

TAMPA INQUIRY REPORT

MV TAMPA, AUGUST SEPTEMBER 2001 COLLECTION AND REPORTING OF INTELLIGENCE RELATING TO AUSTRALIANS

1. This inquiry arose from media reports of claims about DSD activity which, if correct, would have demonstrated serious impropriety on the part of that agency.
2. In summary, these were that during the Tampa incident in August September 2001, DSD targeted communications of the Maritime Union of Australia and the International Transport Federation, and provided transcripts of their conversations to the government to assist it in formulating a political response to the crisis.
3. Although DSD and the government had already denied the allegations, it was important for there to be a thorough investigation in order to establish beyond reasonable doubt whether there was any substance in the media reports.
4. That investigation is now complete and I am able to confirm that the claims are without foundation.
5. I am satisfied that DSD did not target or report communications of the Maritime Union of Australia or the International Transport Federation. Nor did it provide raw intelligence product to the government, or to anyone outside DSD (other than this office). The government could not, therefore, as claimed, have used transcripts to formulate a political response to the crisis.
6. DSD provided no material to the government that revealed results of its signals intelligence collection that it did not also circulate, in the form of reports and situation updates, to members of the intelligence community and relevant public service departments that had a need to know. That reporting, in accordance with normal practice, did not include raw intelligence but summarised the results of collection activity.
7. DSD may not, under Australian law, intercept domestic Australian telecommunications. Domestic telecommunications interception for security and intelligence purposes is carried out by the Australian Security Intelligence Organisation under warrants issued by the Attorney-General.
8. DSD may collect foreign signals intelligence including, in certain limited circumstances, intelligence about the foreign communications of Australians. Its collection activities in relation to the communications of Australians are strictly regulated, currently by the Intelligence Services Act 2001. Privacy rules, made under the Act, regulate reporting. During the period covered by this inquiry DSD was required to comply with the Rules on Sigint and Australian Persons which had provisions similar, but not identical to those now in force.
9. The inquiry has examined records of all deliberate signals intelligence collection activity by DSD, starting some time before and continuing throughout the relevant period. Without exception, such activity was decided within DSD, in accordance with proper authority as established through normal processes for determining foreign intelligence collection requirements.
10. DSD undertook deliberate collection of foreign signals intelligence related to the communications of one Australian person in connection with the Tampa episode. The Director, DSD directed this activity in accordance with the Rules on Sigint and Australian Persons. DSD consulted my office at the time and I agreed then that this action was in compliance with the rules.
11. I have found no evidence to suggest that any minister or minister's office directed or requested DSD to conduct any collection activity.
12. The only ministerial involvement in a decision about collection was when the then Minister for Defence wrote to the Attorney General seeking ASIO assistance, under warrant, with foreign intelligence collection activity that DSD was not empowered to conduct. He did this in response to recommendations in a submission from the acting Director, DSD.

13. The inquiry also examined records of incidental collection of signals intelligence relating to the communications of Australians, and DSD reporting on that intelligence, starting some time before and continuing throughout the relevant period. Incidental collection occurs as a by product of deliberate collection activity.

14. Unless collection results in an end product report, all raw intelligence records are automatically deleted after a short period. Extant records of raw intelligence collected at the time, therefore, are restricted to matters reported on in end product reports.

15. In his response to the media claims, the Minister for Defence acknowledged that DSD inadvertently issued four end product reports in breach of the rules.

16. These reports, issued over a period of four days, included intelligence on communications by Australians, collected incidentally in the course of foreign signals intelligence collection. In two cases these were communications by an Australian lawyer with a (foreign) client which, legal advice suggests, would probably have been subject to legal professional privilege.

17. No Australians were named in the reports. DSD did not provide the Australians' identities to anyone outside DSD. In one case, however, a knowledgeable reader could have deduced the identity from the report.

18. Three of the reports contained no information derived from Australian communications that a reader could have put to any practical use. The fourth could, in theory but not in practice, have given advance notice of legal proceedings to be instituted against the government in an Australian court.

19. That is not a trivial matter and in September 2001 I wrote to the Director, DSD saying "One cannot imagine circumstances in which it would be legitimate to utilise secret intelligence collection resources for such a purpose."

20. DSD promptly put in place special internal instructions to ensure that there could not be a repetition.

21. I have recommended that the Secretary of the Department of Defence send a written apology for what occurred to three Australians whose foreign communications were reported. I understand that he intends to do so.

22. The inquiry also identified an unrelated report, part of which included intelligence that seemed to me not to meet the criteria laid down in the rules for reporting the communications of Australians. This part of the report was to the effect that an unidentified Australian organisation was about to issue a press release. I concluded that the report should not have included that information. Since the identity of the organisation was not known even to DSD, however, no infringement of its privacy could have occurred by virtue of the report's publication.

23. A complainant to my office was concerned that telephone calls he and colleagues made during the Tampa incident might have been jammed. I am satisfied that the intelligence and security agencies did not cause the communication problems they experienced.

24. The inquiry also considered legal issues surrounding DSD's collection of a particular mode of communication during the Tampa incident. It became apparent for the first time that there could be doubt about the legal basis for an element of DSD's collection strategy in certain unusual circumstances. Legal advice obtained by DSD was that the legal position was unclear. In the particular circumstances, however, a court would probably favour the argument that there was a breach of the Telecommunications Interception Act, although there were also arguments that there was no breach and that expert engineering advice could be determinative of the issue. Two end product reports, including one of those mentioned above, relied upon such collection.

25. Situations giving rise to the potential difficulty would be unlikely to occur in the course of normal foreign intelligence collection. In my view, however, the appropriate course was for DSD not to undertake any more collection that had the potential to be in breach of the Act until the issue has

been put beyond doubt. The Director, DSD has indicated that DSD is very conscious of the seriousness of this matter and ceased such activity immediately upon becoming aware of the difficulty. The Director will be taking steps, with other Commonwealth agencies, to clarify and resolve the issue, and will report progress to the Inspector General. I hope to be able to report more definitively on this in the 2001 2002 IGIS annual report.

26. The inquiry highlighted some procedural issues.

27. First, as a supplement and cross check to regular perusal of records required to be kept by DSD for inspection by the Inspector General, we had been inspecting electronic copies of DSD end product reports from a computer terminal in our office. We did this on a sampling basis because it was not feasible to read every report.

28. While this methodology did enable identification of the original DSD reporting error, we could just as easily have missed it.

29. DSD has, at my request, upgraded the searching capacity of our computer system and we will in future conduct thorough text searches to identify reports of interest.

30. Secondly, the previous rules did not clearly require that all end product reports that did not explicitly identify Australians, but nevertheless reported on their communications, were brought to my office's attention.

31. The privacy rules made under the Intelligence Services Act, which came into operation late last year, now explicitly require that DSD keep a record of each such report for inspection by the Inspector-General.

32. The Director, DSD has agreed with my proposal that in future, before such reports are published, those responsible for the report formally note which sub clause of the privacy rules permits communication of the intelligence information. DSD will retain these records and present them to us at our regular inspection visits, together with copies of the reports.

33. Thirdly, an incident such as that which occurred in August September last year, requiring flexible responses to a fast changing situation, can throw up unexpected and subtle legal issues that need to be recognised within the organisation as they emerge. The enactment of the Intelligence Services Act in late 2001 has added to the number and complexity of legal questions that DSD has to deal with. In my view and that of the Director it is time for DSD to have a specialised in-house legal resource to deal with these matters on a day to day basis.

34. At the beginning of this inquiry I asked the Commonwealth Ombudsman, Mr Ron McLeod AM, whether he would be prepared to check the inquiry report in final draft. I asked him to provide me with comments on the methodology followed in the inquiry and the thoroughness with which it was conducted, with suggestions for any areas that might benefit from further scrutiny. The letter is reproduced at Attachment 3 to the report.

35. Mr McLeod, a former Inspector-General of Intelligence and Security, acts in that office on occasions when I am absent from duty. He agreed to assist, noting that he would not be acting in his statutory capacity as Ombudsman. I am most grateful for his help. Mr McLeod's comments on the draft are at Attachment 5.

36. Finally, it is appropriate to state for the record that DSD personnel from the Director down have cooperated fully with this inquiry, and have provided comprehensive access to and information about their systems and records. I also received prompt and complete assistance from the Director-General of Security and other ASIO personnel. I have no reason to believe that either of these officers or their staff provided less than a full and accurate account of their involvement in the matters under review.

Inspector-General of Intelligence and Security

April 2002

