by the Minister (which may explain why Mr Tee, correctly in IBAC's view, chose not to make a complaint directly to IBAC about the matter).

In May 2013, Shadow Minister for the Anti-corruption Commission Jill Hennessy MP was reported in the media as having tabled a letter from the Ombudsman to Mr Tee informing him of the notification to IBAC. The letter, sent to Mr Tee pursuant to section 16E(2) of the VO Act, set out the text of subsection 16E(1)(b) in describing the basis for the notification. It caused substantial media coverage which left open the possibility of the notification being necessitated by something uncovered during an Ombudsman investigation (which was not the case). Such media coverage was considered by IBAC to be unfair to the Minister, albeit perhaps unwittingly, because the definition of "corrupt conduct" in the new integrity legislation requires identification of an indictable offence of a prescribed kind, and because the notification was based on Mr Tee's letter and not something uncovered during an investigation by the Ombudsman.

Section 16E(2) of the VO Act provides that if the Ombudsman notifies IBAC of a complaint under 16E(1), he must inform the complainant in writing. Section 16E(1) of the VO Act provides:

> *16E Notification to IBAC*
> *(1) The Ombudsman must notify the IBAC of the following—*
> *(a) a complaint or referred matter that appears to involve corrupt conduct or police personnel conduct; or*
> *(b) a matter that appears to involve corrupt conduct or police personnel conduct of which the Ombudsman becomes aware in the course of dealing with a complaint, conducting an own motion investigation or performing any other functions under this Act.*

Putting to one side that a complaint was not made to the Ombudsman within the meaning of the VO Act, section 16E(2) appears limited to notifications by the Ombudsman to IBAC of complaints that appear to involve corrupt conduct as referred to in subsection 16E(1)(a). The policy behind this requirement is not readily apparent. Nor is it readily apparent why no confidentiality restriction is imposed by the VO Act on a complainant who is so informed. Nonetheless, at least where such a notification becomes public, someone in the Minister's position can point out in their defence that the notification is based on what appears on the face of the complaint.

IBAC's early operations

The position became materially different when the Ombudsman's letter repeated the language in subsection 16E(1)(b), because it permitted an inaccurate impression of the Ombudsman having investigated and come across something more sinister than the contents of *The Age* article relied upon by Mr Tee. In such circumstances, a person in the Minister's position is left vulnerable to reputational damage, unless and until they are publicly cleared of wrongdoing. There is also a risk of compromise to any investigation when persons of interest know of its existence (being considerations which support the view that section 16E(2) was intended only to apply to the complaint aspect of subsection 16E(1)(a)).

The Ombudsman's letter to Mr Tee also characterised the matter as involving a possible protected disclosure under the PD Act which he could not receive, and which needed to be made to the President of the Legislative Council pursuant to section 19(2) of that Act. The letter otherwise indicated that due to the abovementioned circumstances, the Ombudsman could not deal with the matter[9].

Under section 58 of the IBAC Act, such a notification to IBAC must be dealt with in one of the following three ways: by dismissal, investigation by IBAC, or referral to a prescribed investigatory body.

IBAC considered that the Ombudsman's office had applied an overly broad construction of both the VO Act regarding the notification, and the PD Act regarding there being a possible protected disclosure. Based on what Mr Tee had provided to the Ombudsman, and which was provided to IBAC by the Ombudsman, the notification to IBAC was deemed ineffective due to nothing in Mr Tee's material appearing to involve 'corrupt conduct' as that term is defined in the VO Act[10] (and IBAC's jurisdiction therefore not being engaged).

In any event, there was not provided to the Ombudsman, nor IBAC subsequently, any evidence or information tending to show there was any sinister or unlawful connection between the Minister's attendance at the fundraising events and decisions he subsequently made or actions he took (being something IBAC would need under sections 4(1) and 60(2) of the IBAC Act before it could have commenced any investigation in its corrupt conduct jurisdiction).

IBAC also considered the matter not to be a possible 'disclosure' within the meaning of the PD Act – ie. a revelation to the person receiving it – due to the concerns raised by Mr Tee already being in the public domain. Apart from 'disclosure' being undefined in the PD Act, and therefore presumed to be used in the ordinary sense, both the IBAC Act[11] and the VO Act[12] variously refer to information 'provided' or 'disclosed', thus reflecting a distinction between the intended meaning of each word. There are also examples of usage of 'disclose' in the IBAC Act in a context where it plainly intends that ordinary meaning[13].

The Minister and Mr Tee were so informed in correspondence from IBAC.

Officers from IBAC and the Ombudsman's office have since worked together to resolve issues around the interpretation of the new integrity scheme legislation and to ensure its effective implementation consistent with Parliament's intent.

Bipartisan efforts by the major political parties in Victoria to establish appropriate ground rules in this area for Members of Parliament, and which are designed to promote transparency and reduce corruption risks, appear overdue. Under its prevention and education jurisdiction, IBAC encourages and is able to assist any such efforts.

[9] In the case of complaints to the Victorian Ombudsman, section 15(1) of the VO Act provides that he must refuse to deal with a complaint *'that appears to involve corrupt conduct … other than to notify the IBAC … '*. Likewise, section 16A(2) provides that the Victorian Ombudsman must not conduct an own motion investigation into any administrative action that appears to involve corrupt conduct.

[10] The VO Act adopts the meaning of 'corrupt conduct' contained in the IBAC Act, which requires identification of a prescribed indictable offence (not including misconduct in public office).

[11] eg. Sections 40, 41 and 54(1) of the IBAC Act.

[12] eg. Section 16L of the VO Act.

[13] eg. Section 42 of the IBAC Act.

3. OPI related matters

Investigation concerning alleged misconduct within the Mounted Police

In 2010, OPI commenced Operation Wren, an 'own motion' investigation into the outcome of a Victoria Police Ethical Standards Department (ESD) investigation[14] into alleged misconduct by members of the Mounted Branch.

In 2008, officers of the Mounted Branch complained to ESD about the conduct of fellow officers which resulted in them being suspended from duty. As a result of advice from the Office of Public Prosecutions (OPP), the suspended officers were not prosecuted. Nor were disciplinary charges proceeded with after the officers were deemed to be medically unfit.

The complainants, who were subsequently assessed by the Ombudsman as whistleblowers, then submitted written complaints to OPI. The complaints comprised more than fifty allegations against eight police members, ranging from unlawful disclosures of telephone intercept material and confidential information, to inappropriate interference with witnesses and preparation of the criminal brief.

The OPI investigation involved a review of an allegation of detrimental action lodged by one of the complainants with the Ombudsman, and identified a number of issues relating to Victoria Police's dismissal procedures, internal witness support program and whistleblower protections. These ancillary matters have been considered separately by Victoria Police in response to its own investigations.

IBAC has completed the investigation of this matter and found allegations that the ESD investigation had not been managed properly and/or had been interfered with or undermined improperly to be unsubstantiated. IBAC also found no evidence to support serious allegations that the identities of internal witnesses had been improperly or inappropriately revealed, or that telephone intercept material had been leaked unlawfully.

IBAC informed the Chief Commissioner of Victoria Police of its findings and offered to brief his office further in relation to the ancillary matters.

Investigation concerning complaint to OPI by Theo Theophanous

In 2010, former State Minister and member of the Legislative Council, Theo Theophanous, lodged a complaint with OPI in relation to his having been charged with rape in circumstances where the Presiding Magistrate discharged him at the conclusion of the subject committal proceedings and simultaneously disparaged the prosecution case (and particularly the evidence of the complainant to police).

Following this, the Director of Public Prosecutions, Jeremy Rapke QC, determined not to directly present Mr Theophanous for trial notwithstanding a contrary view by a senior Crown Prosecutor who had acted in the committal proceedings.

Mr Theophanous' principal grievance was that the police investigation and subsequent prosecution case were so deficient that he should not have been charged with the offence of rape, alleged to have been committed a decade earlier, and subjected to committal proceedings. He was also concerned that following his discharge from the committal proceedings, a member or members of the police media unit told the media, incorrectly, that he was being investigated in relation to allegedly interfering with witnesses, and that this detracted from the effect of his being discharged from committal proceedings.

[14] Codenamed Operation Hurst.

OPI related matters

Mr Theophanous considered that the rape charges and perceived police media leaks at the time of his discharge from committal proceedings impacted adversely on his political career.

OPI extensively investigated Mr Theophanous' complaint, including conducting many interviews and gathering and analysing a substantial amount of relevant documentary evidence and transcript of the committal proceedings. Upon assuming its investigative powers on 10 February 2013, IBAC completed the investigation.

Whilst IBAC considered there was evidence of some lack of objectivity on the part of the investigating Victoria Police member and that in some respects the investigation was deficient, the police case was considered not so manifestly deficient that IBAC could say Mr Theophanous should not have been charged and subjected to committal proceedings.

IBAC found that deficiencies in the police investigation and prosecution case were made known to Mr Theophanous and his legal advisers by the prosecution and were utilised by such advisers during the course of the committal proceedings. IBAC considered that in the particular circumstances of this case, it was not necessary or appropriate for the investigating police member or his superiors to be making value judgements about the credibility of the complainant to police.

IBAC concluded that this case did not appear to be in the category of cases where that might be required. The investigating member's duty therefore required him to deal properly with allegations that were persisted in by the complainant to police and, importantly, were supported by certain other evidence. It was therefore regarded as being the Court's function, and not that of Victoria Police, to determine the outcome of the allegations.

IBAC considered that the appearance of some lack of objectivity on the part of the investigating police member in the course of the investigation needed to be seen in the context of the complainant to police appearing to need support for much of the time during the initial investigation, and relevant legislation and police procedures in Victoria requiring the investigator to support that complainant in such circumstances.

The Presiding Magistrate noted that the investigating member had both a responsibility to support that complainant and to investigate her complaint independently. Whilst the Presiding Magistrate considered that the extent of the correspondence between the investigating member and that complainant permitted the allegation of a 'compromising situation for the police officer in his independent role that is required of an investigator', the Presiding Magistrate specifically stated that he did not find the investigating officer was so compromised. Ultimately, any such lack of objectivity was found to have had no bearing on whether or not Mr Theophanous was going to be charged.

In relation to Mr Theophanous' other abovementioned grievance, IBAC was not able to establish the source of the misinformation provided to the media at the time of him being discharged from the committal proceedings. However, IBAC considered that a police media unit stipulated response to media enquiries had, depending on the way in which the question was framed, the potential and tendency to confirm the correctness of media assertions that he was, at the time, being investigated for interfering with witnesses.

Whilst these media assertions were incorrect, it is noted that at the time, Mr Theophanous was a person of interest in a then ongoing police inquiry relating to a possible attempt to pervert the course of justice. In fairness to him, this inquiry appears to have come to nothing so far.

OPI related matters

Mr Theophanous was informed by IBAC in correspondence of these outcomes. On more than one occasion he sought to further engage with IBAC about a number of aspects with which he strongly disagreed. Whilst the matters he put forward in this regard were carefully considered by IBAC, they did not affect its original conclusions. Mr Theophanous continues to assert that the police prosecution case was so deficient he should not have been charged and subjected to committal proceedings and further, that members of the police media unit, possibly deliberately, provided misinformation to the media in order to benefit themselves and/or harm him.

In response to Mr Theophanous' further representations, IBAC maintains that on all of the evidence, the prosecution case was not so deficient that it can say he should not have been charged and subjected to committal proceedings. IBAC otherwise accepts that Mr Theophanous was subjected to media misinformation indicating he was being investigated for interference with witnesses, from the date he was discharged from the committal proceedings and for some days afterwards, which was likely to adversely affect his reputation.

More generally, IBAC considered that the stipulated response directed by the police media unit to relevant media enquiries may have contributed to the promulgation of such misinformation. However due to a lack of evidence, IBAC could not identify any particular person who provided misinformation to the media and in the absence of such evidence, could not conclude this was done deliberately for the purpose of benefiting the police or harming him.

It is noted that IBAC did not accede to a request on behalf of Mr Theophanous for a copy of its internal investigation report. An explanation of why IBAC's standard response is not to accede to such requests appears in Appendix C.

Finally, a matter of some concern to both OPI at the time it was involved and IBAC subsequently, was that a subpoena issued by the Magistrates' Court on behalf of the defence requiring the police to produce various classes of documents at the committal was not fully complied with. Due to the outcome of the committal, it was most fortunate that such non-compliance caused no injustice to Mr Theophanous as defendant.

This oversight was due to the normally unauthorised practice by some police personnel of corresponding in the course of their work using private email. It was determined under sections 162(7)(b) and 163(4)(c) of the IBAC Act that because the oversight was accepted by IBAC as being innocent, and on account of special circumstances pertaining at the time (where the complainant to police resided overseas), no further details could be disclosed due to the risk of unreasonable reputational damage to the member(s) of police personnel concerned.

Nevertheless, the omission, regarded by IBAC as being innocent, resulted in IBAC making a recommendation to the Chief Commissioner of Victoria Police[15] that its underlying cause be looked into in order that any risk of future re-occurrence in like circumstances be minimised. The IBAC Commissioner has since been informed by the Chief Commissioner that the recommendation is being acted upon by Victoria Police. IBAC intends following up on the matter.

[15] Under section 159(1)(a) of the IBAC Act.

OPI related matters

Investigation concerning complaint against OPI and Victoria Police by Noel Ashby APM and Paul Mullett APM

Earlier this year and as publicly foreshadowed by former Victoria Police members Noel Ashby and Paul Mullett, IBAC received their complaint about the alleged commission of what they termed serious indictable offences by certain senior persons at OPI and Victoria Police who were involved with an OPI investigation codenamed Operation Diana.

By way of background, in 2007 OPI determined to conduct an investigation into the conduct of Mr Ashby concerning alleged unauthorised communication of confidential information and alleged improper associations.

Subsequently on 24 September 2007, the then Director of OPI and Ombudsman, George Brouwer, purported to delegate most of his powers under the *Police Regulation Act 1958 (Vic)* (PR Act), and all of his powers under the *Evidence Act 1958*, to the Hon Murray Wilcox AO QC, a retired Federal Court judge. Under section 102F of the PR Act, those powers were permitted to be delegated to a person who had taken a relevant affirmation under section 102D(3). The affirmation was not made, however, until 25 September 2007, the day after Mr Brouwer signed the instrument of delegation.

Private hearings presided over by Mr Wilcox commenced on 25 September 2007. In November 2007, Mr Wilcox commenced public hearings. Mr Wilcox later recommended Mr Ashby and Mr Mullett be prosecuted. These matters were included in OPI's report to Parliament *Exposing corruption within senior levels of Victoria Police* published in February 2008.

Subsequently, Mr Ashby was charged with eleven counts of perjury. Each count was founded on allegations that he had sworn falsely to particular matters in October 2007 when he was a witness at a hearing held pursuant to section 86(1)(a) of the PR Act. The hearing was conducted by Mr Wilcox as the purported delegate of OPI. Charges of a similar nature were laid against Mr Mullett, but these did not proceed.

In February 2010, the Victorian Supreme Court held that as the purported delegation of power by Mr Brouwer to Mr Wilcox preceded the taking of the relevant affirmation by Mr Wilcox, the delegation was ineffective at law. In consequence of that finding, the Court concluded that the answers given on oath by Mr Ashby in the hearing before Mr Wilcox were not answers given upon oath before a competent tribunal, and thus the charges of perjury had no proper legal basis.

Subsequently, the perjury charges against Mr Ashby were withdrawn.

On 8 May 2013 pursuant to section 29 of the IBAC Act, the IBAC Commissioner signed a declaration to the effect that he was unable to act in relation to any consideration of this matter because of possible perceived conflict of interest. This followed an earlier decision that consideration of the complaint be quarantined so as to ensure any former employee of OPI now working for IBAC (some of whom had varying degrees of involvement with OPI's Operation Diana) had no association or dealing with it.

Having done so and on the same date, the IBAC Commissioner signed an instrument pursuant to section 32(5) of the IBAC Act which delegated to retired member of the Victorian Court of Appeal, the Hon Murray Kellam AO QC, being at the time a sworn IBAC officer qualified under section 20 of the IBAC Act to be IBAC Commissioner, all of the Commissioner's duties, functions and powers, both delegated and otherwise, for the purposes of dealing with the complaint[16].

[16] Provided in Appendix D.

OPI related matters

Of the various components of the complaint handled by Mr Kellam, two aspects required investigation by reason of section 65(1) of the IBAC Act (which requires IBAC to investigate complaints against the police ranks of Chief, Deputy and Assistant Commissioner). As further detailed below, all other components were either not substantiated or not able to be investigated by IBAC (based on various restrictions in the IBAC Act and/or lack of credible evidence of possible wrongdoing).

The first allegation related to OPI's Operation Diana. It was alleged this was commenced and continued for a motive other than that publicly stated by OPI and that two senior police personnel at the time, one being now former Deputy Commissioner Simon Overland APM and the other a still serving Assistant Commissioner, played a part in the commencement and continuation of the Operation with knowledge of these motives.

Based on interviews with Mr Brouwer and the two senior members of police personnel, together with examination of relevant documentation and taking into account the absence of evidence supporting the allegation, Mr Kellam regarded this particular complaint as not made out.

The second allegation related to then Deputy Commissioner Overland releasing telephone intercept material in breach of the *Telecommunications (Interception and Access) Act 1979* (Cth) (TI Act).

This particular complaint was also regarded as not made out by Mr Kellam, based on an assessment of the background facts and relevant legislation and documents, as well as Mr Overland's explanation for the relevant events and a public statement by then OPI Director Michael Strong, in June 2010, who expressed the view there had been no breach of the TI Act.

Further, it is noted that neither the Commonwealth Attorney-General's Department nor the Australian Commission for Law Enforcement Integrity took action against Mr Overland following complaints of a similar nature.

Mr Kellam otherwise determined that the balance of the allegations should be dismissed for the following reasons:

- facts alleged against a former senior OPI officer did not constitute 'corrupt conduct' within the meaning of the IBAC Act and therefore IBAC had no jurisdiction to conduct an investigation into the allegations against the person
- there was no evidence that a then senior OPI officer (who is now a current senior police member) intended to breach the TI Act, and therefore the conduct in question equally did not constitute corrupt conduct within the meaning of the IBAC Act
- as the common law offence of 'misconduct in public office' was not included in the definition of 'relevant offence' in the IBAC Act, IBAC was unable to investigate whether the people so accused had committed such an offence
- an allegation that such persons committed perjury in swearing affidavits in support of relevant court applications lacked substance.

Regarding the allegations that were not investigated on account of the threshold considerations outlined in the first three bullet points above, it is noted that no decision was or needed to be made by Mr Kellam as to whether investigation by IBAC would otherwise have been warranted.

OPI related matters

Ombudsman's report to IBAC concerning OPI's investigation into Sir Ken Jones QPM

In May 2011, OPI commenced an investigation, initially codenamed Operation Flood, into an allegation that then Victoria Police Deputy Commissioner Sir Ken Jones had engaged in serious misconduct by leaking to the media confidential police information regarding, in particular:

- aspects of the police investigation into the prison murder of Carl Williams, including any connection with the murders of police informers Terrence and Christine Hodson
- a police intelligence brief dated February 2011 which cast doubt on favourable crime statistics for the Melbourne CBD that had recently been released by Victoria Police
- emails between then Chief Commissioner of Victoria Police Simon Overland APM and Sir Ken about preliminary work by Sir Ken into alleged systems failure involving Victoria Police's Law Enforcement Assistance Package (commonly referred to as LEAP) and murders committed by parolees
- general contacts between Sir Ken and various journalists.

In July 2011, the Ombudsman, having determined that the complaints the subject of the investigation were public interest disclosures under the then applicable *Whistleblowers Protection Act 2001* (WP Act), referred them back to OPI to investigate under section 43(1) of the WP Act.

OPI's report to Parliament *Crossing the Line* (arising from OPI Operation Flood I) in October 2011 foreshadowed a further report to the Ombudsman pursuant to section 62 of the WP Act. OPI delivered its *Report of Investigations into allegations of unauthorised release of law enforcement data by former Deputy Commissioner Sir Ken Jones* (arising from OPI Operation Flood II) to the Ombudsman, together with various recommendations, shortly before it ceased to exist in February 2013.

At that time, OPI issued a short press release to that effect. Regrettably and in apparent breach of section 22(1) of the WP Act, a person or persons unknown leaked information to at least one media outlet to the effect that:

- the OPI investigation report was highly critical of someone senior in the Ombudsman's office (for allegedly interfering in OPI's investigation[17])
- the report was supportive of Mr Overland and critical of Sir Ken in the context of the media leaks under investigation allegedly being part of a plot to topple Mr Overland as Chief Commissioner and replace him with Sir Ken
- OPI considered Sir Ken was behind the leaks but was unable to directly link him to them[18].

After 10 February 2013, the PD Act[19] permitted the Ombudsman to report on the results of OPI's Operation Flood II to IBAC and make recommendations.

In March 2013, under cover of an explanatory letter and pursuant to section 62 of the WP Act, the Ombudsman delivered his report to IBAC in the matter, together with various recommendations and a copy of OPI's investigation report redacted to remove material capable of identifying any protected whistleblower(s).

[17] Amongst various responses to OPI's draft report, the Ombudsman's officer in question, as well as raising a concern that despite being someone whose conduct was intended to be criticised he was never interviewed in the course of the investigation by OPI, in effect maintained that his actions accorded with a statutory duty under the WP Act to protect a whistleblower both from being identified and from victimisation.

[18] Sir Ken strongly denied all allegations of wrongdoing.

[19] See clause 6 of schedule 1.

OPI related matters

The Ombudsman was critical of the OPI investigation report for lacking sufficient evidence upon which critical conclusions were reached, as well as a range of other articulated deficiencies. Hence the Ombudsman proffered views that this prevented any findings by IBAC relating to the actions and conduct of Sir Ken and others in the report. He recommended that OPI's report not form the subject matter of any public report by IBAC due to unjustified reputational damage to individuals named in it.

Certain matters dealt with in both reports were regarded by the Ombudsman as possibly suitable for referral to the VI, headed by Robin Brett QC, to be dealt with as was considered appropriate. It was otherwise recommended by the Ombudsman that due to both Mr Overland and Sir Ken having left State employ and residence, no benefit would be obtained were the VI or IBAC to further investigate the conduct of Sir Ken.

Upon receipt of the Ombudsman's report and consistently with one of his recommendations, IBAC consulted the VI regarding the most appropriate way for this complex and sensitive matter to be handled. IBAC also acceded to the Ombudsman's request that work on the matter be quarantined from former OPI staff now working at IBAC, as some of them had been associated with the OPI report and therefore fell within the class of persons who were previously aware of what was leaked to the media. In defence of those staff, a number of people who did not work at OPI also had such knowledge due to the contents of OPI's draft report being shown to them by OPI investigators (mainly for natural justice reasons).

At that time, IBAC correspondence informed all persons named in the OPI report that the Ombudsman's report to IBAC, which annexed the OPI investigation report, had now been referred to IBAC on a confidential basis, and that IBAC may need to contact them in the future for further information. Each of those persons contacted were reminded of the whistleblower protections that remained in place in respect of such parts of the draft OPI report they had previously been shown by OPI.

IBAC subsequently agreed to a VI request that IBAC take no further action until the VI had concluded further enquiries relevant to a complaint it had received in relation to OPI's investigation. IBAC also acceded to a request that it wait until the VI had determined its own jurisdiction.

In May 2013, the VI explained to IBAC in correspondence its absence of jurisdiction in the matter. Hence the Ombudsman's report and his recommendations to IBAC remained with IBAC to deal with.

Subsequently, pursuant to section 29 of the IBAC Act, the IBAC Commissioner declared himself unable to act in relation to the matter because of a possible perceived conflict of interest. The IBAC Commissioner then signed an instrument pursuant to section 32(5) of the IBAC Act which also delegated to Mr Kellam all of the Commissioner's duties, functions and powers, both delegated and otherwise, for the purposes of dealing with the matter. This delegation was consistent with another of the Ombudsman's recommendations to IBAC that someone independent should handle the matter in the event that the VI was unable to do so.

Mr Kellam's report, which is anticipated will form the basis of a separate special report to Parliament, is expected to be completed in the near future.

OPI related matters

Investigation into police conduct which caused the premature collapse of a serious drugs-related prosecution

In May 2013, Victoria Police notified IBAC of a complaint relating to an investigation codenamed Operation Plyers, an offshoot from the Petra Taskforce which had commenced in 2008. Petra Taskforce was established to investigate alleged Victoria Police member connections to the murder of police informers Terrence and Christine Hodson in 2004.

The allegation by a member of Victoria Police related to whether high ranking members of the Petra Taskforce Steering Committee had authorised a police investigator in Operation Plyers (the contractor) to enter into an agreement to obtain information concerning the improper leaking of a police surveillance unit profile to an organised crime figure[20]. The agreement, made by the contractor with a person charged with serious drug offences (the informer[21]), was for the withdrawal of such charges and the return of property seized as being the proceeds of crime, in return for the information.

The high ranking members of the Steering Committee included then Deputy Commissioner Simon Overland APM, Deputy Commissioner Graham Ashton APM (in his capacity as OPI Deputy Director), Assistant Commissioner Luke Cornelius APM (in his capacity as Assistant Commissioner ESD) and then Assistant Commissioner Dannye Moloney APM (now retired).

The information and level of cooperation provided by the informer was subsequently considered by the contractor to be insufficient to justify withdrawal of the charges and restoration of seized property, and the contractor therefore declined to fulfil his part of the agreement.

The informer took the matter to the Supreme Court and also raised it with the OPP, which had not been consulted about the agreement. Ultimately, in 2011, police were compelled to withdraw all charges against the informer, return the property which had been seized and pay legal costs in an amount of over $100,000.

To date, IBAC has examined a substantial number of documents (which included, inter alia, two statements by and a record of interview with the contractor) and obtained information both orally and in writing from the members of the Steering Committee and others.

In the course of its ongoing investigation, IBAC will consider the circumstances in which the contractor felt it appropriate to enter into the agreement with the informer, the role of the Steering Committee in that regard, and why any internal police investigation into the matter did not commence until earlier this year.

[20] Being the subject matter of Operation Pliers.

[21] The defendant's informer status requires identity details to be withheld.

4. Conclusion

The substantive work done by IBAC in 2013 means that the IBAC legislation, at least in substantial part and thus far, has enabled IBAC to work effectively and as intended by Parliament.

Striking an appropriate balance of investigative capabilities between its police and general public sector jurisdictions is something IBAC is mindful of, especially regarding the requirement to perform an effective police oversight role.

IBAC intends focusing a reasonable proportion of its investigative resources on its important police oversight role, whilst maintaining sufficient capability to properly perform its role in identifying and exposing serious public sector corrupt conduct. At present, its police and other public sector investigations are roughly even in number, although the proportions may vary from time to time depending on operational needs.

Additionally, IBAC has demonstrated during 2013 that it is fulfilling its obligations to act as the central clearing house and coordinating body for managing complaints or allegations that are assessed to be protected disclosures, as is required by the new PD Act.

The issues that face IBAC in carrying out the legislative intent of Parliament are various, and have been the subject of considerable public debate. IBAC's role is to implement the legislation, and to engage Parliament and the government on any proposed refinements and amendments, based on a body of work made up of experience and caseload.

IBAC expects to present a further special report to Parliament in the first quarter of 2014. The report will cover IBAC's first full year since it assumed full powers in February 2013, relating to its legislative and other operating contexts, matters taken up in investigating and exposing police misconduct and public sector corrupt conduct, and its important prevention and education functions.

Finally, IBAC declares its determination to gain the respect of individual Victorians – as well as the public sector bodies from whom it receives notifications, makes referrals to and otherwise oversights – in terms of the fairness and professionalism of its communications and dealings, as well as soundness of its decisions and recommendations.

5. Appendices

Appendix A

IBAC policy around fairness to persons named publicly as subject to a complaint

There is always a risk of tarnishing reputations when someone makes public the reporting or notification of alleged corrupt conduct to IBAC. Should IBAC remain silent, despite a favourable outcome for the subject of a complaint, unfair ongoing reputational damage may result.

As a result, where the fact of a complaint or notification to IBAC of possible corrupt conduct becomes public, IBAC may either make public any favourable outcome for the person(s) whose conduct is impugned, or otherwise inform those with a direct interest in the matter (without any confidentiality restrictions).

Only when a complainant to IBAC is informed that an investigation has commenced or of its outcome, is it an offence under sections 184(1) and (2) of the IBAC Act for that to be disclosed, which is why IBAC has adopted the approach described above.

Noted in this regard is the 2013 Independent Advisory Panel Report into the Queensland Crime and Misconduct Commission (CMC) by the Hon Ian Callinan AC QC and Professor Nicholas Aroney and, in particular, a recommendation that it ought be made an offence for any person to disclose that a complaint has been made to the CMC, the nature or substance of same, or the fact that any investigation has commenced. The Queensland Government's subsequent response to this recommendation is generally favourable. There is already such a provision in relation to South Australia's recently commenced ICAC[22]. Any such approach may not be needed if IBAC's policy proves effective.

[22] See section 54 of the *Independent Commissioner Against Corruption Act 2012* (SA).

Appendices

Appendix B

Public reporting requirements in section 162 of the IBAC Act

Nothing in this special report is considered to be covered by sections 162(2) to (4) of the IBAC Act which require, respectively, that the principal officer of a public body that is the subject of adverse findings be afforded the opportunity to respond, and that non-adverse comment or opinion about any persons be shown to them in advance.

IBAC otherwise considers that individuals who are the subject of comment or opinion in this report have, in the course of investigation, been given a reasonable opportunity to respond to anything that might be regarded as adverse. In accordance with section 162(3), their responses to such comment or opinion are fairly set out in this report.

To the extent that persons are identified in the report and are not the subject of adverse comment or opinion, IBAC is satisfied in accordance with section 162(7) that:

- it is desirable to do so in the public interest
- it will not cause unreasonable damage to any such person's reputation, safety or well-being
- each such person is not the subject, nor for that matter intended to be the subject, of any adverse comment or opinion.

Appendices

Appendix C

IBAC policy around requests for IBAC's internal investigation reports

Investigation reports are primarily prepared by investigators to inform management of the facts and underlying evidence as well as any suggested actions, recommendations, or other outcomes. Such reports are normally not prepared for public release and often contain references to sensitive information such as informant information, background intelligence, and investigatory methods and techniques.

Further, sections 163(1) and (2) of the IBAC Act limit what IBAC may provide to a complainant – or must provide in the case of complaints about police personnel and protected disclosure complaints[23] – about the results of an investigation, any action taken and any recommendation by IBAC (that any action or further action be taken).

Further, subject to certain exceptions and qualifications that are not relevant for present purposes, disclosure to a complainant of information acquired by investigators, which an investigation report will normally contain, is expressly prohibited by section 40 of the IBAC Act.

Other more general considerations IBAC takes into account are that such material is expressly excluded from the operation of the *Freedom of Information Act 1982*[24] and may also fall into the category of protected documents that are not compellable in at least civil proceedings[25].

[23] See section 163(2) of the IBAC Act.

[24] See section 194 of the IBAC Act.

[25] See section 46 of the IBAC Act.

Appendices

Appendix D

Instrument of delegation

ibac independent broad-based anti-corruption commission

INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION ACT 2011 (VIC)

DECLARATION OF INABILITY TO ACT UNDER SECTION 29 and DELEGATION UNDER SECTION 32(5)

Pursuant to section 29 of the *Independent Broad-based Anti-corruption Commission 2011* (Vic) (the **Act**) I, **STEPHEN GUY O'BRYAN**, Commissioner, Independent Broad-based Anti-corruption Commission (IBAC), for the State of Victoria, hereby declare myself unable to act in respect of IBAC complaint no: CF/13/292 made by Noel Ashby and Paul Mullett ("the complaint") on account of perceived conflict of interest.

Accordingly and pursuant to section 32(5) of the Act, I hereby delegate to The Honourable **MURRAY BRYON KELLAM AO, QC**, being a sworn IBAC officer who is qualified under section 20 of the Act to be the Commissioner, all duties, functions and powers of me the Commissioner under the Act (including the duties, functions or powers already delegated to me as Commissioner by IBAC under section 17) and any other Act for the purposes of dealing with the complaint.

Stephen O'Bryan

Stephen Guy O'Bryan
Commissioner, IBAC

Date: 8 **May 2013** **Time:** 12.23

Abbreviations

AAS	Australian Accounting Standards
CMC	Crime and Misconduct Commission (Queensland)
ESD	Ethical Standards Command (Victoria Police)
IBAC	Independent Broad-Based Anti-corruption Commission
IBAC Act	*Independent Broad-Based Anti-corruption Commission Act 2011 (Vic)*
LEAP	Law Enforcement Assistance Package
OPI	Office of Police Integrity
OPP	Office of Public Prosecutions
PD Act	*Protected Disclosure Act 2012 (Vic)*
PR Act	*Police Regulation Act 1958*
PSC	Professional Standards Command (Victoria Police)
TI Act	*Telecommunications (Interception and Access) Act 1979 (Cth)*
VI	Victorian Inspectorate
VO Act	*Ombudsman Act 1973 (Vic)*
WP Act	*Whistleblowers Protection Act 2001 (Vic)*

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