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SENATE

STANDING COMMITTEE FOR THE SCRUTINY OF
BILLS

Reference: Search and entry provisions in Commonwealth legislation

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SENATE
STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

Tuesday, 3 August 1999

Members: Senator Cooney (*Chair*), Senators Coonan, Crane, Crossin, Ferris and Murray

Senators in attendance: Senators Cooney, Crane, Murray

Terms of reference for the inquiry:

Review of the fairness, purpose, effectiveness and consistency of right of entry provisions in Commonwealth legislation authorising persons to enter and search premises.

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Committee met at 2.29 p.m.

CHAIR—I declare open this hearing. On 10 December 1998 the Senate referred the issue of the fairness, purpose, effectiveness and consistency of right of entry provisions in Commonwealth legislation to its Standing Committee for the Scrutiny of Bills. The committee is currently required to report by 30 September. The committee held a private briefing with the Commonwealth Attorney-General's Department on 22 June 1999. I ask the committee to resolve that the final transcript of that briefing be made public.

Resolved (on motion by Senator Crane):

That the final transcript of the briefing held with the Commonwealth Attorney-General's Department be authorised for publication. Perhaps we could resolve also that the final transcripts of any future hearings be made public.

Resolved (on motion by Senator Crane):

That the committee authorises for publication the final transcripts of any future hearings of the committee.

Today we propose to hold a private hearing with representatives of the Australian Taxation Office, the Australian Quarantine and Inspection Service, and the National Registration Authority for Agricultural and Veterinary Chemicals. Tomorrow we will be meeting with the Federal Police, the Civil Liberties Council people, the Health Insurance Commission, and the Customs Service.

These hearings are called private hearings only because the Senate standing orders, as currently drafted, do not expressly permit this committee to hold public hearings. While members of the public are not permitted to attend private hearings, these hearings are in all other respects the same as public hearings.

[2.32 p.m.]

DARMODY, Mr Mark Francis, Large Business and International, Australian Taxation Office

D'ASCENZO, Mr Michael, Second Commissioner, Australian Taxation Office

DUDA, Mr Wilfred Winston, Legislation Officer, Australian Taxation Office

FORSYTH, Mr Stuart Frederick, Acting Assistant Commissioner, Small Business, Australian Taxation Office

PEARCE, Mr Thomas Joseph, International Tax Division, Australian Taxation Office

THOMPSON, Mr Bruce, Assistant Commissioner, Excise, Australian Taxation Office

CHAIR—Welcome, gentlemen. The committee has received a submission from the ATO which it has made public. Can I ask you to speak to that submission and on any other matter that you see as relevant to the inquiry and then we can move to questions, unless you do not want to make any statement.

Senator CRANE—Mr Chairman, before we start do you mind if I ask them to address one particular aspect of their submission.

CHAIR—Fine.

Senator CRANE—One of the things that brought this inquiry on is the various differences in terms of search and entry rights that are appearing before this committee in different legislation. I would particularly like you to address the question across the full range of the tax office, whether or not there is consistency with the entry and search provisions or whether you have inconsistency within your own operation. That might save us a lot of questions.

Mr D'Ascenzo—There are differences in our operations. We have recently obtained Excise as part of the tax office function.

Senator CRANE—I am not asking you to do that especially, but in the context of your presentation.

Mr D'Ascenzo—I think I can cover that, but if I do not fully cover it then please come back to me on it.

Thanks very much for the opportunity of talking to the committee. We did provide a very extensive submission. The intention is to help in any way possible from our point of view. We have been looking at the way the discussion has run in terms of other people's submissions to this committee. We would like to make the point that we see the tax office and its functions as different from the range of law enforcement agencies that might be addressing this committee.

We have had a lot of court cases of recent times and all those cases have acknowledged the need for the commissioner's access powers. This is not ancient history; this is very much this year, last year, last decade. Quite a lot of cases have acknowledged the need for it. Without going back into history, what the cases say is that you have to have regard to the purpose for which our access powers are conferred. The purpose is the obligation to pay tax in accordance with the law and the collection of that tax. The courts have seen the need for the commissioner to make wide ranging inquiries and that our access powers confer on the commissioner a power to enable the performance of this function.

We do not often formally use our access powers but we believe that their existence in their present form, together with their internal limitations and the procedural safeguards that we have introduced, promotes, we believe, a non-adversarial climate in the way that we can administer the tax laws.

In fact, the courts have seen the inherent limitations as serving to safeguard the extremely important social value of privacy which must be balanced against the necessities of administration of the revenue law. That is the courts themselves saying that the way the powers operate provides that sort of balance. We believe that our administrative powers operate on an extensive system of checks and balances which are appropriate for the nature of the power and to the manner of its exercise. These checks and balances are formal and informal, legal, cultural, internal, external.

We have worked very hard with the tax profession and with the community to try to develop a rapport that allows us to go on the task of ascertaining taxable income in a way that will function differently from the criminal law function. We think that suggestions that every time we use our access powers we are looking from a criminal perspective are just counterproductive. The fact is that ATO officers do not use access powers for prosecution purposes.

In cases of serious offences or fraud, a search warrant procedure is invariably followed. In that sense, we are similar to other law enforcement agencies where we are dealing with serious offences or fraud. Usually when that happens, we do it in conjunction with the Australian Federal Police. So our procedures in relation to search warrants are often tied to the Australian Federal Police.

There are situations where we might have gathered information through our access powers for the purpose of ascertaining taxable income which is relevant to prosecutions that might have been commenced by others or ourselves through the Director of Public Prosecutions. When that occurs, because the information was obtained for different purposes, then the court has a discretion to exclude that information. So by the end of the day, the courts are the arbiters in that sense.

Quite apart from the inherent limitations of the powers, we have set up a lot of practices and procedures which try to make those powers work in a fair, reasonable and proportionate way. To the extent possible, we seek to give occupiers advance notice of our inquiries to improve opportunities for cooperative approaches.

I might tender the whole range of our booklets, if that is possible. I noticed in the questioning with the Attorney-General's Departments that the committee is very concerned about people knowing their rights and responsibilities, whether or not the forms are gobbledygook and whether or not people are protected. That is a fair point.

I think what we see here is a twofold approach. Firstly, when we are about to go to taxpayers, say, to do field inquiries or audit work, we often write to them in advance. We indicate our names and who to contact. We give them booklets which are in plain English and we give them a whole range of avenues. I will tender that booklet.

The first thing we do before we go there is let them know that we are coming. We go there, we provide them with information, and that information sets out rights and responsibilities. The interesting part is that we often use our access powers, not because we want to get in there and get the information in dealing with crooks, but because we want to protect the rights of third parties. Often we go to get information from, say, financial institutions and banks so that we can check whether or not the amount of, let us say, interest that has been put in the returns is the right amount. The banks have rights of confidentiality under contract. They need some protection to be able to provide us that information. We often use our access powers to protect the rights of third parties in giving us that information. The courts have seen that as a proper approach for us.

I noticed questions in the transcript of the proceedings with the Attorney-General's Department about how you identify yourself and such. If we are just talking to people informally, we provide them with our name and telephone number and show them our office pass, which has a picture on it. I show you here our normal building pass. It identifies ourselves. When we go further and seek access powers we have a different wallet. It is signed, as you can see, at senior executive level.

Senator MURRAY—Thanks.

Mr D'Ascenzo—I had to borrow that because I did not have one of those. I had to sign off for it.

Senator MURRAY—So one of you is now called Glen Carey.

Mr D'Ascenzo—They are given to people who require that sort of access. The signature there is of Mr Burr who is an Assistant Commissioner of Taxation. The delegation is at a senior level and to people who are appropriate to that task. The third thing that we do is provide copies of booklets. They are the ones that we send to people we are going to audit. This one is directly related to the fair use of our access information gathering powers.

Senator MURRAY—That is the one in here?

Mr D'Ascenzo—Yes, it is. They are the ones that we hand over if we are going to use the power. As you can see, they are trying to be user-friendly and are in plain English. If you are from a non-English speaking background, we have booklets that are translated into a range of other languages or we can use interpreters.

One of the important things about the booklets, and all our publications, is that there are avenues of complaint outlined in them about the way we do things. There are internal complaints. You can go to their manager, but you can also go right outside the direct line of responsibility to our Problem Resolution Service, which is separate from the line activities. We also give fairly full outlines and leave contact telephone numbers in terms of the Privacy Commissioner or Ombudsman or specify that they can go to the courts.

In terms of our own people, our internal controls include a comprehensive access manual. That is quite significant. We have given extracts of that in our submission. That provides a whole lot of things. For instance, I have here a pro forma from our access manual that tells people how to go about the process—the form of letter, the form of advice. People are more than welcome to a copy of that. Then we have the Taxpayers Charter which we monitor and seek compliance with amongst our officers. I mentioned beforehand the formal authorisations that people have to go through before they can use access powers. As part of our field training activities, we go through the access manual and field power usage. One other thing that we do is put our people through interpersonal skills training to make sure that, when they relate to taxpayers, they do so at a professional level.

Senator CRANE—So nobody would turn up if they had not had some basic training?

Mr D'Ascenzo—That is right. Basically, the main point that I would like to emphasise, because it is coming out from some of the submissions made to you, is that we believe that there is a clear distinction between the administration of the revenue laws and the criminal focus of other law enforcement agencies. When I looked at the submission or the discussions with the criminal justice branch of Attorney-General's Department here on 22 June, I saw them coming very much from a criminal law slant.

I would like just to make the distinction that we believe that the primary focus on our access powers is in relation to the administration of revenue law. It is about ascertaining taxation income, not about law enforcement or pursuing crime. In fact, where we are looking to pursue crime of a serious nature and we are on a different footing, then we do use the search warrant procedures available in the Crimes Act and other provisions.

The way we go about administration is such that we do not see it as an 'us and them' approach, and we try to instil that non-adversarial climate in our staff. You will see in all the access manuals and our procedures that we try very hard to work with people, to get consent. Often when we have to use the access powers we try to provide people with protection so that they can properly divulge information to us and not be in breach of any confidentiality requirements that they might have.

Our submission outlines the range of inherent limitations in the power. It has to be bona fide for the purposes of the act and all those sorts of things. I have alluded to some of the safeguards and internal procedures that we have put in place to ensure that things are done in a professional way. I think it is very important that we provide taxpayers with an understanding of their rights, and that we give them every opportunity to raise concerns in that process as we go about our business.

As a result of all those internal limitations to our powers and the extra practices and procedures that we have set up for the way that we carry them out, I think we do strike that balance between our function of ascertaining taxable income, which is different from a criminal law focus, and individual rights of privacy.

CHAIR—Thank you very much. I will just make it a discussion.

Senator CRANE—I will go back to the training of the officers. We often read in legislation—I am not referring to any particular legislation—that the head of the department or a particular person shall appoint an officer to do this function. I do not know whether or not that is how it works in the tax office, but could you explain how it is determined who that officer might be to carry out that task and whether there are some parameters in terms of doing that?

Why I ask this question, which is a little bit different, is that it goes back a few years now. It cropped up when tax officers were going on to farming properties—I am a farmer in real life—checking out tax liabilities against shearers and what have you, a process which became very adversarial, if I could put it that way.

You might do everything in your power to be nice and kind and everything but, if the tax man is coming, then it is a real problem for the person being visited. In all these instances I am aware of, no notice was given to any of the individuals being visited. Could you first of all explain to us how you select an officer who does this and what sort of qualifications they have to have? Secondly, could you deal with this issue from the other side of the fence on how you see the adversarial role?

Mr D'Ascenzo—We have something like 14,000 people in the tax office some part of whose function is to take on field work of a nature that requires them to go out and deal with people in their business and other environments. The proportion of people who are on field work varies over time. We have tried to move away from a functional approach that says, 'You are an auditor. You are an adviser.' We try now to look at problems and say, 'What is the best way of dealing with those problems?' Sometimes that is a question of providing information and sometimes it is a question of following up and trying to get information for compliance purposes, verifying whether or not the amount of taxable income that taxpayers have included in their return is the right amount. There is no getting away from that being part of our function, but it is for the purposes of determining taxable income, not for the purposes of prosecution action.

At various levels, everyone goes through selection processes and people in, say, large business are not out in the field until they are at least an ASO6—and perhaps people might correct me here because it varies between our business lines—and people, say, individuals or in small business may be ASO4s. I might be wrong there. First of all people have to have some experience to be in such a position within the organisation. All people are appointed to positions either on a merit promotion process or, if there are internal movements or transfers, by meeting suitability criteria—and that is suitability for the job. If you deal and interrelate with people, you need to be able to do that in some sort of professional way. So the first hurdle is a selection hurdle or a suitability hurdle to get to the right position.

There is no requirement that people are qualified in tertiary education but, off the top of my head, I would be surprised if 80 per cent or more of those people did not have some sort of tertiary qualification. A lot of people are qualified but I think that is a ballpark figure.

Mr Forsyth—The vast bulk of auditors are accountants in the income tax lines. I am not sure what the situation is so much with the withholding tax people, but a lot of them are very experienced.

Mr D'Ascenzo—The point I am making is that typically they are people who are likely to have tertiary qualifications, who have been selected for the job and who then have a training process to ensure that they are able to do the job. That will vary between different lines in terms of what training is apposite to their particular operations.

When they get to that sort of position, they will get an authorisation of the type that I mentioned to you. Often if they are new people, they will go out with more experienced people if they are going on to fieldwork, so they would have some mentoring processes. The other thing that is mentioned in our manual is that for any difficult situation there is always the access back to the manager or to specialist staff like the tax counsel network if they need assistance.

You mentioned the shearers and the farmers. I am not sure when that was, but certainly since 1996 our procedures have clearly been to try to provide some notification to people, particularly where we go to third parties.

Senator CRANE—It was quite some years ago—10 or 12 years ago.

Mr D'Ascenzo—I think some 10 years ago we started developing access guidelines, probably because of those sorts of concerns. So we have a history of procedures in this area. The last time they were refined over a two-year period. Mr Forsyth was leading the team there and that is why I brought him along today. As you can see from the manual, in third-party situations, it would invariably be our position to try to tell the person that we are coming, give them notice and off we go. There are situations where that is not the rule, but that has to be cleared by the manager and not just at a junior level. There needs to be a case developed as to why there is a need not to go through the protocols that we have established.

Senator CRANE—Just explain for lay people like me what it means when you say ASO4 and ASO6.

Mr D'Ascenzo—It starts at one and works its way up.

Senator CRANE—Okay. What is the top?

Mr D'Ascenzo—It goes to eight. There are two eights, so it probably goes to a nine, if I am right, and then you have the SES, which is the senior executive service.

Senator CRANE—So it is about halfway up the scale?

Mr D'Ascenzo—That is right.

Senator CRANE—You used the word ‘often’ on a number of occasions during your address.

Mr D’Ascenzo—Yes, I have.

Senator CRANE—You said ‘often we will write to them’. Can you explain to the committee the circumstances when you would not write and you would just turn up cold turkey? What level of investigation are you looking at there? In many instances, the person who really knows, with a lot of small businesses in particular—and also I think with large businesses—is the accountant. Do you ever go directly to the accountant or do you go directly to the taxpayer?

Mr D’Ascenzo—I do use the word ‘often’ because I am trying to explain the general rules and there is always an exception to those rules.

Senator CRANE—Yes, I understand that.

Mr D’Ascenzo—There is an example that strikes me, and others might have other examples as well. Let us say that I sent one of those letters to the people saying that we are going to make these inquiries. We go there and start making inquiries and get to a situation where we need to get into that room for those documents and the people say, ‘You cannot do that.’ We say, ‘You have various rights in terms of seeking legal advice. If you think there is anything that is subject to privilege, like legal professional privilege, you have rights to protect that. At the end of the day, we think that is important for our inquiries and we want to have access to those documents’. At that time, we might need to pull out our wallet authorisation and say, ‘I am authorised’—that is, a copy of the relevant legislation might also be provided to people. We would also pull out one of those booklets and say, ‘We have a right to do that. I am only wanting to access those documents for the purpose of ascertaining the assessable income’. Therefore, we would use it at that time without having forewarned them.

When we go to third parties, on the other hand, I cannot imagine too many situations of third parties not being notified, except where we think that perhaps the nature of the relationship between the third parties is such that there is a real risk of loss of information if third parties were alerted.

Mr Forsyth—There have been problems in the past with safety deposit boxes where the bank feels that, under their contract, they have to tell the person. The person turns up and empties the box in the interim period. We then arrive to see what is in the box and there is nothing in the box. They are not the run of the mill situations. They are often illegal activity type of situations involving quite extreme facts.

Mr D’Ascenzo—And, often in those cases, we are working with the AFP or NCA and we would use their processes of going through a search warrant.

Senator CRANE—I might leave it there for a moment, thanks, Mr Chairman.

Senator MURRAY—Thank you for your submission. It was very helpful. Your Charter and booklets are very helpful in terms of formally representing the relationship between the tax office and the taxpayer. The direction in which the tax office has been going in this last decade, particularly in the last five years, has been very helpful to an appropriate relationship.

Firstly, I will bring you back to Senator Crane's first question, that is, the question of consistency. I am not sure how familiar you are with the Standing Committee for the Scrutiny of Bills. We look at every bill that comes before the parliament. As a result, we pick up lots of inconsistencies. We have recently done an inquiry, which I thought had a very good report, on the appropriate penalties which attach to the requirement to produce information. That reflected a lot of inconsistency across the range of government legislation, which can be either departmental, because of departmental perspectives, or can be historical. Things have changed over time and there is a need for greater consistency to be expressed. That is what lies behind Senator Crane's question.

Within that list—and I thought there were about 15 acts or something there; I have not counted them—are there inconsistencies which are historically driven? Are there inconsistencies which have been determined either by the style of government or by the department which has driven that particular legislation? You have indicated that the A-G's Department may, for instance, have a criminal mentality, whilst you look at it differently. Or are those inconsistencies simply historically based: some acts were done before? If you do identify in your answer any inconsistencies, are you making any efforts to redress or to review those or is there any program in prospect to resolve them?

Mr D'Ascenzo—I might reiterate the fact that, when we deal with acts outside our jurisdiction, there is to my mind an apples and pears comparison. As you pointed out, we believe that the range of criminal law enforcement and policy type of legislation is different from our task of ascertaining taxable income. In that sense, I think parliament has made the distinction between the tax law access powers and the access powers in relation to more criminally focused legislation. I would like to make the distinction between our task and the role of ascertaining taxable income, and other people's law enforcement tasks, particularly criminal law enforcement tasks.

Within the bailiwick of laws that we administer, there are some differences and it is always hard to digest whether or not some are historically driven or otherwise. As I alluded to at the beginning, we have only recently picked up Excise. The historical nature of excise has been tied to the Customs function. There are differences in its powers and operations and ours.

We have to go through a process of assimilating Excise into the fabric of ATO operations. That will involve a review of the relevant legislative provisions to see whether or not they are aligned to the sort of function that they perform within our bailiwick, as distinct from what the historical ties to Custom might have been. Within that process, there may be some reason for there to be differences, but our aim would be to make sure that they are made transparent and that people can see what the differences are, and make choices. The government and parliament ultimately make choices as to whether or not they are appropriate.

Sales tax, for instance, which we have had for a long time in the tax field, does have differences. Our access powers under income tax law give rights of access but do not give rights to seizure. There is a distinction between our access powers and search warrant and seizure powers. The reason that it did not require a seizure was because we just needed to work out what the taxable income was. We do not need to analyse the goods or service. In the sales tax law, they needed to take the goods back so they could analyse it and test it and see whether or not it fitted within the sales tax classification level. Their powers are different because they do have the right of seizure to fulfil that function.

I suspect that with Excise there might be a similar necessity. In fact, Bruce might speak about that: you were mentioning about the substitution schemes where you need to take the fuel and then test it quickly, otherwise the attributes change over time.

Senator MURRAY—We are very familiar with that.

Senator CRANE—But isn't that an extension to do the job, rather than an inconsistency?

Mr D'Ascenzo—Yes. That is what I am suggesting. I am saying that there are differences in some of the access powers we have and some of these powers are new to us. Therefore, we have to analyse whether or not those differences are rational and make sense or whether they are just anomalous or historical.

Senator MURRAY—Let me be specific. If you were to tabulate for us, for instance, those 15 or whatever acts there are and each of the powers, would you be able to identify consistencies and inconsistencies for us and indicate when, in your view, they are appropriate because the function is different or when, in your view, in due course they should be systematised? Is there that kind of problem there in your law or is that not a problem?

Mr D'Ascenzo—Our income tax law was one act, basically, and that is consistent.

Senator MURRAY—I understand that. Is the one I refer to 22?

Mr Thompson—Perhaps if I look at Excise and offer an example there. We have an access power in the Excise Act that gives us access to large manufacturing places, so we can go in, have a look at the records and inspect the production line. We go into all the big companies: we look at Philip Morris and cigarettes; we look at petroleum; and we look at alcohol, spirits and brewing. That access provision, although it is worded differently, really has very much the same effect as section 263 of the Income Tax Assessment Act, going in and checking records.

So, if you asked us to draw a parallel between the two, in terms of text, they are different. In terms of effect, Customs, or whoever wrote the act in 1901, probably looked across and had a peep to see what was happening in income tax. They would not have looked at the Income Tax Act in 1901, but there has been obviously the same level of thinking applied, but different words attached to it.

If we move up-market, in terms of when we are dealing with criminal activities in the Excise Act, we are required, correctly, to go and get warrants. We get either a search warrant or a monitoring warrant. If it is search, it is search and seizure, because, a bit like sales tax, we need to actually take the goods sometimes and take them back, analyse them and get chemical testing done and things like that. Again, at that search warrant level, we would go to a magistrate and have to show cause to be able to be given that warrant. It is very much on parallel with where the ATO is at: it would normally, when I was involved in that, go with the AFP generally, or with the NCA or others, to get that search warrant. So the wording is actually different in our legislation, but heading very much towards very similar and very complementary outcomes.

Mr Forsyth—They are set out in detail in one of the appendices to the manual we provide to our staff. The two substantive differences that we traditionally had were the sales tax, with the right of seizure, and child support, where, for good valid reasons, the power was limited to employers of parents, I think. There was no need, for child support purposes, to have access to people's homes or businesses; it was really just the employer that we needed access to for the purpose of inspecting their records to make sure they were making the relevant withholdings.

Looking at the other differences, a lot of them will be around different wording because at various times different styles have been adopted and some of them have reasonable time requirements so you can only enter at a reasonable time. In practice, we interpret our provisions in section 263, which are the most broadly drafted in general terms, as having that reasonable time requirement in there because we believe if we did exercise the power unreasonably then, with the developments that have occurred in administrative law since 1936, the courts would simply say that we had exercised the power invalidly anyway. We really do not see there being any substantive difference in the outcome that arises under those slightly broader powers than under the others. Yes, it would be nice if they all had identical wording, but they do not.

Senator MURRAY—I get the clear impression from the three of you that there is no problem, from your perception, that you have inadequate powers or that the powers you use are excessive in any instance or that the powers you have are inappropriately used—with the obvious exception, because in life you can never cover every eventuality.

Mr D'Ascenzo—That is right.

Senator MURRAY—If I move on from there, parliament essentially has this problem: we, like you, cannot envisage every circumstance so, generally speaking, the parliament gives fairly broad powers. With regard to this, the limitations have had to be developed by you administratively—your charter, how you train people, who can access, and so on and so forth. When the parliament perceives that as a problem, quite often it will delegate the power to be expressed in regulations. But, once again, things we are discussing here have not been expressed through regulations; they will be expressed through administrative recourse.

There is a third area—and I want to see how you react to it—which interests me as a possible route to go because all these things affect civil liberties and you are really looking for the safeguards for the community. The third area is the trade practices route. What has

happened with trade practices law is that the general legal provision has been established and then mandatory codes of conduct have been identified and developed with the appropriate parties which are then enforced at law, but it is the regulatory authority that does that appropriately and it gives it legal underpinning.

With regard to some of these areas where the legislation gives very general guidance and there are no existing regulations, I wonder whether you would think it proper that your practices of operation—somebody below a certain level could not do things, you have to have accredited people properly trained in the activity, your charter of rights and responsibilities, et cetera—should have a legal underpinning in a mandatory sense or whether that would actually constrain or restrict you or affect your ability to operate effectively. The reason I put it like that is that the difficulty for us and for the community is that in a new regime you might choose not to continue with your charter, you might choose not to continue with your training practices, you might choose not to have your administrative safeguards.

Mr D'Ascenzo—In which case, I am sure the Treasurer of the day, the government, the parliament and the community eventually would bring us back to fold. We have gone a long way along that path anyhow, Senator. Basically, these guidelines were not done in isolation from the community and we have dealt with all segments of the community in trying to work out a procedure that reflects their perspective of how we should be operating. You asked beforehand: put yourself on other side of the table in terms of people receiving these notices. That is what we have done there.

I think these have been drafted very much from the perspective of the third party—the taxpayer, the community—in terms of their rights and our obligations. In fact, many people might say that, if you wanted to be more efficient in your operations, you would not safeguard individual rights to the extent that we have tried to do so. That is the first point.

We review these on a progressive basis. I mentioned that we had initially tried to do so back in the early nineties. I was involved with that drafting. Mr Forsyth recently reviewed them with a team during the period over the last three years. There will be other reviews as time goes by. I do not want to put too highly the fact that, sometimes when you go through more mandatory processes, they do look to relationships that were appropriate 10 years ago but may no longer be appropriate. The more formal you make these processes, the more formalistic is the response in terms of being more litigious, more adversarial and less inquisitorial in outcome.

Senator MURRAY—It becomes rules, not guidelines.

Mr D'Ascenzo—Exactly right. The third matter is that it is really a bit outside our bailiwick in that the idea of our charter being mandated through legislation was put to the government and the government said it preferred to have it developed in this informal way, standing there as the guide to proper performance. The government and the commissioner, through its report to parliament, would indicate how well the commissioner was exercising and abiding by the spirit of the charter rather than the letter. Hopefully, we can get to a point where we are abiding by the spirit of professionalism and balance that we draw in our guidelines rather than be drawn into adversarial formalistic legal rules.

Senator MURRAY—That is very helpful. One of the reasons I am asking you these kinds of questions is that we are also seeking, as a committee, to be guided in the other areas in which search and entry apply. It may be that one of the recommendations would simply mean the parliament would require there to be a charter, for instance, in agricultural departments and not specify what the charter would be because then it starts to have the force of ‘you have to have’ that mechanism applied.

Mr D’Ascenzo—I was looking at the transcript in relation to the Attorneys-General. One of the senators asked the question, ‘Do you know whether they have guidelines and procedural statements?’ The answer was, ‘I do not know.’ We have gone to great lengths to try to make that established in the way that we do things, making sure people know these are the expectations they have of us and that they know their rights up-front through those booklets and other publications and our own dealings. We do that because that is the way we should operate. That is the best way of operating in a non-adversarial venture. At the end of the day, if we disregard all those sorts of operations of professionalism, then we are going to be drawn back, whether it be by the community or the courts.

CHAIR—That is only if the courts have the power to bring you back, isn’t that right?

Mr D’Ascenzo—But they do have power to bring us back.

CHAIR—Just to examine that, you can affect your warrant.

Mr D’Ascenzo—It says, ‘You are authorised to exercise these powers for the purposes of the act.’ The purposes of the act are to ascertain taxable income. So, if we try to do that for other purposes, then the courts can say, ‘No, that is not a proper exercise of those functions.’ In fact, in the Smorgon case, one of the High Court justices said, ‘That itself is serving to protect and balance the rights of the community and the rights of the individual.’ Mr Forsyth mentioned reasonableness. I do believe that the courts will read in a reasonableness provision across all our laws, so that, if we operate unreasonably, then that is beyond the power of it. That is at the legal end.

At the administrative end, it is important for the tax office to have the support and confidence of the community. If we start operating in some sort of inappropriate way, then I think we run the risk of losing that support. We have tried very hard through the style of our administration to be seen to be doing things properly.

CHAIR—There are two points on that. First of all, to the people that can take you to court, you say, ‘Look, the courts are the institutions that can help you.’ How many cases can you think of where people on moderate income have been able to go to court to fight the tax department, as distinct from bigger bodies? If you cannot think of many, how can you say that the courts are going to protect the small businessman or the working woman, or whatever?

Mr D’Ascenzo—This is a more general issue of the public’s access to the courts and the cost structures associated with that. In terms of tax administration, this is covered more in the substantive law area. We were instrumental in trying to support recommendations of the Joint Committee of Public Accounts in terms of Small Claims Tribunal type of process. We

have been in the forefront of trying to introduce a mediation type of process where there are complaints. There are internal problem resolution areas there that provide assistance. We have got hardship provisions. We have got a test case program where we fund some taxpayers to go through if the matter is of interest to the community.

CHAIR—The problem that I can see in the proposition you put is that all this is in your hands. Other bodies have got to go to a magistrate or a judge to enable them to enter. It seems to me that one of the bases for doing that is that it gives an independent opinion about the validity of your actions—the tax department's actions.

Mr D'Ascenzo—They would go to the magistrate for a different purpose though. That is the very key point that I have been trying to make. Our purpose is one of ascertaining taxable income. The police's purpose is to seek to find evidence to prosecute a crime. It is, I think, a totally different environment.

CHAIR—You have said it again and again, but I cannot quite follow that: if somebody enters my house or yours, I cannot see where the difference is. To give you an example of what I mean, one of the things that I notice these days that is different from when I was younger—I am probably the oldest here—is that, when people go into the Melbourne Cricket Ground these days, they have got to open their bags. People would say, 'Oh, we are not about an exercise of trying to find evidence against them; we simply want to check that they have not got any alcohol in their bags.' But I would have thought that the issue is that they have got to open their bag, not what the purpose of the opening is. It seems to me that a lot of your argument here is directed along those lines, which really misses the point, I would have thought, of the whole issue.

Mr D'Ascenzo—My view is that the courts have seen that distinction between curial processes and tax administration. So the courts have said that there is a difference. The courts have said that, for the purposes of administration, we need wide-ranging inquiries, access powers and we need to be operated within limits. The community expects us to operate within those limits and we do operate within those limits. Parliament has also accepted that that is what is required to ensure that people are able to ascertain taxable income.

CHAIR—So you are saying that we should not be holding this inquiry because the courts have settled and the parliament has settled—

Mr D'Ascenzo—No. You put to me that there was a distinction which you could not see, and I understand your perspective in that sense. I am saying that people have drawn that distinction and they have drawn it to say that this purpose is different from that purpose, and when you are pursuing this purpose there are certain procedures that we want you to follow, and we follow those procedures. When you are following this purpose, this is the sort of procedure that we think is appropriate for that. And they have said that they believe the current limitations within our powers do serve the balancing act that is always intrinsic in these sorts of questions. There is no reason why parliament cannot review all those, and I am happy to follow parliament's advice.

CHAIR—Yes.

Mr D'Ascenzo—I suppose, guided by those perspectives, I am putting to you that, within that framework, we have tried our best to operate within the spirit of those frameworks. We have indicated a range of approaches that taxpayers can take through us to try to have redress. But we do provide—apart from the courts—the telephone numbers of the Ombudsman and the Privacy Commissioner. There are other avenues and we are out there trying to say, 'These are available for you; this is what the community has for you in terms of your safeguards.'

CHAIR—What would be the problem for the tax department to have to go and get a warrant compared to other organisations?

Mr D'Ascenzo—As I said, I think the problem is that it will start creating what I think is an adversarial culture in the way that we do our things. It will start to put things onto a criminal footing, and a perception of criminality in the process, where we do not think any exists.

CHAIR—Whether the courts or the parliament says it, but the taxation department could see that there is no concern in being able to walk in uninvited to private premises or public premises for that matter?

Mr D'Ascenzo—For purposes of ascertaining taxable income.

CHAIR—You can see no problem in that at all?

Mr D'Ascenzo—I can see that, to achieve that task of ascertaining taxable income, the current parameters of what parliament has thought, and the courts have thought, it would be appropriate to allow that to occur within the bounds of reasonableness.

Mr Thompson—Just to go back and go through where we go with that, if we were coming around to visit your business premises and your agent had got a copy of that letter, we would be saying, 'We would like to come around and sit and talk with you generally and also to have a look at some of your business records.' Often the agent would ring us and find out what it is about or you might, and there would be a discussion on that.

The warrant with the photo that Michael has shown you is really to verify that I am the person you got the letter from. Generally, in 99.9 per cent of cases—it is a top of the head figure; perhaps it is not that much—it is really not a case of demanding access. It is a case of us working together to sort through the issue, to work out what it is, perhaps get a photocopy of a couple of records and then the officer is out of there. Often your agent might be with you or you might choose not to have them involved.

Senator CRANE—What is the difference?

Mr D'Ascenzo—That is very different. If we were to go to court and say that we wanted a search warrant to come around to your home or to your business, we would be starting a completely different relationship where we would generally need police officers with us. No-one could leave the home while we are there or enter the place, and basically you are

entering into a new set of rules into the way we operate. Most of our business is cooperative. It is a very cooperative mood and the warrant is really an identification more than anything.

Mr Forsyth—You are talking about a public company. You would have to execute a search warrant properly to obtain all of the business records of a major company. You would have to go to a large number of sites over a long period. The current system relies on our access power—that is there and it can be used—but basically it is all done by negotiation. The files are supplied by negotiation.

CHAIR—So both Mr Thompson and Mr Forsyth are saying that my proposition that you should get a warrant to be able to enter is not feasible because such a warrant would require you to search all the premises and to have police around the house to keep people in the house while you are there. Is that what you are putting to us?

Mr D'Ascenzo—I do not think they were putting it in those terms. What I was saying is that is a possible scenario that might occur.

CHAIR—Why do you put that? That is a very defensive proposition to put if you say that it is only a particular scenario?

Mr Thompson—Generally, if we exercise a warrant, we usually exercise it with the AFP there.

Senator CRANE—There are plenty of warrants issued that do not have the police or AFP.

Mr Thompson—I am looking at our experience, where we do exercise warrants and generally it is with police. I am sorry if that is misleading. What I am really worried about—having been an auditor and having worked as an auditor—is that the mood of cooperation that is there in so many of the cases is being lost when we move to that very formal serving of a warrant and searching premises. It is creating a completely different mood in the experience for the people involved.

Senator CRANE—But what if you turned up with a police officer? I know we have gone way past time and we still have a myriad of questions to ask. We are going to have to see if we can get these people back when we come back because there are a lot of general questions.

My concern is that these things start off and you have a set of tramlines that run parallel. Then gradually, because there is no disciplinary requirement or formality there to start with, the tramlines start to get wider and wider. That is the sort of impression I get out of the community, not necessarily the Taxation Office but across the board. When they come and see you about a particular thing, just a legitimate inquiry, it is getting expanded and expanded and without some sort of a discipline there, and it need not be to the extent of a warrant, you get this growth factor that, I would suggest, becomes unhealthy.

CHAIR—You seem to have a mind-set that if you go to the magistrate you have got to turn up with all sorts of enforcement authorities, or you have to do it all alone and that leads

to peace and light between you and the person you are auditing. It is a very interesting concept—that is all I can say. You must target somebody, I take it. You sit around and say, ‘We are going to target this person.’ You just do not casually go around, I take it, and drop into a house.

Mr D’Ascenzo—We often do things on a project type basis. We look at where there is a risk of taxpayers not having carried out, or fulfilled, their obligations in terms of ascertaining their taxable income correctly. We pursue those sort of leads in that way. It is our general—

CHAIR—And you sit there talking and say, ‘This particular group of people seem to be avoiding tax.’ Do you discuss it amongst yourselves?

Mr D’Ascenzo—That is right. It is done on a project type basis.

Senator MURRAY—It is a sample audit?

Mr D’Ascenzo—Not necessarily.

Senator MURRAY—Say you selected lawyers; you want to go after lawyers: don’t you just take a sample or do you look through your books and say, ‘We think he and she—

Mr D’Ascenzo—It varies. We have done sample audits to set a benchmark to see whether compliance is appropriate or not appropriate within that segment. At other times we do not do audits. We work out what the problem is first. That is the usual process. We work out what the problem is. Often we work with a range of industry associations, if it is in an industry, and we say, ‘What is the problem with this industry? Why do the figures from our tax information say that there seems to be a problem in compliance?’ There may be a lot of things there. People do not know what their obligations are; people do not know how to comply; our systems might be hard to deal with or it might be that people are just not putting in the right sort of amount of taxable income.

Senator MURRAY—I think that behind Senator Cooney’s question was the point that, if you dropped in on somebody because it was random, that person would probably be less nervous about it than if you dropped in the tax audit and they knew it was because you had selected them for a specific reason.

Mr D’Ascenzo—Often it is against the third parties that we use our access powers. We might be going to a bank to find out about a taxpayer’s record in terms of a loan transaction with an overseas company that they might have had, or it might be an employer in relation to how many PPS forms he or she had received and who had provided those PPS forms. Often we use our access powers very much in the course of allowing third parties the protection of divulging that information which is relevant to our purposes of ascertaining taxable income.

CHAIR—It seems to me that one of your problems is that everything is in the control of one organisation, namely, the tax department. You form the suspicion—and, no doubt, discuss it amongst yourselves—and then go and look for evidence—I do not suggest for criminal purposes—that there has been tax avoidance. It seems that you fall into the classic

category of those who are people who engender suspicion, those who investigate it and those who carry out action on the basis of those investigations. You would have to agree with this. There does not seem to be any outside body at all that in any way audits the power of entry that the taxation department has and which may well be controlled within the department by people enthusiastic to see a result obtained.

Mr D'Ascenzo—There are the Ombudsman, the Privacy Commissioner and the Auditor-General who report to parliament.

CHAIR—Can you tell me what the powers of the Privacy Commissioner are in this area?

Mr D'Ascenzo—I know how to contact him if I am in trouble. I do not know exactly the full powers of the Privacy Commissioner.

CHAIR—Did you say that the Privacy Commissioner can do something if tax officers were going through a person's books—could he?

Mr D'Ascenzo—I know that the Ombudsman does make reports about our activities and says, 'I do not believe this is right or this is not right,' and we follow that up.

CHAIR—That is once it is over, isn't it?

Mr D'Ascenzo—No, sometimes in the course of those processes.

CHAIR—Can you give us some examples of when that has happened—not now, but later on?

Mr D'Ascenzo—It has happened with the Ombudsman in his last report where he indicated concerns about the way that we had carried out some audits. We provided our side of it. In fact, in the report after that first report, the Ombudsman retracted some of those concerns.

CHAIR—But the Ombudsman did have concerns about your—

Mr D'Ascenzo—Initially.

CHAIR—Perhaps we could get you back later on that. I would like you to think about the question of why you should not have at least some sort of outside check, whether a magistrate or a judge, before you go down for the friendly chat.

Mr D'Ascenzo—By all means, Senator, we are always here to take guidance and to be open to the process. I do not want to put it too high in the process but I want to think about the opportunity given to us. Think about the process of going on a normal routine type inquiry to check an employer's record as to whether he or she remitted tax instalment deductions. Does that mean that every time we have to go for one of those—or, in fact, any time we do any of our fieldwork—we have to go and seek a warrant? It may well be that at

any time during that process people will say, 'No, you cannot have access to these document.'

CHAIR—That is the sort of thing I was thinking about. I probably attach more importance to the act of somebody entering your house against your will than the tax department apparently does. There does not seem to be any—

Mr Thompson—Very rarely does—

CHAIR—I cannot detect any sort of concern about being able to go into a person's house or office, for that matter, without the other person's will.

Mr D'Ascenzo—That is unfair. If you see the whole intent and spirit of the guidelines, you will see that concern coming out very clearly out of those guidelines. The checks and balances and procedures do reflect that concern.

CHAIR—If you do not need the power of entry, why are we concerned about it? People are going to invite you in. Say we take away the power of entry?

Mr D'Ascenzo—Then we end up getting into a very adversarial climate, I suspect, Senator.

Mr Forsyth—One of the things we tried to balance in writing the manual was that people that are well advised and rely on their rights should not be in a better position in the tax system than those who cannot afford advice. We tried to take that into account in framing the guidelines and in setting out our procedures. We see an onus on us to provide them with an opportunity to recognise their rights. In the general run of things, we provide more opportunities for rights than a search warrant would. We offer more opportunities for people to obtain representation, phone somebody and get advice before we take any further steps than a search warrant would. That includes brochures and all the rest of it.

Senator CRANE—During the original presentation you said that, if you wanted to go into the next room and there was some resistance, you could slip a thing out of your pocket—not putting too fine a point on it—but you did not tell us what you would do when you arrived there. Do you hand this book of rights to the individuals so they can sit down and read it and determine what their rights are? You said you send the letter out. If you are sending a letter to me as a person who employs people who are PAYE taxpayers, and you want to check that, do you define that in the letter as what you want to do? Can you then come in and say, 'I want to go for a meander down this part of your tax return', and do a depreciation check or something else? Just how definitive is it? Having got in there, does it give you the opportunity to have a witch-hunt?

Mr D'Ascenzo—I am not sure that witch-hunt is the right word.

Senator CRANE—We know what a witch-hunt is.

Mr D'Ascenzo—It allows us to examine information. What I had in mind, when I had that example, was the conduct of some of our large case audits. You find this file that has a

reference to another file and you say, 'I need that file because my inquiries are being led that way.' Then all of a sudden the shutters come down. In terms of if it was in context of an audit, we do provide these obligations up-front. If people are not aware of their rights, we do give them time to cogitate on those booklets. We do give them time to have access to legal advisers, or representatives, if they wish.

Senator CRANE—What happens? I live 500-odd miles from Perth and my lawyer is up in Perth. Do I tell you to go away until I get the lawyer down?

Mr Forsyth—We would expect you to ring your lawyer and take advice over the phone in most circumstances like that.

Senator CRANE—That is a procedure side. Just coming back to this other question, you define the PAYE tax collection and what you have to carry out under that system, which is fairly thin. If it does lead off on another file, is the inquiry at that time restricted? Having given that letter with the one notification, does that then give you the right, having got there, to look at everything? Is there a limitation?

Mr D'Ascenzo—The only limitation for the purpose of the act is practical. The practical limitation is that, if I am there to check on late or a non-remittance type case, I really have that focus. I am working in a project dealing with that sort of activity. In fact, even if I were to see something that took me into a different perspective, our procedures would say, 'Jot that down and refer it to a different area. They can take that on board as part of their case selection for a different exercise.'

Senator CRANE—I am not arguing one way or the other.

Mr D'Ascenzo—I am saying that technically that access allows you to pursue it for the purposes of the act. It can be wider than the letter provided to you up-front. That is the technical answer. The practical answer is that, in relation to the simple cases, the people are there with a simple brief, and they will not stray from that simple brief other than to refer the matter for further investigation subsequently.

On the other hand, if they are in the context of a large case audit where those inquiries take you into a different area of consideration, we would not hold off that. We would pursue that if we thought that was relevant to those investigations. The technicalities do not limit inquiry, provided it is for the purposes of the act, but the practicalities do limit it in certain circumstances.

Senator CRANE—I could probably sit here for an hour asking questions but we have other witnesses. Can we agree that, at a suitable time when we come back, we call these people back to answer some of the other issues?

CHAIR—Yes.

Mr D'Ascenzo—I expected that would be the case and we are more than happy to do so.

CHAIR—At a time suitable to yourselves. I have a few more questions too. I would be interested between now and then to work out what discussions go on in the department, and whether you do get around and say, ‘This person has not declared all his or her income’; whether you talk about that amongst yourselves, and whether you have courses and you tell how to detect people who might not be declaring their income and how the culture is built up in the department.

Mr D’Ascenzo—We will focus on some of those activities. I might just mention that it is not done in that way. What we basically do is try to work out on a risk management approach where the risks are to the revenue. Often we do not do it at the individual level. We often do it at the segment or industry level basis. We see which industry seems to have concerns to us in terms of their level of compliance.

We have done a lot of work recently in the building industry as part of our for cash economy project. We have also done a lot of work in relation to the fruit and vegetable industry. We have done work in the clothing industry for cash claiming purposes. That is focusing on our small business areas. Excise looks at fuel; chop-chop tobacco and those sorts of things. With sales tax, there has been some work in terms of mobile phones and shrink-wrapped computer products, so we really focus on products and the industries rather than necessarily at the individual level.

Senator MURRAY—Within that you make comparisons across all those persons in that sector. Is the person you look at anybody you identify as outside the norm?

Mr D’Ascenzo—We used to do it that way, Senator. That used to be our project based audit methodology. We found that, because of scarce resources, we had time to do the base level, but we did not have as much time to follow up the others. Now we have truncated that a bit and sometimes do those base levels. Other times we just work at what we have in terms of our data. Working with the industry bodies we make some sort of judgment as to whether or not there is a problem. We address that through a whole heap of strategies.

Senator MURRAY—How do you end up visiting that particular factory or person? How do you go from that analysis to picking on Mr or Mrs X?

Mr D’Ascenzo—Bruce may have more recent experience than mine.

Mr Thompson—Once we have identified the risks and whether the risks are in the risk industries—and often that involves going out and talking to those industries that might be the master builders or whoever—we might then build a profile of high risk. Then we would analyse the systems where those high risk cases are. A letter would normally go out to those people. Quite often we say, ‘In the history of looking at your industry and from recent things and from talking to your industry bodies and others, we think these are the high risk areas. Can you have a look at those and, if you have any issues, can you ring someone on this line or write in and tell us that you have made a mistake?’ We then generally follow that up with audits. Letters would go out and then we talk to some of those people about where they are up and review their records and see where they are at.

I have one further point. One of the things that we did this year for the first time was to have a forum with the major tax bodies. Through that liaison forum we actually had a day where we went through a whole series of our major compliance programs that we were expecting to undertake this year. At the beginning of the year we told them, so they could let all their accountants and everyone know, that these were some of the areas we were actually looking at. We discussed with them the types of programs we would be undertaking, how we were looking at doing it and all those things. We took feedback, and some of those processes changed as a result of that. I think it is a lot more interactive with the community than it used to be.

Mr D'Ascenzo—That is one point, and the other point that Mr Thompson mentioned was profiling. It is not the sort of talk-in-the-corridor type profiling; it is based on some sort of, usually, hard data. My experience is more at the top end of the market, where we do inquiries of large companies. For instance, we recently did projects on transfer pricing. We went through, I think, 200-odd companies to see, firstly, what their tax payable per turnover was and criteria of that nature. Then we saw how many transactions with overseas associates they had and how many transactions they had overseas generally. We asked them what sort of record keeping facilities they had. So you put them all together and you say they are high risk, medium risk, low risk and so on. Then you go and actually visit those people at high risk, and you send them one of those letters and one of those booklets, and off you go. We are genuinely here to provide you with information on our perspective. I assumed, from your questioning, that you were looking for a frank, full and vigorous debate, and that is the spirit in which we are here.

CHAIR—It is like a lot of other people who come along and say, 'Yes, we have got to get an outside body, normally the courts, to give us a warrant.' That is pretty inefficient, too, because how can you check them? You do not even have the tax department as an audit. In other words, there seems to be absolutely no way that the public can ascertain whether the system has been running fairly. I am not suggesting for one minute that it is not running fairly, but the sort of society we live in says, 'There ought to be an ability for the public to check.'

You are all members of the public, I understand that, and you suffer all the problems and enjoy all the joys that the rest of the public do. You yourself may ask what check is there on some other authority that might come. For instance, if you are pulled up for not wearing your seatbelt, and you say that you are. You say, 'This police officer has to prove their point.' You do not want to make it too adversarial—I understand that—but there has to be some sort of check whereby we can say, 'Yes, it is all going reasonably well. The person who cannot afford big cases can get some sort of protection and, if you have enough money, you can certainly go to the courts.'

Mr Thompson—In a sense—I know I might be covering old ground—it is the problem resolution, the Ombudsman and all those things. All of the information comes into there. Not only do we resolve any issues that come up but that actually feeds back into our access guidelines; it feeds back in when we are about to do a fairly major revision of our charter. So one of the things about those documents being updated is that they are all kept fairly contemporary and, in a sense, that is our rule book that is used by everyone. So, if you like, to the extent that if there is anything uncomfortable for people, it flows back through those

independent sources and comes back in to reflect in all these rules for the next group to go out with. In a sense, that is actually keeping our system fairly contemporary, whereas some of our legislation is locked at a point in time. The guidelines that everyone is operating under are actually moving forward all the time, and it might be every couple of years or so for major revisions.

Mr D'Ascenzo—Also, these are very transparent. They are in the public arena. I am not talking in terms of the individual. We try to provide them with all the information we can, but they really are a very transparent distillation of the way we operate. We learn from these experiences. We build them into the processes so that, at any point in time, they are on the public record. People can say, 'Hey, commissioner, the way you are doing things is not protecting the rights of individuals.' We believe these sorts of guidelines and these sorts of procedures provide that in a very transparent way.

CHAIR—Guidelines are one thing, but it is how they are carried out that counts. The Ombudsman and the Privacy Commissioner have very limited powers. Everybody is very principled, but the real problem is how they are, in fact, executed.

Mr D'Ascenzo—Again, we do have those independent internal processes and they are made public. That is in the commissioner's report. You can certainly see that we would follow those up in a concerned way. It is in our interest to make sure that these are living documents. If there are ways that we can improve upon that, we certainly would like to build upon it.

Senator CRANE—I just hope I have not provoked you enough into walking out of here and issuing a tax audit advice!

Mr D'Ascenzo—As I have explained, it does not work that way. It is true that the public has a perception of the tax office having these powers. Because we are a large organisation, we are dependent on how people operate and we cannot be there next to each person all the time. That is why we try very hard to make these transparent procedures and practices that we want to be held accountable to.

Senator MURRAY—It is a lot better than it was.

Senator CRANE—To start with, just getting it on the public record gives people a document to read.

Mr D'Ascenzo—I think it is good.

Senator CRANE—I think, Mr Chairman, we will see these gentlemen again in the next week or two.

Mr D'Ascenzo—We are more than happy to come and assist in any way possible.

CHAIR—Thank you very much.

Mr Pearce—Senator, I received these suggested questions. Do you want us to respond to them?

CHAIR—Yes, any that you have not. They were questions that James devoted a morning to.

Mr Pearce—They are good questions.

CHAIR—The plans are all there. He writes them out. If we do not execute them or carry them out, we have failed as a committee. That is why I am saying that is the real problem.

Mr D'Ascenzo—We have followed it up for you, Senator.

Mr Pearce—Would you like us to answer those orally?

CHAIR—However you like.

Senator CRANE—They can be answered and then, if we want to address further aspects of them, when you come back, we can. I think that is probably the best way. There are other issues, obviously, that some of us want to raise.

CHAIR—Thank you.

[3.54 p.m.]

O'CONNOR, Mr Peter Gregory, Assistant Director, Compliance, Legal and Evaluation Branch, Australian Quarantine and Inspection Service

SHIRLEY, Mr Barry John, Compliance Operations Coordinator, Australian Quarantine and Inspection Service

CHAIR—Welcome. Did you want to say anything first or do you just want to answer questions?

Mr O'Connor—I could probably make an opening statement, Senator, if that suits you, and hopefully that might put it in some context. Thank you for the opportunity of coming and elaborating on our written submission that we put in back in May. In developing our submission we took careful note of your terms of reference about reviewing the fairness, purpose, effectiveness and consistency of the right of entry provisions in Commonwealth legislation. In our submission we sought to explain how we use those powers of search and entry within the legislation that AQIS, as an agency, administers and how that relates to the achievement of our corporate objectives. Perhaps I could briefly outline some of that environmental context in which we operate and with which Senator Crane will be quite familiar.

AQIS is a regulatory agency within the Department of Agriculture, Fisheries and Forestry, or AFFA, as it is known. In its corporate plan AFFA has two key outcomes. The first outcome is that the Australian agriculture, food, fisheries and forestry industries are profitable and competitive and continue to create jobs, particularly in regional Australia. The second outcome we seek to achieve is that Australian agriculture, food, fisheries and forestry industries have a sustainable resource base. As an operating group within AFFA, AQIS focuses on some specific outcomes that are consistent with those broader AFFA outcomes.

The AQIS focus is to enhance the competitiveness of Australia's agricultural industries by achieving improved market access opportunities for Australian food and other agricultural products through technical market access negotiations and the delivery of an effective export certification system. The second arm of our charter is to ensure the sustainability of Australia's agricultural industries by protecting animal, plant and human health and the environment through technically sound quarantine policies and delivery of effective quarantine operational services.

In working towards those outcomes the AQIS corporate mission statement is to develop quality services that improve Australia's competitive position and protect our animal, plant and human health and environment, in partnership with industry and with the community. We have developed a concept of partnership and we follow or are seeking to follow a co-regulatory model. This concept of partnership with stakeholders influences the way in which we undertake our regulatory role. I think we have a pretty good track record of a successful strategy of achieving regulatory compliance through a cooperative approach with industry and with other stakeholders.

However, there can be little doubt that AQIS's credibility as a regulator ultimately rests on our ability to take strong enforcement action where necessary. It is in that context that search and entry powers are essential where efforts at encouraging voluntary compliance fail and that there is a need to deter non-compliant behaviour. Strong enforcement powers are also necessary to signal to our foreign country partners that Australia's export certification and our import inspection activities are underpinned by a fully regulatory environment.

In the compliance context, AQIS has responsibility for administering enforcement procedures under the Quarantine Act, the Export Control Act, the Imported Food Control Act and some parts of the Australian Meat and Live-stock Industry Act. As a responsible regulator, we have taken steps to update our legislation to ensure that those acts provide a full range of regulatory powers consistent with the Commonwealth's criminal law policy. The Export Control Act and the Imported Food Control Act are fully consistent with the entry, search and seizure powers in section 1AA of the Crimes Act. The Quarantine Amendment Bill 1998, which is presently before you in the Senate, when passed will ensure that the quarantine legislation, which is 90 years old, will be updated and will therefore be fully consistent with the criminal law policy of the Commonwealth.

We exercise our search and seizure powers with prudence and wherever possible we seek consensual entry, certainly in terms of registered premises or approved premises under the Quarantine Act, rather than rely on the coercive powers of a search warrant authority. Over the past three years we have sought search warrants on 10 occasions as an investigative device and on six occasions have actually enforced those search warrant powers. On the other four occasions we have returned them to the court.

Senator CRANE—Can you explain the difference between the two systems—the search warrant and the other entry provisions?

Mr O'Connor—We do have powers in the act that allow us without search warrant to go onto registered premises—that is, premises registered under the Export Control Act as export premises. Under the Quarantine Act we have powers of entry where there is a quarantine risk to be investigated or where there are what we call approved premises, which are premises approved for quarantine purposes. The old notion was that quarantine was carried out at quarantine stations, therefore the equivalent of registered premises, if you like. Under the Quarantine Act we have arrangements whereby there are places approved, usually commercial premises, where the purposes of quarantine are carried out, equivalent to perhaps a bond store arrangement under the Customs Act. Those particular approved premises also have a compliance agreement whereby they agree to the quarantine officers coming to ensure that the purposes of the act are met. So in terms of our search warrant powers, they are used very, very rarely—in fact, as I have said, six times effectively in the last three years.

As far as the exercise of a search warrant or the decision to apply for a search warrant to the court, that is handled within my area, which is the Compliance, Legal and Evaluation Branch. We have compliance officers in each of the state capital cities except Hobart. We have a quite rigorous training system and competency based accreditation for these particular people. We have a quarantine manual, which we are quite happy to make available to the committee in hard copy, and we can also make it available on disc for you. Mr Shirley is

responsible for those compliance operations and he can perhaps take you through the detail there.

The other point I would like to make is that over the last 12 months our branch has actively sought ISO 9002 accreditation. We were granted that in June this year. That is pretty important in terms of ensuring effective systems apply, not only for the whole area of compliance investigation but particularly in sensitive areas such as the application for and the execution of search warrants and so on. If the committee would like, Mr Shirley can give you some of that background detail on the compliance manual, and we are quite happy to table the document.

Senator CRANE—Can you clarify one thing you said about education and qualifications. Is it correct that the individuals actually have to get a qualification in terms of their right to go on and inspect or carry out the functions? Is that correct with AQIS?

Mr O'Connor—Within our compliance area, we have a compliance staff of about 25 people. There is a mixture of people with investigative backgrounds from the state, the AFP, or the Customs Service, and there are also people with a technical background as far as commodity inspections are concerned—meat and fish inspectors and so on. The issuing of warrants and appearing before the magistrate to seek a warrant would usually be done by the senior compliance manager in each of the regions or by one of the experienced compliance people. When we are actively recruiting for compliance officers, we look for people with a sense of judgment and experience in investigation. Part of those investigation skills would be the exercise of, and application for, warrants and the execution of those sorts of things.

As a regulatory agency, we also have outside scrutiny through CLEB, the Commonwealth Law Enforcement Board, which is a part of the operations run by the Attorney-General's Department. We also have CLEB standards as far as Commonwealth investigators are concerned. We are seeking to have all our compliance officers within AQIS accredited to level 4 competency standard as a minimum requirement under those CLEB standards for investigators. In our manual, we have about 100 pages devoted to how a power should be exercised in terms of investigations and search warrants. It is pretty comprehensive, and it is fully consistent with the CLEB standards of the Attorney-General's Department. In relation to the legislation, we were hoping that, subject to the successful passage of the amendment bill through the Senate, we would have all our legislation fully compliant with part 1AA of the Crimes Act.

CHAIR—You have to get a warrant whenever you enter. Do you go to a magistrate or a judge?

Mr O'Connor—We go to a magistrate or the Federal Court registry—usually a chamber magistrate.

Senator CRANE—I would like an explanation of the process. Just as a general comment, it seems to me that AQIS has some of the most rigid compliance requirements, before they even go in and inspect. When people were putting kangaroo in our meat, I thought they were too rigid. In comparison with other operations, they are pretty rigid. That was the only point I was trying to draw out.

CHAIR—Perhaps we ought to pursue that because you are in charge of some pretty important stuff. Keeping diseases out of Australia seems to me to be a very grave matter.

Mr O'Connor—Yes.

CHAIR—Following on from what Senator Crane says, do you find any problems in getting warrants?

Mr O'Connor—Magistrates usually give us a pretty hard time. You have to spell out the detail in your application for the warrant. It varies from person to person, but the magistrates usually want to ensure that it is in power and that procedures are being followed. They particularly seem to be concerned about the scope of the warrant and the time in which it is executed. We are pretty strict with ensuring that we do act within the time constraints.

Mr Shirley—In practical terms, we adhere to the guidelines put out by the Commonwealth DPP. In chapter 6 of those guidelines, they suggest that we go to them before we go to the magistrate in terms of the issuance of the warrant. What happens in the AQIS compliance environment is that we do go to the DPP and engage them very early in all our investigations so that they have time to scrutinise the information under warrant before we go to the magistrate.

Senator MURRAY—Doesn't that slow you down? On some things you need to move quickly.

Mr Shirley—Generally, no, and we have not had recourse to undertake any of the emergency provisions of the warrants so far.

Senator MURRAY—Could you give us an idea of the time span? When dealing with people on these issues, that is often a reason people give you for needing the powers they do. You have a fairly tight procedure. Could you give us an idea of how it goes from the day you decide you need a warrant to the day you get a warrant? How much time is allocated?

Mr Shirley—When you decide you need a warrant, you are looking for documents or other physical evidence, and that would have been obvious from the way your investigation progressed. You need certain things, and they are in a certain place and you are aware of that. If you have conducted your investigation in the right manner and recorded it, as we do, on a computerised compliance information system, it is quite easy to grab portions of information or grab statements that you have already taken and put them into any information fairly quickly. Then it is a matter of going to the DPP liaison officer and asking them to look over the warrant in fairly short order.

Senator MURRAY—Typically, how long would it take before you get to the DPP?

Mr O'Connor—The last time we executed a search warrant was about a week or 10 days ago in Sydney. It concerned some allegations that had been made on *A Current Affair* concerning the export of companion dogs to Singapore. It had a lot of publicity, and it did

take a lot of investigation. We had done nearly 450 hours of investigation before we went for a search warrant. There are a whole lot of details that you need to—

Senator MURRAY—You said that you go to the DPP first. I want to know: does it take you a week from the day you decide to go to the DPP? How long does the DPP take?

Mr Shirley—I think this one was a matter of three days. It was decided that we needed a search warrant. There was some discussion as to whether we needed to go under the Export Control Act or the Crimes Act 1914, in which case we would have had to involve the Australian Federal Police.

Senator MURRAY—What guarantee do you have that the DPP will be rapidly responsive?

Mr Shirley—We have a very good rapport with them.

Mr O'Connor—We have a very good relationship with the DPP.

Senator MURRAY—But there is no statutory obligation for them to respond quickly. This is a relationship understanding, isn't it?

Mr Shirley—They are aware of the investigation imperative and they are very amenable to the short time frame in which we need to have it looked at. It never takes any more than a few days.

Mr O'Connor—In this particular instance, the DPP's advice was quite strong in terms of ensuring that we would get one bite of the cherry. We wanted to be sure under what provisions we were going in and that we had established prima facie evidence which we were seeking to follow up. It was not that we were out there trawling to see what we could find.

Senator MURRAY—Whilst we are on all this, you mentioned a series of guidelines in your discussion—I think two or three sets. Could the committee have copies of those?

Mr Shirley—Yes. I do not have them here with me at the moment.

Senator MURRAY—Could you send them to us?

Mr Shirley—Yes, that is no problem at all.

Senator MURRAY—The reason I am pursuing this line of questioning is that we are going to search for procedures and practices within different areas of government which are effective and work well, and we want to standardise them. It would be somewhat difficult if you recommended in every case that the DPP should be involved in serious matters, and then we discovered it took three or four months to do these things.

Mr O'Connor—There are standards that we apply, and we have consolidated them into what we call our compliance investigation manual.

Senator MURRAY—But you mentioned specific guidelines that the police and the DPP have.

Mr O'Connor—Yes, they are on that list there.

Mr Shirley—They are not actually mentioned in there but they are in here and in one of our work instructions.

Senator MURRAY—Could we have copies?

CHAIR—They are all in here, too.

Mr O'Connor—Yes, they are all referred to in here.

Mr Shirley—They are also a part of our ISO 9002 quality procedures, in terms of all the manuals and disks.

Mr O'Connor—There is a set of disks with a complete manual on it.

Senator MURRAY—In the matters you investigate and file, are there often run-on activities which emerge from that? In the process of investigation would you find that there seems to be a tax problem and you might ring the tax office? Might there be something which contradicts state legislation which you are aware of, such as pest control? Are there consequences to your activity or do you keep yourselves very narrowly confined to your powers and provisions?

Mr O'Connor—The latter, Senator. We are there, particularly if we are following a prosecution track. It is usually under one of our own pieces of legislation or the Crimes Act. However, we do have arrangements for the sharing of information which are supported between law enforcement agencies, particularly the Commonwealth or the states. We do have information sharing provisions, subject to principle 11 of the Privacy Act, which allows the sharing of information for law enforcement purposes, but subject to fairly strict controls and supported by a formal memorandum of understanding.

Senator MURRAY—You do not see dangers with that in that you have been lawfully given a warrant or right of access, and the person or company knows what it is all about, but then a whole lot of other things may follow on which they are not alert to?

Mr O'Connor—Perhaps I should clarify that point. I do not think, in terms of proceeding under search warrant, that we have ever done that in the past. We have in a general intelligence sense.

Senator MURRAY—So it is in your information gathering stage?

Mr O'Connor—Yes, there may have been something. For instance, in looking at a potential breach of the Export Control Act—or some involvement arising out of our powers of investigation for fit and proper person provisions for being an operator or registered export establishment—there has been one instance that I can think of where in the

information that we gathered there would appear to have been some potential breaches, or prima facie evidence of breach, of the Corporations Law. In that particular instance, we proceeded to make our information available to the ASIC. That is because it was really about bottom of the harbour Phoenix company-type arrangements that were going beyond our power as far as the export control was concerned.

CHAIR—But with the warrant you stick to the dictates of the warrant?

Mr O'Connor—Yes, absolutely.

Mr Shirley—We use a three-conditioned warrant which is a general model now for normal Commonwealth warrants for the offence related warrants.

Mr O'Connor—I should point out that, consistent with the Commonwealth law enforcement policy, we have amended our legislation. The quarantine bill that is before the Senate at the moment has an example of that where we have made a distinction between prosecution warrants and what we call monitoring warrants. While we have the legislative powers under the Export Control Act for monitoring warrants, we have not sought a monitoring warrant as such. They have always been for the power for investigative warrants.

Senator MURRAY—I notice this list of questions. You probably have a copy of it.

Mr O'Connor—No, we have not, Senator.

Senator MURRAY—Question 10 says that you can execute monitoring warrants to check if an act has been complied with and offence related warrants where you suspect there has been a breach. Where you are executing a monitoring warrant, do you have the power to seize and remove anything? It goes on to say, about page 17 of the *Hansard*—that is, our interaction with the Attorney-General's Department—they had thought such a power was inappropriate. Did they ever mention that to you or is that news to you? Do you have a view on that?

Mr O'Connor—We think monitoring warrants potentially have effective force in terms of compliance, particularly in the co-regulatory model where we are relying on company based quality assurance systems that we need to audit. Our people will voluntarily come into those arrangements. We can go in and audit a QA system or registered or approved premises under the Quarantine Act. However, sometimes the records might not always be kept on the registered premises. For instance, an abattoir could be a registered premise. Not all the records could be there; they could be in the company's head office. We have the power to seek a monitoring warrant to go to the headquarters and take computer files or whatever for the purpose of audit. Most companies would take the view that they do have the power if they want to exercise it. We usually seek cooperation and, most times, we get entry by consent.

Senator MURRAY—What you are saying is very interesting. You sat during some of the ATO questions. They do not have a monitoring warrant facility because they believe that the people they go and visit know they have those powers of access and entry and, therefore, allow them to do what they have to do without calling on a warrant. Do you believe that the

monitoring warrant is better for the agency using it or for the person who needs to be protected in the case of it being used? Where is the benefit of the warrant for the person or company who need protection of law or for yourselves? You have those powers. The person knows you could go off and get a proper warrant if you needed to.

Mr O'Connor—We have not. It is a hypothetical case because we have not actually exercised these powers at all even though they are there and available to us. Their effect is silent at the moment. I would think it would protect somebody if they thought that there was an abuse of the auditing power. There are also some protections against self-incrimination. One of the things that we stress to our officers is that, if they use a monitoring power or announce themselves as going in for the purposes of monitoring, they do not change hats halfway through and then launch into a prosecution and give a person a warning. We have said in our manuals that, if somebody is there for a compliance monitoring audit and there is some evidence there that might be prima facie evidence of a breach of the legislation, they should withdraw and as a separate exercise at a later date go back and properly warn the person.

One of the things that we are very conscious of in carrying out a compliance investigation of a reported incident to us is that the persons get proper warning in terms of any admissions that they might make. They have the right to remain silent and they also have the right to refuse entry, except on a registered premise.

Senator MURRAY—But, like the tax office, you do write to people or ring them up and say, 'We'd just like to come over and have a chat to you and discuss a few things which are worrying us.' You do not get involved in warrants to do that. I presume that happens.

Mr O'Connor—Yes. We have what we call a compliance risk assessment model that we apply. As well as investigating incidents that are reported to us from our operational staff or the community generally, or sometimes even from a competitor of the person out there in the field, we build risk profiles as to where there could be a risk with non-compliance, particularly where we have these QA systems that we are very reliant upon as far as our export certification is concerned. We will go in and undertake an audit to ensure that the people are doing what they say they are doing and they are living the rhetoric of their quality assurance manual.

Senator MURRAY—Do you have, like the tax office charter, documents or pamphlets which say, 'These are your rights. This is what we are trying to do. If you've got any problems then contact these people. These are your rights of appeal.' Is there any kind of—

Mr O'Connor—We usually write to them and tell them that we are coming in. We seek entry by consent. As I say, we have never used the monitoring warrant to get entry into premises. We conduct an entry discussion at the beginning of the audit and an exit interview with—

Senator MURRAY—Have they got anything in writing? The tax office gives the person being visited a pamphlet which says, 'If you are disturbed about anything, or you want to check on anything, there is the Privacy Commissioner or the Ombudsman. These are your rights and these are your obligations.'

Mr O'Connor—No, we do not have that at this stage.

Senator MURRAY—Is there no need?

Mr O'Connor—Not in terms of auditing, no. These people are willing participants, they are traders out there. When we go in for an auditing process, it is not so much a policing role, it is a compliance role. It helps in underpinning the integrity of our export certification system to our foreign trading partners.

Senator MURRAY—So it is non-adversarial?

Mr O'Connor—It is non-adversarial. In fact, we would see it is to their advantage. For instance, the European Community, when they come to review our certification systems, invariably come to compliance and look at our compliance activity. We report that we have done so many compliance audits; we have done certain investigations; and we have achieved so many prosecutions. We try to separate out those things that demonstrate to the foreign country reviewer that we have some robustness about the AQIS certificate, that the AQIS certificate is well recognised in terms of—

Senator MURRAY—In the nature of things you would not be perfect. There must be some disputes and conflicts at times. How are those resolved?

Mr O'Connor—With individuals?

Senator MURRAY—Yes.

Mr O'Connor—Once again, we are talking about monitoring warrants as opposed to prosecute—

Senator MURRAY—We are talking about your officers being in somebody else's place of business, or their home, which I suppose would be very occasional. I would assume that sometimes there would be a conflict, an interaction? Do you have a dispute resolution procedure, any methods by which complaints can be resolved?

Mr O'Connor—No, not as such, although we are encouraging our operational staff when they are looking at compliance agreements to acknowledge that there is some sort of dispute resolution mechanism in that compliance agreement in terms of the issues of non-compliance, for instance, under the Quarantine Act, that they are not following procedures.

Mr Shirley—If there are complaints against our officers they will be referred to the AFFA business ethics and security investigation unit in terms of a formal complaint.

Senator MURRAY—Does the business person know that is available? How would they know that is available?

Mr O'Connor—That is a good point if somebody has made a complaint either to the minister or to the secretary. I have seen one instance where a letter has gone back and said, 'If there is a complaint then we'll refer it to the business ethics unit.'

Within our compliance area we separate out complaints against staff. Staff ethical matters go to the business ethics unit, a separate unit. We look at alleged breaches of the act by people to whom the act applies—traders, importers and so on.

Senator MURRAY—The essence of search and entry provisions, of whatever kind, is that they are intrusive. At times they are acceptably intrusive but there are other times when they are not. What the ATO has said through their charter is that they recognise that intrusiveness and therefore accord people a route for complaint which is self-evident on the material they are given at the time of visiting. It is just part of their process, so they say. I am just paraphrasing their evidence to us. I assume you have people who might sometimes be aggrieved.

Mr Shirley—There is also the aspect of accessing our Internet site. There are communication components of that where people can write to us and make complaints. We also operate the AQIS Redline which is a telephone, or Internet, or writing in hotline feature, where not only can people report instances of breaches of legislation, they can report concerns within AQIS programs and, indeed, complaints against AQIS staff. There is that facility.

Mr O'Connor—We have recently developed our service charter, and one of the issues that we need to come to grips with, particularly in the compliance area, is about leaving our service charter with somebody after we have been through on an audit or investigation.

Senator CRANE—What about when you have the warrant to search? Do you give people a little booklet or something which spells out their rights?

Mr O'Connor—No, we usually ring them up, tell them we are coming out and suggest they may want to have their legal adviser there, or to contact their legal adviser. We usually go in on notice, telling them that we have a search warrant. They will discuss it. In the most recent instance we spoke with the person and executed the warrant within the hours when we told him we would be there, which was the next morning. He had spoken to his solicitor in the meantime and his solicitor advised him to cooperate, and he did that.

Senator CRANE—You heard the tax office people before. They sort of do not fit into the same category because the audit assessment on quality assurance programs is to make sure that our export programs are right, because the commercial benefits to an operator in being involved in their own quality assurance is quite significant. It reduces his costs. It is as much an education process as it is going in there to be a policeman.

Mr O'Connor—Yes.

Senator CRANE—It does not quite fit into the search and entry category.

Mr O'Connor—No.

Senator CRANE—I just wanted to make that distinction there.

Senator MURRAY—Just with the warrant, I have given you a piece of paper which is an extract from the Senate record of Tuesday, 22 June 1999, and numbered SSSB 21. In there I indicated, in criminal warrant situations, the sorts of questions that ordinary people might want answered, and I listed them. You have discussed some of these already. They include the right to be silent; the right to avoid self-incrimination; the right to have witnesses present; the right to have a lawyer present; the right to record the proceedings in some way; the right to refuse any process or to refuse particular responses; the right to be given an inventory, a proper identification, and those sorts of things. That is an area on the tougher side of search and entry, if you like, the warrant side, the stuff that is likely to lead to prosecution.

Is it appropriate for the government to consider a standard form of rights which might be made available to people so they know where they stand, rather than it being verbal? Of course, for the person to ring their lawyer—and they should always be advised they can—you have just incurred \$200 worth of expense whereas a little card telling you what you can and cannot do would save you that.

Mr Shirley—I am aware that the AFP has procedures to give an occupier a statement of his rights, as it were. That reflects the features under section 3 of the Crimes Act 1914 concerning warrants. I am in the process of benchmarking that particular approach. So, we will have an occupier's rights statement as per the AFP approach to executing search warrants. But that only reflects the rights embodied in the legislation. I am sure we will be able to expand and cover some of these other pertinent rights.

Senator CRANE—Do they hand that out each time?

Mr Shirley—They do. I was only aware of that just recently because they had developed it through a particular operation and then it was taken up as a particular procedure throughout the rest of the regions and through central office. We will benchmark that anyway.

Senator CRANE—How long have they been doing that?

Mr Shirley—I think for at least 12 months. I am not entirely sure of how it evolved but I am aware it was from an operation in Melbourne, in their southern region, where a constable devised it. It is now being used.

Senator MURRAY—In your legislation they can avoid the right to self-incrimination, can't they? In the ATO they cannot. There are these critical differences. People who watch television might believe they have the right to remain silent and it is not true in certain—

Mr Shirley—With a search warrant you are not normally conducting a formal interview at a particular time. You are going in to look for your evidence and that is the primary concern of the search warrant. If you do happen to conduct a formal interview at that particular time, the protocols of part 1C of the Crimes Act would kick in. But that is a separate process, or an inclusive process, in terms of the search warrant happening.

Senator MURRAY—Nevertheless, there are consequential questions in the process of the execution of a warrant which would not be a formal interview but could be self-incriminatory, like, ‘Where is such and such’, and the person replies. I do not want to be too fanciful about it. I just wish to indicate that people’s rights and their understanding of their rights is not always clear to them.

Mr Shirley—No.

Senator CRANE—What I want to follow up there is the self-incrimination question. That only applies in certain instances, doesn’t it? It does not apply across the board. Maybe you could give us a piece of paper which actually spells it out: where it applies, where it does not apply, and why the difference. Could you do that for us, please?

Mr O’Connor—We certainly can. I do not know whether we have already done that in one of your other committees.

Senator CRANE—Part of that is in the bill we have got before us now.

Mr O’Connor—We answered that question. Senator Forshaw raised that.

Senator CRANE—Yes, that is right.

Mr O’Connor—We replied to that in writing so we can get that.

Senator CRANE—If you can get that for us.

CHAIR—In the sample you gave of foot and mouth disease, we had an outbreak of that in Australia?

Mr O’Connor—Of foot and mouth?

CHAIR—Yes. On your first page, right down near the bottom, just above the heading, ‘AQIS Regulatory Strategy’, where it says:

Losses which would follow an outbreak . . . have recently been estimated at about \$6 billion—

Does that mean that there was an outbreak or is that just used as an example of what would happen?

Mr O’Connor—That was an example in terms of the risk assessment.

CHAIR—But that has not happened?

Mr O’Connor—No.

CHAIR—Do the matters you are dealing with vary? That is an awkward question because you are going to say that everything you deal with is absolutely terribly important. Foot and mouth would be disastrous. Is that the sort of thing you deal with right across the

board, or are there some matters that you deal with that are not quite as important as others? The point of that question was to try to work out what sort of climate we are dealing with here when we are talking about entry and search.

Mr O'Connor—We have got some examples of cases in which we have used the search warrants.

CHAIR—Do not worry about those. Am I correct in saying that all the matters in which you have used the power of entry and search have been 'grave' matters almost—and I use that word advisedly?

Mr O'Connor—Yes. You mentioned foot and mouth disease there before. Probably one of the most serious things that we have had in recent times in terms of quarantine was a visitor carrying live Newcastle disease vaccine, which had been obtained in Taiwan and brought back as part of the person's luggage. She lived in an area that was very close to significant commercial egg and poultry production. That went to court and the woman was fined, I think, about \$8,000. It did create a lot of problems for us. Even when we obtained the evidence, we had to get it down to be tested at the old laboratories in Geelong. We had to get special permission to fly it from one state across to another. So, yes, they usually are fairly serious things.

CHAIR—Then you talk about the turtles here.

Mr O'Connor—Yes. In the turtle case, as it turned out, that was probably at the lower end of the issue, but you do not always know that when you start out.

CHAIR—I would have thought it was serious enough. If you are going to talk about the lower problems, it would be of the type that the turtle turned out to be.

Mr O'Connor—Yes. Sometimes we might have it reported to us, for instance, that Asian students are bringing in mooncakes or something. They are usually warned, given a letter of warning. It is explained to them. In fact, we have people who go out to universities and conduct education programs that talk about that and use those examples.

CHAIR—Thanks very much. Senator Crane, do you want to ask any further questions of these gentlemen?

Senator CRANE—Can we hand this list of 10 questions over?

CHAIR—Yes.

Senator CRANE—I have one question I would like to ask about your authoritative powers in dealing with breaches and what have you. This is probably a question for estimates, but has the quality assurance program helped the situation in terms of your policing and having to be as rigid as you were in the past, particularly with meat exports?

Mr O'Connor—I think it has helped. I suppose it also brings in another range of sanctions and that is the economic sanction under these QA arrangements under the Export

Control Act, for instance. As well as the penal provisions, you also have the sanctions of suspension or revocation of their approved arrangements. That can lead to higher inspection charges, more frequent audits and a whole range of things that actually hit the hip pocket. I suppose it brings into play these other—

Senator CRANE—But they are all commercial.

Mr O'Connor—They are commercial sanctions.

Senator CRANE—The reality is that, if you break your own QA operation, you will kill yourself as an exporter overseas. That is the problem.

Mr O'Connor—Yes, that is right. It is for that reason that we seek to encourage voluntary compliance rather than be seen to be stamping out non-compliance. In our particular area, that is what we have a particular brief to do: to investigate alleged breaches of the legislation.

Senator CRANE—From what I have seen, I think you have the most rigid disciplines, if you like, in place in terms of search and entry. Do you find that it is too restrictive?

Mr O'Connor—In my four years in the area and the job, I have not found it has been an issue.

Senator CRANE—It is not something—

Mr Shirley—It protects everybody really. It protects both sides of the fence.

Mr O'Connor—We need to be seen to be very fair, otherwise, if you are proceeding with a prosecution, the DPP will throw it out even before you get to court if the magistrate does not.

Senator CRANE—What about in terms of comparing your operation with other operations? Have you looked at any of those particular aspects? You said you address the consistency or inconsistency question, which is part of why this happened. Have you compared yourself with other departments and come to any conclusions with regard to that or any other legislation you operate under?

Mr O'Connor—As a matter of policy development, I think we have just said that we will follow the criminal law policy of the Commonwealth and bring our act up to date in that regard. We accept those restraints on our powers and we think it is in the interest of good governance and protection of civil liberties.

Senator CRANE—You said that you have exercised six out of 10 warrants in the last three years. Have you had any major complaints about it in terms of the conduct of the warrants from any of those particular six?

Mr O'Connor—No. In each case, it has led to convictions anyway.

Senator CRANE—I am satisfied, thanks, Mr Chairman.

CHAIR—Thank you, Mr O'Connor and Mr Shirley.

Mr O'Connor—Would you like these responses back in writing by any particular time?

CHAIR—At your convenience. If we are looking for them, we will give you a ring. How does that sound?

Mr O'Connor—That sounds entirely reasonable, thank you.

[4.46 p.m.]

SMITH, Dr Roland Joseph, Manager, Quality Assurance and Compliance, National Registration Authority for Agricultural and Veterinary Chemicals

SUTER, Mr James Patrick, Corporate Legal Manager, National Registration Authority for Agricultural and Veterinary Chemicals

CHAIR—Do you want to say anything to start? You do not have to.

Dr Smith—I would like to make a few introductory remarks and emphasise a few of the points that are in our CEO's letter to the committee. I am in charge of the quality assurance and compliance program at the NRA and James Suter is our corporate legal manager. We obviously work very closely in any compliance related activities.

As background, the NRA is responsible for regulating the supply of agricultural and veterinary chemicals in Australia and our responsibilities cover a range of areas. In essence, before any agricultural or veterinary chemical product can be registered, which enables it to be sold in Australia, it has to go through a rigorous evaluation which looks at aspects such as: does it do the job that it is designed to do—does it work, basically? Is it likely to have any undue hazard to human health, to people who use it or consume the crops or the produce that comes from it? Is it likely to have an undue hazard to the environment or to animals? And the other area of particular importance: is the use of this particular product likely to adversely affect our international trade?

So the NRA's responsibilities are national, and they control things up to the point of supply, up to the point of retail sale. Beyond that, each state then has responsibility for control of use. So the national registration scheme, if you like, is a Commonwealth-state partnership type of arrangement where the Commonwealth has the NRA role and beyond that the states, and we work together. From a compliance point of view, we try to make that operation as seamless as possible in implementing our respective roles.

The NRA has a key role in evaluating and registering products before they can be sold. After that, there are a number of things that we do to help ensure that the products which are actually sold do indeed continue to meet those requirements and that only those products which have been registered are supplied and used in Australia.

Our compliance program is one area of activity there. We have a number of other activities, but one of them, for example, is our manufacturer's licensing scheme for veterinary chemical products where we work with manufacturers to help them implement good manufacturing practice systems so that they build in quality.

In terms of the compliance program, you will note in our submission that we have very clearly defined offences within our legislation. But, not unlike other agencies, we try to use a risk based approach as to how we apply this. The thing we consider to be particularly high risk is when the use of a product or the importation of a product that is not registered is likely to pose a major risk to public health and safety or to the users of the product and also if it is likely to pose, for example, major risks to the environment or to our export trade.

To help put things into perspective, in the last year we have followed up in excess of 300 reports of alleged non-compliance in terms of agvet chemicals. The vast majority of those have been dealt with through administrative means. Basically, by writing to companies who are selling these products, we advise them of the offence that they are committing and what they need to do to fix it. Basically, we give them a warning that, if we are not satisfied that they have taken appropriate action, we may act further.

However, a number—and I guess we are probably talking about less than 10 per cent—end up with investigation with a view to possible prosecution. We do take stronger action where we think the risk is great enough and where it is serious. The message I am trying to get across is that we do not take the decision to investigate with a view to prosecuting lightly. When we do it, we are committed to achieving the appropriate outcome.

There are two key pieces of legislation for the NRA: the Agricultural and Veterinary Chemicals Code Act 1994, which has been adopted in complementary legislation in each state, and the Agricultural and Veterinary Chemicals (Administration) Act. The latter act is a Commonwealth piece of legislation. From a compliance perspective, it focuses particularly on things like importation offences where people are importing unregistered or unapproved products.

Both of those pieces of legislation have search and entry provisions in them. There are two kinds, essentially. There are monitoring provisions which basically give us the ability to enter premises where agvet chemicals are sold, manufactured or held, with a view to monitoring, keeping an eye that they are actually supplying those products in accordance with the legislation and not supplying unregistered products. Under those monitoring provisions, we can enter business premises but we cannot enter residential premises without the consent of the owner. They are the monitoring provisions.

We then have our offence related provisions which is where the search warrant situation comes into play. That gives us, with the consent of a magistrate, ability to enter, search and seize. The conditions under which we can do this are very clearly defined in our legislation. Essentially, there are things such as convincing the magistrate that we have a good reason to believe that there is going to be evidence of an offence having been committed against our legislation on those premises within the next 72 hours. That is the sort of argument that has to be convincing to the magistrate.

The warrants have to be executed within seven days. There are obviously things that we have to do when we go there such as make people aware of why we are there, tell them what their rights are and show identification. We have to do all the normal things that you would expect in terms of people being accountable to the stakeholders that they are investigating.

We use our search and entry warrant provisions reasonably frequently and, if I were to put a figure on it, I would probably say between eight to 10 times in a year. We use it judiciously. I believe that without those provisions it would not be too strong to say that it would be almost impossible to achieve successful outcomes to prosecutions that we believed were serious enough to take this far. At this stage I am not aware of any complaints in terms

of the way we have executed those search warrants. Obviously, people you are prosecuting are not always thrilled to bits with you.

CHAIR—We did not see any Christmas cards.

Senator CRANE—Tell me the ones who are thrilled. When you say you use them eight to 10 times a year, what sort of cases are you using them for?

Dr Smith—I can give you an example of some prosecutions that have been completed this year where we used a warrant. There was a recent case which involved a veterinary chemical manufacturer in Bendigo where they were—and AQIS was actually involved in a different aspect of this in terms of importation of seed stocks for the vaccines—actually manufacturing, supplying and selling unregistered, unapproved veterinary chemical vaccines.

Vaccines are in the high risk area in terms of the potential harm to animals and the potential introduction of unwanted diseases into livestock, and things like that. So that was an example where we actually went there prepared with the search warrant. If we believe there is key evidence there and we do not want it to get away, it is a fairly standard practice for us to go to the magistrate first and to be prepared. Then we will usually talk with the owner of the establishment and—

Senator MURRAY—Just stop there. You go along to the magistrate and discuss it generally?

Dr Smith—No. We make a formal application to the magistrate to get the warrant. Sometimes the owner of the business premises will tell you it is not necessary to serve the warrant, as far as he or she is concerned. So in some cases it is done as a cooperative thing. But it is there as an assurance in case that entry is not forthcoming.

Senator CRANE—But you get the warrant first?

Dr Smith—Yes.

Senator CRANE—And what evidence would you collect before you get to the stage of doing the warrant?

Dr Smith—In this case we would have had evidence from people who had received the vaccine. For example, in this case we would have visited pig producers and other people who had received vaccines from this particular establishment, got statements from them, actually seen invoices, and seen product at their places. That is the evidence of it having been received. We then have to try and link that back to its being supplied from that particular establishment. So that is an example.

Senator CRANE—Are you doing it on the basis of the product not being registered or, having got the product, it does not meet Australian standards?

Dr Smith—No. If it does not meet Australian standards it should not have been registered in the first place—

Senator CRANE—Let me put the question another way then. If, in fact, you go there and it is not registered but it does meet Australian standards, do you then proceed with prosecution or do you give the person a warning? Do you say, ‘Go away and go through the right process and get it registered’?

Dr Smith—It would depend on the seriousness of the particular product that you are looking at. The bottom line is that our offences are all about supplying unregistered product and it is not a simple matter for a compliance person, or anybody, to go to a premises and to determine readily whether the product meets Australian standards or not. The registration process, where people determine whether it meets Australian standards, is something that can take many months for experts in those areas to determine. It is a process that has got extensive toxicology and environment and efficacy evaluation. We would generally see the risk associated with somebody supplying unregistered product as being very substantial. Whether it did turn out to meet Australian requirements eventually or not, the fact that they are supplying it without having gone through the registration process says to us that they are taking a considerable risk in supplying that product because they do not know what effect it is going to have on the animal, the crop, or whatever it is being used on.

Senator CRANE—Do you apply consistently on local manufactured and imported product?

Dr Smith—Yes. We have an offence for importation of an unregistered product, but if someone is supplying an unregistered product they are supplying an unregistered product, whether it is imported or locally manufactured.

Senator CRANE—Are you familiar with the Glean case in Western Australia?

Dr Smith—No. Glean is a Du Pont product, I think.

Senator CRANE—This is a Chinese alternative to Glean. I am not sure what the product is. There are a number sold under it now, but I could not tell you the exact figure. It is primarily controlled rye-grass pre-emergence and radish post-emergence.

Dr Smith—I am not familiar with that particular case. There have been a couple of cases in Western Australia, but I am not personally aware of any to do with Glean.

Senator CRANE—I probably interrupted you, but I wanted to get the picture.

Dr Smith—In terms of general things, I would also say that I was listening to some of the AQIS comments about training of inspectors. Those sorts of things are fairly similar in terms of our approach. Our investigators all have to meet certain standards. Over the last few years we have recruited three people into the organisation who are either ex-AFP detectives or ex-Victorian police detectives. We are putting all our inspectors through appropriate investigators’ training courses at the Police Training College. All of our prosecutions, as a Commonwealth agency, are conducted for us by the DPP. At the end of an investigation we prepare a brief of evidence and, in preparation of that, we liaise with the DPP.

Senator CRANE—Do you think that is because they are likely to be better detectives in getting a prosecution or because they would be better able to handle and protect the rights of the individual who has had the search and entry line put on them?

Dr Smith—I think it is a bit of both. For people from that sort of background that is their bread and butter. They have been skilled in good investigative techniques and in being able to prepare legally sound and robust briefs of evidence which will stand up in court. I listened to you talking before about people's concerns about not giving evidence that might be self-incriminating and making people aware that they do not have to say or produce things if they think they might self-incriminate. Having people with that sort of background tightens up the skill set in the organisation for ensuring that people are aware of their rights. That looks after the person being investigated, but it also looks after the organisation. When it gets to court, you are not likely to have something questioned because you have not treated somebody in an appropriate way in gathering the evidence.

Senator CRANE—I will not mention the company with regard to Glean because they have had enough damage done to them already. They felt very aggrieved afterwards because it created a buyer resistance when, in fact, it came to nothing. The handling of that case was despicable. Pretty draconian questioning went on. It was not done in a private manner. It was well publicised through the rural press in Western Australia. People thought they had a product which was environmentally damaging. When you get on that side of it, not only do you have the individual trauma, but you can cause commercial damage.

Dr Smith—I am not personally familiar with the Glean case. Was this a couple of years ago??

Senator CRANE—Approximately.

Dr Smith—Was there a prosecution?

Senator CRANE—No, that is what I just said. There was no case found against them. They were quite vocal about the whole thing. It got a lot of publicity. I do not want to go any further now, because I am just going to re-expose the company to the public arena. I use that to highlight the importance of how people are handled when these sorts of things are done, because there is the individual trauma in the case of the taxation officers, if they knock at the door and open it. You get into the commercial aspect of it as well.

Dr Smith—I cannot comment on that because I am just not close to it. It is basically our operational rule that, if we are investigating something about any particular company, we just do not comment on it. I just refuse to talk publicly about it.

Senator CRANE—You may do, but in this particular case, it was well publicised. Do people together or a company like that get a pamphlet of rights so they know what their position is?

Dr Smith—No, we do not actually hand out the pamphlet of rights. We do the same things; we verbally advise them of what their rights are. They are the same standard rights that the AQIS people were referring to, but we do not have a pamphlet. In a general sense,

when all of the decisions that the NRA makes in terms of whether to grant a registration of a product—which is often quite a contentious issue—are communicated to the applicant or the registrant, those letters always have paragraphs at the end which clearly outline their rights of appeal. They can ask for the NRA to reconsider the decision under section 167.

Mr Suter—Yes, they are statutory requirements of the code.

Senator CRANE—When do they get that?

Mr Suter—In the case that Joe is talking about, if a decision is taken effectively in a negative manner in relation to an applicant to either impose a condition on a registration or refuse it, it is done at the same time as when the decision is taken and communicated.

Senator CRANE—They do not know their rights up-front?

Mr Suter—We have a customer service charter, which spells out in general terms that there is a right of review and appeal, but there is not a specific document we have which indicates that generally.

Senator MURRAY—But they are not given that customer service charter, are they, when you go to visit them?

Dr Smith—It would not be routinely given to someone that was under investigation. The customer service charter is widely distributed amongst all registrants, users and NRA stakeholders. We do surveys and get feedback on that sort of thing. Within that, there is also a mechanism for people to make complaints about how the NRA has dealt with somebody on a particular issue and there is a process. This is part of our ISO 9002 certification for dealing with those complaints and providing feedback.

Senator CRANE—It is too late after the event. You people have one of the most important functions in the country, in terms of chemicals, vaccines and the safety and all the rest of it. Yet, at the same time, I think you have a very important public commercial function as well. But in the process of you doing what you are doing, you do not inadvertently damage somebody. Whether you like it or not, this information gets out, and it gets out very quickly.

Dr Smith—Yes.

Senator CRANE—I just made that point. I guess this is what this inquiry is about.

Dr Smith—I accept your comment.

CHAIR—Tomorrow morning we are going to have the Australian Federal Police. I have discussed matters with them over the years. One of the things I will say to them tomorrow is that they will take all the investigatory processes under the Commonwealth, because they have the sort of thing you were talking about before—the tradition—and they seem to understand what is involved in that sort of delicate balance between the public good of having our civil rights looked after and the public good of making sure we administer things.

I am simply searching for an answer here, not in any way trying to reflect on your organisation. Why should we have organisations like yours doing the investigation? Is it because of the special knowledge you have about chemicals and things like that? It is not only you—it is also the health commissioner and the tax office itself, as you would have heard, and AQIS, and what have you.

Dr Smith—Therapeutic Goods Administration.

CHAIR—Yes. Why do we have investigative powers in organisations like those? Have you thought about that, or would you like to think about it and give us an answer?

Dr Smith—I would like to think about it a little bit further. My initial reaction—and it is an initial one because this is not a question I had put a lot of thought into before coming—is that the regulation of agvet chemicals does require a lot of specialist knowledge. For somebody to understand the seriousness or the implications of a particular act of non-compliance or supplying a certain product, the risk that that poses either to health or agriculture or trade, it is much better housed within an agency that has the ability to understand the implications of the offence that has been created.

CHAIR—About the science involved?

Dr Smith—Yes.

CHAIR—Who does the analysis of the goods or whatever else you have got?

Dr Smith—The evaluation of the chemicals up-front?

CHAIR—How would you describe them? Are they all chemicals or are there other sorts of goods?

Dr Smith—In the main they are agricultural or veterinary chemical products, but these days there are issues around biological products and things like that. They are chemical products, so one of the core functions of the NRA is the registration function. To do that we have people within the NRA who are looking after the agricultural side of things and also the residue evaluation, that is, setting maximum residue limits, approving use patterns which will not give rise to maximum residue or residue levels which will threaten either public health or trade. As well as that we work closely with the Therapeutic Goods Administration in the Commonwealth department of health, with Environment Australia and with the National Occupational Health and Safety Commission. Those three agencies evaluate, as service providers to the NRA, the toxicology, the environmental impact and the worker safety submissions. It is all coordinated by the NRA.

CHAIR—What is your speciality?

Dr Smith—I am a chemist—not a pharmacist. I was an organic chemist many years ago.

CHAIR—Yours is a doctorate of philosophy?

Dr Smith—Yes—a Ph.D. in chemistry.

CHAIR—It is quite clear that you are highly qualified. Who else is in the department?

Dr Smith—In the NRA?

CHAIR—No. Who would be doing these sorts of investigations?

Dr Smith—We have a mixture of skills. We have people who have come to us from a police background who are—

CHAIR—Yes, you have told us about that, and that was one of the reasons that I asked the question, because if they come from a police background that would seem to suggest that they ought to stay there, that the investigations of the chemicals ought to stay with the police. Then you said it was probably preferable to have it where it is because of the expert knowledge of the people, so I was just wondering about the specialities.

Dr Smith—We have people with agricultural science backgrounds, so they have tertiary qualifications in agricultural science; we have someone with a microbiology background and we have qualified vets in the area as well to cover that whole range of technical areas.

CHAIR—And you would argue that you could not put those comfortably in the AFP?

Dr Smith—I would not think so.

Mr Suter—Also, we found recently that we have been getting more interaction from my area with the DPP in relation to prosecution briefs because the prosecutors need to understand in depth the nature of the chemicals and things like that. If you can use that as an extension, then I suppose a generic investigator might have the same difficulties.

Senator MURRAY—I want to distinguish between investigations which lead to prosecution, or could lead to prosecution, and that area which has been previously described by the ATO and AQIS as the non-adversarial area, namely, the monitoring, assessment or auditing kind of role. In that area it was interesting to see that the ATO regarded their search and entry provision powers as sufficient to get them through the door and do most of their job without raising aggravation through presenting somebody with a formal document, whereas AQIS have a new beast, which I have not seen before, called a monitoring warrant, which they do not use but which effectively means that they have reinforced their powers and they can execute it if they want to.

How do you deal with the non-adversarial side? What happens on that side? And to what extent are your search and entry provisions intrusive and are resisted by people you are dealing with on that basis but not with the intention of moving towards prosecution?

Dr Smith—We do not have something called a monitoring warrant. We do have monitoring search and entry provisions within our legislation which, as I think I mentioned before, give us the ability to go into premises where agvet chemicals are supplied and stored, basically just to check that these products are being supplied according to the requirements

and that unregistered products are not being supplied. I am really not aware of any real resistance to our people going around and doing it. In fact, as well as what we do in that regard, the agvet chemicals industry itself has a thing called Agsafe, where they actually accredit retail outlets of agvet chemicals, and that requires them to meet certain standards, to only supply appropriately registered products and all of that. But I really am not aware that we have had an adversarial situation in performing that function.

Senator MURRAY—You never have conflicts, grievances? Are people aware that standing behind your ability to do that are search and entry provisions which are quite tough if you choose to exercise them?

Mr Suter—They tend not to be in that situation. It tends to be that the person who is dissatisfied is dissatisfied with the fact that the product that they are trying to sell actually requires registration. That is usually where it becomes a bit adversarial and, from what I can see, that is more or less resolved by negotiation with the product company.

Senator MURRAY—Is there an avenue of appeal?

Mr Suter—Yes there is.

Senator MURRAY—What is that?

Dr Smith—There are several.

Mr Suter—If we were to say to someone that their product required registration, they can say no, then there would be a right of reconsideration of the decision to investigate them, and that could go to the CEO under section 166 of the act.

Senator MURRAY—Yes, that is internal. Are there external avenues of appeal?

Mr Suter—The external avenue of appeal would be that they would have a right to take us to court for a declaration that the product is not under the act.

Senator MURRAY—So there is no intermediate tribunal or anything of that nature?

Mr Suter—No, because the intermediate tribunal stage is triggered by them lodging an application. If we refuse that, then there is a merits review in the AAT. So in the case we are talking about you do not actually have the application that triggers that process.

Senator MURRAY—In your opinion the grievance procedure which exists is adequate, it meets the book?

Mr Suter—I have to say there is always that difficult area when our scientists say that the product does require registration as a matter of science and the company scientists say that it does not. There is usually then a question as to whether we will then take compliance action, and that seems to be something that could be seen to be a bit unsatisfactory in that the question is really whether the nature of the product is such that it requires registration, not the fact that a supply has occurred.

Senator MURRAY—If you had not had the search and entry provision, you would not have found out that they have got this product which might need registration—is that right?

Mr Suter—We may have, possibly.

Dr Smith—In terms of our information gathering, we find out about unregistered products from a number of different sources. One of them is by our people visiting premises. Other sources we find out this information from are people who actually use agvet chemicals in the field. They will let us know. You quite often find competitor companies are very proactive, if you like, in reporting unregistered products to us.

Senator MURRAY—Do you use your provision in the third party sense at all? Do you go to the final user, for instance?

Dr Smith—I am not sure I understand the question.

Senator MURRAY—Imagine the ATO's situation: the ATO have concern with this particular company but they go and talk about it to the lawyer or their accountant or a bank or somebody else, as a third party, to establish facts and private matters relative to the taxation affairs. Would you ever be in a situation where, although you are regulating, as I understand it, the manufacturer, the wholesaler or retailer, you might in fact use search and entry provisions to go to the farmer to establish what they bought, when they bought it, whom they bought it from, what price they paid, who delivered it—all those kinds of things. Do you do that?

Dr Smith—We do get that sort of evidence from farmers but usually, in my recollection, it comes forward voluntarily. They will talk to us and then we will then go and put that to the person who has supplied the product.

Senator MURRAY—So that third party search and entry does not generate any problems for you?

Dr Smith—No.

Senator MURRAY—You would have powers to go there with a warrant, wouldn't you?

Dr Smith—Yes, we would. I have now been in this particular area for a little over a year and I cannot recall us using the search and entry provision to the third party in that way in that time.

CHAIR—Most of your stuff comes from—I was going to say an informer. That is the wrong word, but you know what I mean.

Dr Smith—We do get a lot of people dobbing other people in. Obviously we do not take that as a basis for going and launching an investigation with a view to prosecuting. It is, if you like, intelligence for us to help assess risks and target areas so that it all goes into—

CHAIR—So the issue was that they come to you rather than you having to go to a third party.

Dr Smith—It is a bit of both. If we are investigating a particular incident, particularly non-compliance, and we would want, for example, to get evidence to prove that a supply has actually occurred, we will obviously try to contact the person who has been supplied with this unregistered product. But, in my experience, that information has always come forward voluntarily.

CHAIR—Thanks very much, Dr Smith and Mr Suter. I am sorry we have kept you. This is an important issue. Are you local? Are you in Canberra?

Dr Smith—Yes. We are in Brisbane Avenue.

CHAIR—Did you get James's questions?

Dr Smith—No.

CHAIR—These are the real pressures. You have just heard the senators' questions so far; these are James Warmenhoven's questions.

Dr Smith—I guess if there are any further requirements you have from us, James or someone will contact us.

CHAIR—Yes.

Senator CRANE—We will be in touch with you, don't worry about that.

CHAIR—These questions are—

Senator CRANE—You would never do a run around on to properties and ask them for any chemicals after seeding, for example, or do you just do random tests to see whether or not they comply with standards?

Dr Smith—No. In the past we did have thoughts of having a random testing program to check whether products did comply with standards, but it is a fairly expensive and ineffective way to achieve compliance. It is better to try to educate people and work with them rather than do this random testing business around the place.

CHAIR—Suppose somebody was breaking the law that you administer. Other than by people telling you of that, would there be any other way you would know?

Dr Smith—It depends on where the offence was occurring and what it is. If it is an importation issue we may have things brought to our attention by the Customs Service. We link with the Customs Service in that regard. We do have our own inspectors out there in the field. They, as part of their routine monitoring activities, will become aware of unregistered products which might be being supplied. So it is not just the informant thing, we have the other side of it as well where we go out and look for things.

Senator CRANE—If somebody gets a product registered, how do you know six or 12 months down the track they are actually meeting the standards of that registration? Is it a one-off thing?

Dr Smith—It is an interesting issue. With veterinary chemical products we have in place the good manufacturers licensing scheme. That audits not only their facilities and processes but it checks products, that they are continuing to be made to certain specifications. However, with agricultural chemical products there is no such licensing program in place. I do not think there are any such programs anywhere in the world. There certainly are for veterinary products but not for agricultural chemical products.

Senator CRANE—There are some interesting results obtained by farmers getting independent analysis of fertiliser. They think they are buying X but they are buying half of X. I often wonder. They have all the stamps and everything on the drum but what really is in there 12 or 18 months later?

CHAIR—That's right.

Dr Smith—There are approved actives, approved compositions for those things. There is also an avenue for people to report adverse experiences with products to the NRA as well.

Senator CRANE—There is always the weather—the sun was too hot or the sun was too low or it rained yesterday.

Senator MURRAY—I do not think this has much to do with search and entry.

CHAIR—It is fascinating, it is very interesting, but we are out of time. Thanks again for coming, and thanks to Hansard.

Committee adjourned at 5.28 p.m.

