

IN THE MATTER OF

An investigation into whether **FORENSIC ACCOUNTANTS** are private investigator under the Private Security Personnel and Private Investigators Act 2010 (the Act)

DECISION

[1] This decision examines the question of whether forensic accountants fit within the definition of private investigator or private investigator employee in sections 5 or 13 of the Act, and if so whether they are required to hold a security licence or certificate. It also considers whether an exemption applies to any class of forensic investigators.

Background

[2] Following the Authority's decision in *D, E & C Ltd*¹ relating to employment investigators the Private Security Personnel Licensing Authority (PSPLA) received inquiries and a complaint regarding whether other investigative professionals, such as forensic accountants, were also considered private investigators who should hold licences or certificates with the PSPLA.

[3] We referred the issue to the Complaints Investigation and Prosecution Unit (CIPU) for investigation and report. The CIPU report writers concluded that forensic accountants carried out work that fitted within the definition of private investigator and should hold a licence or certificate with the PSPLA unless exempted. They further concluded that forensic accountants working for government departments would be exempted under s 5(4)(i) of the Act and forensic accountants that are members of Chartered Accountants Australia New Zealand (CAANZ) would be exempt under s 22(d) of the Act.

[4] We circulated CIPU's report among the known groups and individuals that could be affected by the report and invited them to provide feedback and submissions on the findings. The only submissions received were from CAANZ who endorsed the CIPU conclusion that its members should be exempt under s 22(d) of the Act.

[5] We accept that we do not have the statutory jurisdiction to issue a binding decision of a declaratory nature. Therefore, this decision is intended as indicative only to provide clarity and guidance to forensic accountants.

Issues

[6] The key issues we need to consider are:

- a) What specifically do forensic accountants do?
- b) Do forensic accountants fit within the definition of private investigator as set out in sections 5 and 13 of the Act?
- c) If so, are any forensic accountants exempt from being licenced with the PSPLA under s22(d) or any other provision of the Act?

¹ *D, E & C Ltd* [2020] NZPSPLA 007

What specifically do forensic accountants do?

[7] Forensic accountancy is a specialisation within accounting. CAANZ describes forensic accountants as:

Highly skilled in analysing and preparing financial information for a court of law. It's a field that requires a combination of accounting, auditing and investigation skills.²

[8] Forensic accountancy is not just about investigation of fraud, but also involves presentation of information. Forensic accountants' private sector work includes helping clients with data breaches, misappropriation of funding, conflicts of interests, quantum loss investigations, allegations of wrongful dismissal and investigation into financial malfeasance. The work of a forensic accountant includes gathering and reviewing financial information, contracts, social media postings and communications as well as interviewing people and preparing reports and evidence for court proceedings.

[9] The data analysed is usually provided to forensic accountants by their clients, or their client's employees, but on occasions information is obtained from other sources. It is often information of a confidential nature and not on the public record.

[10] One example of an investigation would be for a client company where one of their employees or officers has possibly breached their employment contract or code of conduct. Such an investigation would usually require the forensic accountant to help their clients investigate the allegation by initially preparing an investigation plan and setting out the scope and what is to be achieved. They then gather evidence by collecting relevant material and possibly interviewing people. They finally analyse the material collected and produce a report. Data and evidence obtained and considered includes financial records and metadata from computer records.

Do Forensic Accountants fall within the definition of a private investigator?

[11] The word private when referring to private investigators or other security personnel does not mean covert or secret. It is used to distinguish private investigators and private security personnel from public or state appointed investigators and security workers such as police or those employed as investigators or security guards by government agencies.

[12] The question of whether forensic accountants fall within the meaning of private investigator under s 5 of the Act is primarily a matter of statutory interpretation. Legislative purpose is an important cross check against the meaning of the text to ensure that the intent of the statute is achieved.

[13] Section 5 of the Act defines private investigator as:

- (1) In this Act **private investigator** means a person who, for valuable consideration, either by himself or herself or in partnership with any other person, carries on a business seeking or obtaining for any person or supplying to any person any information described in subsection (2).
- (2) For the purposes of this section **information-**
 - (a) means any information relating to-
 - (i) the personal character, actions, or behaviour of any person; or
 - (ii) the financial position of any person; or

² <https://charteredaccountantsanz.com/member-services/technical/forensic-accounting>

- (iii) the occupation or business of any person; or
 - (iv) the identity of any person; but
- (b) does not include information that is contained in a public record.
- (3) For the purposes of this section but without limiting the meaning of the terms **carries on any business**, a person is carrying on a business if he or she holds himself or herself out to the public as being ready to carry on that business.
- (4) Despite subsection (1), no person is a private investigator within the meaning of this Act by reason of the fact that
- (a) He or she seeks, obtains, or supplies any information -
 - (i) for or to the Crown, or any constable, or any local authority; or
 - (ii) at the request of a person who is not a client of the business; or
 - (iii) only as a necessary, usual, or reasonable incident of any other activity by that person that is not described in that subsection; or
 - (iv) for any person relating to the dissemination of news or other information to the public or section of the public; or
 - (v) for any cultural or historical purpose or for any purpose relating to education, literature, or science; or
 - (vi) relating only to the person by whom he or she is engaged or retained; or
 - (vii) in the course of and for the purposes of the business of a bank, or of a credit bureau, or of a debt collection agency.

[14] In accordance with s 29 of the Interpretation Act 1999, the word person when used in any statute includes a corporation sole, a body corporate, and an unincorporated body.

[15] The definition of private investigator was largely transposed from the Private Investigators and Security Guards Act 1974 (1974 Act) which was the predecessor to the current Act. The 1974 Act was introduced to Parliament "to provide greater protection of the individual's right to privacy"³. The purpose of the Bill was to control those whose occupation required them to inquire into and interfere with some of the private activities of individuals. Its aim was to ensure only fit and proper persons could become private investigators and security guards.

[16] The current Act was introduced with the express purpose of reforming the law relating to the private security industry and private investigators. The purposes of the Act as set out in s 3 are to:

ensure that persons offering specified private security and investigation services for hire, and personnel providing those services:

- (a) are suitably qualified to carry out that work;
- (b) do not behave in ways that are contrary to the public interest.

[17] The explanatory note to the Bill which introduced the current Act observed that considerable flexibility is possible within the framework, both to accommodate possible changes in the technology and in the operating environment, without needing to amend the Act. We are therefore satisfied that Parliament intended the definition of private investigator to be sufficiently wide and flexible to accommodate not only the significant changes and developments in the private investigation industry that had occurred between 1974 and 2010, but also future developments. The purpose of the Act with respect to investigators clearly being to protect the public from inappropriate and unacceptable practices of those conducting investigations that affect individuals and organisations.

³ (30 July 1974) 392 NZPD 3300

[18] As the CIPU report states there are two streams within which a forensic accountant may work⁴:

- a) Undertaking desk-based analysis of financial information provided by a client; or
- b) Actively requesting and gathering further information from clients and other related parties.

[19] Most people spoken to by CIPU accepted that those who undertook the type of work outlined in b) above fitted within the definition of a private investigator. We agree. Those undertaking this type of work are inevitably seeking, obtaining, or supplying information as defined in s 5(2) of the Act and therefore fit within the definition of private investigator.

[20] Some forensic accountants consider the work outlined in a) above does not fit within the definition of a private investigators. However, we consider even those undertaking desk-based analysis of data will often be involved in the supply of information as defined in s 5(2).

[21] We therefore conclude that those who are in the business of forensic accountancy are private investigators as defined in s 5 of the Act unless they only seek, supply, or obtain information in any of the situations set out in s 5(4) of the Act. For example, a forensic accountant will not be a private investigator if they **only** seek, provide, or supply information:

- For or to the Crown, the police, or a local authority, or
- In the course of, and for the purposes of the business of a bank, or credit bureau or debt collection agency; or
- Relating only to the person by whom they are engaged or retained.

[22] In addition, a person who is employed as a forensic accountant by a business or individual who is required to hold a licence in the class of private investigator, is a private investigator employee in accordance with s 13 of the Act.

Are forensic accountants exempt from holding a licence or certificate under s 22 (d) of the Act or for any other reason?

[23] Section 22(d) of the Act provides an exemption for people who are licenced or permitted to carry out security work under some other statutorily established regime. It provides that the Act does not require any person to hold a licence or certificate:

in respect to the carrying on by that person of an occupation or business in accordance with a practicing certificate, licence, permit, or other authority, granted or issued to him or her under any other enactment.

[24] The accounting profession is primarily regulated by CAANZ. CAANZ remains subject to the New Zealand Institute of Chartered Accountants Act 1996 (NCICA Act) which established its predecessor organisation prior to the creation of the current trans-Tasman body. CAANZ membership is voluntary and not all accountants are members.

⁴ CIPU Forensic Accountants Report at 4.

[25] The NZICA Act imposes a duty on CAANZ to control and regulate the practice of the profession of accountancy with reasonable skill and care. It has an established complaints process for dealing with complaints and other disciplinary matters, including breaches of the NZICA Code of Ethics. CAANZ requires its members to meet established training and experience requirements and to provide two character references. CAANZ offers a qualification for forensic accountancy but it is a voluntary accreditation

[26] The training and ethical requirements for CAANZ members are more extensive than those required under the Act for private investigators. In addition, CAANZ has a robust complaints process which ensures its members do not behave in ways that are contrary to the public interest.

[27] We accept that the purposes of the Act are achieved by forensic accountants being CAANZ members. CAANZ is a creature of statute, therefore we accept that forensic accountants who are members of CAANZ are exempt from the licensing requirements of the Act under s 22(d) and accordingly do not need to hold a security licence or certificate in the class of private investigator.

[28] We also accept that forensic accountants who are employed by the Crown are not required to hold a licence or certificate in accordance with s 22(c) of the Act.

[29] However, we are satisfied that forensic accountants who are neither members of CAANZ nor employed by the Crown, are private investigators and are required to hold a security licence or certificate of approval in the class of private investigator.

Conclusion and Summary

[30] We conclude:

- a) Forensic accountants are private investigators under s 5 of the Act or private investigator employees under s 13 of the Act unless they **only** seek supply or provide information:
 - For or to the Crown, a constable, or a local authority, or
 - In the course of and for the purpose of the business of a bank, credit bureau or debt collection agency, or
 - For any other purpose as set out in s 5(4) of the Act.
- b) Forensic accountants who are members of CAANZ or are employed by the Crown are not required to hold a security licence or certificate of approval in accordance with s 22 of the Act.
- c) A person or company that is carrying on business as a forensic accountant who is neither a member of CAANZ nor employed by the Crown is required to hold a security licence in the class of private investigator.
- d) A person who is employed as a forensic accountant by a business or individual who is required to hold a licence in the class of private investigator, is a private investigator employee in accordance with s 13 of the Act. They are therefore required to hold a security certificate of approval unless they are a member of CAANZ.

DATED at Wellington this 30th day of September 2022



P A McConnell & K A Lash
Private Security Personnel Licensing Authority