COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

Reference: Search and entry provisions in Commonwealth legislation

WEDNESDAY, 4 AUGUST 1999

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SENATE

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

Wednesday, 4 August 1999

Members: Senator Cooney *(Chair)*, Senators Coonan, Crane, Crossin, Ferris and Murray
Senators in attendance: Senators Cooney, Crane and 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 9.07 a.m.

ATKINS, Mr Michael Francis, Principal Legal Policy Adviser, Australian Federal Police

CROOKS, Mr Mark Patrick, Federal Agent, Legal Policy, Australian Federal Police

WILLIAMSON, Mr Gordon James, Acting Director, Intelligence and Operations Support, Australian Federal Police

CHAIR—Do you want to start off by saying something or do you want to go straight into questioning?

Mr Atkins—We are happy to go straight into questioning. We think the submission speaks for itself. It is intended to outline our observations about the operation of the powers.

Senator MURRAY—Personally I think your organisation has a high reputation, and deserves it. I think when we are looking at an inquiry such as this, probably least attention needs to be focused on the police forces simply because, from my perspective, they are the institutions which are most familiar with the process of search and entry and the procedures have been well established over a long period of time.

I am most interested really—and these are the questions I want to pursue with you—in trying to establish from you whether the persons on the other side of your inquiries are always acquainted with their rights and that the persons executing search and entry provisions, through warrant or any other form of authority that you have, are properly trained in the style which is appropriate to the particular level of the inquiry.

For instance, yesterday the ATO made a clear distinction between what are non-adversarial interactive advisory situations and what are serious adversarial situations which may lead to prosecution. You also are experienced at that. Somebody helping you with inquiries I presume typically would fall into the former whereas somebody being pursued with the likelihood of a prosecution would be the latter.

In response to that lead-in, I would like you briefly to outline for us the way in which your people are trained to exercise investigatory powers which have search and entry provisions attached to them, either of what we loosely call the non-adversarial type and the adversarial type; secondly, the level of person who is authorised to conduct that—whether it goes right the way to the most junior or if there is some cut-off point; and, thirdly, the formal and informal advice given to the person or organisation which is being approached in these matters as to their rights, obligations, any complaint procedures or anything else arising out of it.

Mr Atkins—I might make a general observation and then ask Gordon to talk to it. I am not a police officer; I am a lawyer. Both Mark and Gordon are police officers. My general observation is that all of our operational people can be deployed anywhere at any time so you could have a very junior officer doing fairly routine work suddenly moved to a very serious investigation or becoming part of a very serious investigation. While in practice, of

course, more experienced people have more influential roles in investigations, it is difficult for us to divide our investigators up into categories where you have someone doing investigations where they are unlikely to use the powers.

The next observation is that the powers are widely used across all categories of investigations from work in the ACT, which would be normal community police work, through to high level fraud or high level drug investigations. Any one officer at any time can become involved in a very serious investigation quite unexpectedly. We only really have the search warrant powers; we have no other powers of entry. There is some in the ACT legislation but it is essentially a warrant-based power to gain access. We do do joint operations with other organisations, and those officers may have powers of entry but they are exercised by those officers.

Senator MURRAY—Before you go further with your response, you would be typical—as is the ATO—of an organisation which can knock on somebody's door without having a warrant and say—

Mr Atkins—'Can we come in?'

Senator MURRAY—'Look, can we come in and discuss this matter because of such and such?' The public at large is aware that the police have at the back of it the ability to come back with a piece of paper, so most people say, 'Of course, come in and we will have a discussion', because they do not push it that far.

Mr Atkins—That is right.

Senator MURRAY—Whereas with other government agencies the public is not necessarily aware that that power lies behind the public servant who is standing outside their door. In a sense you do not need, and often do not use, the warrant process to gain access and discussions?

Mr Atkins—That is right at the moment. An interesting observation is with the promulgation last year by the Privacy Commissioner of the national principles for the fair handling of personal information which the government has announced will be legislated or be given into effect this year. I think that perception will start changing because that sets a benchmark for private sector disclosure of information, and ultimately this process is about disclosing or gathering information.

I think you will find that the public perception will change simply because a normal member of the public's commercial dealings with companies will begin to be predicated on an assumption of non-disclosure of information. Over time, that will become part of the public perception of that information, so when someone knocks on the door and asks to talk, you can expect people to say, 'Why should I be disclosing this information?' In terms of day-to-day practice, I might pass on to Gordon.

Mr Williamson—Senator, before I answer the three specific questions that you raised, I would make an observation about your example of knocking on the door and asking to come in to have a look around. It is not a practice that is widely followed within the AFP because

of the very fact that the persons with whom we are dealing with, say, in an adversarial sense, are generally well apprised of their rights. They may well tell us, 'No, you can't,' in which case our investigation would be severely prejudiced by the time delay that was necessary to obtain a warrant.

Our usual practice is to seek judicial authority through the issue of a warrant before we go to somebody's premises. It would be quite unusual for us to rely on a consent search power or consent of the occupier to search. I would not necessarily say that it is the same for other law enforcement agencies, particularly state police, but our investigations tend to be well planned and long term. The authorisation procedures in the context are generally the way it is undertaken.

In terms of the non-adversarial sense, the areas that Mr Atkins referred to in getting access to information, where the issue is more one of privacy than of an adversarial relationship between the police and the person who has the information, aside from the legislative scheme there are a number of codes of practice in place between the police and agencies in possession of information to ensure that there is an appropriate mechanism for the exchange. Quite often, holders of information will seek the AFP to use a search warrant power to gain information where their only concern is their privacy obligations to their clients.

Senator MURRAY—Can you explain that?

Mr Atkins—Good examples are the banks. Banks obviously cannot disclose information to us in the absence of a search warrant. But there is a protocol.

Senator MURRAY—So it is a protective device for them?

Mr Atkins—Yes, and one that we well understand. It protects everyone, including the customer. It certainly protects the banks and it means you can facilitate access to information. If we need to get it, we know how to get it. It is probably the best example of that sort of arrangement.

Senator MURRAY—If a search warrant is executed directly, person to person, obviously the person is acquainted with it. If it is directed to a third party to inquire about a person, that person may not be aware of it. Is that right?

Mr Atkins—That is correct.

Senator MURRAY—Essentially, search and entry have been conducted relevant to their affairs which are not known to them.

Mr Atkins—That is right.

Mr Williamson—There are substantial reasons for that being an appropriate event. Many of our investigations run over many years. Where we are tracing organised criminal groups we tend, where possible, to follow the money connections, the banking records and those sorts of pieces of information. It is not uncommon for investigations to start that way and to

run for many years. If the suspect were to be aware that we were seeking that information the investigation would be prejudiced.

Senator MURRAY—That is fair enough because at the end of the process the person who is prosecuted becomes aware that you did exercise a third-party warrant. But what would happen if you exercised it and discovered your information was wrong and it was an innocent person? Is that information destroyed? What happens to it?

Mr Atkins—I will make an observation and pass it on to Gordon for what happens in practice. In some cases you might be able to say this shows the person is innocent. Very often it does not; it hangs there. It becomes part of the intelligence on the activity you are investigating. It is very hard for police to say, 'Yes, that person is innocent' and 'That person is guilty'. It is all a matter of building up a case. You may have a long running investigation which stops or suspends itself simply because the leads have run out, information is not available, information is inconclusive. You would not think of disposing of that information.

Senator MURRAY—But there have been cases where these forces have been provided with false information which you quite properly investigated and found out to be false. For instance, somebody who has got it in for somebody may ring you up anonymously and say, 'Go and check their bank account because they have just received a massive amount of money for gun running,' just inventing something. You naturally would go and check and discover that it would not be true.

Mr Williamson—But in those circumstances, Senator, we would not be able to satisfy the tests in the Crimes Act to obtain a search warrant.

Senator MURRAY—I see.

Mr Williamson—There are tests in the legislation as to what we need to satisfy the judicial officer of. If it were simply an anonymous phone call that someone is involved in gun running and they have lots of money in their bank account, we would not get to first base on that.

Mr Atkins—Because you need the reasonable suspicion to get the warrant in the first place. It does not mean that this person has done it or this site will contain useful evidence. It is simply a reasonable suspicion that it does. But there is some basis for expectation that useful material will be there.

Senator MURRAY—Right. Let us get back to the specifics of some of my earlier questions. You get a warrant under proper legislative authority and there is a check list of things before both you and the magistrate or judge get that. I presume that generally it is a magistrate. You arrive at the premises with your third or first party. What happens then? When the warrant is served, is there a document given to the other person which spells out their rights or is it merely a verbal exposition of their rights?

Mr Williamson—In all circumstances, there is a document headed 'Rights of occupiers' which is provided to the occupants of premises who are there when the premises are

searched. If we are dealing in an adversarial sense—that is, with the premises of someone who is suspected of involvement in crime—they would come within the protections in the Crimes Act which would require them to be cautioned and informed of their rights and other circumstances, depending on whether there were grounds to suspect that they were involved in a commission of an offence themselves. The protections which are afforded to somebody in an adversarial sense are much higher because of the requirements of part 1C.

Senator CRANE—But there is a document or a piece of paper that is handed over?

Mr Williamson—There is indeed.

Senator MURRAY—Because we are trying to get a view as to how various agencies conduct this process, could you give us copies of those two types of material?

Mr Williamson—It is only one type of material, Senator. In all circumstances the document, which is called the 'Rights of occupiers' notice, is provided.

Senator MURRAY—But there is a verbal addition to that.

Mr Williamson—There is a verbal addition if the person is a suspect. There is a verbal addition which is tape recorded in accordance with the various subsections in the Crimes Act. That provides specific protections: the right to legal representation, a warning as to what they are obliged or otherwise to do.

Senator MURRAY—When these matters occur is it good practice, or do you prefer, for there always to be a witness? For instance, there would be two police officers serving the warrant so that, if a claim was made as to how it was conducted, there was somebody to corroborate what actually happened? Is it always one-to-one or does it vary or does it not matter?

Mr Williamson—I suspect we would need to differentiate between adversarial and non-adversarial circumstances. It would be quite usual for one police officer to go to a bank, say, to execute a warrant to obtain banking documents.

Senator MURRAY—It is a process.

Mr Williamson—Yes, it is a process issue. In terms of going to suspect premises, it simply would not occur that one officer would go by himself, leaving aside the protection issues of what might occur and whether there is a need for corroboration. It is simply the safety of our officers. We would not send one person out to execute a search warrant.

Senator MURRAY—From the suspect's point of view, is it in your view preferable for them to have a witness or to have somebody present, or is that irrelevant?

Mr Williamson—It is of no moment to the AFP in most instances for them to have someone else there. We would be concerned that other people potentially involved in offences were not there.

Senator MURRAY—Let us assume that proper process was not followed, that the officer did not follow your training procedures—and, of course, all your people are accredited because they pass exams as they go along; you have a formal system—and that a complaint arose from how the warrant was executed—the manner and the process—and that complaint needed to be resolved. Where does the complainant go?

Mr Atkins—The complaint would be under the complaints legislation and it would be reported by the officer or the officer who received the complaint to our Internal Investigations Division as if it had come to us. That would then be drawn to the attention of the Ombudsman. They may go straight to the Ombudsman, but the formal processes would kick in. There would be a formal investigation that would be conducted initially by the AFP, but supervised by the Ombudsman. The Ombudsman might decide to do an own motion investigation, but that full complaints regime would apply to the handling of that complaint.

Mr Williamson—Within that regime there is also the possibility to deal with minor matters at the time where, for instance, a person was unaware of whether certain action by police was lawful or not and that their complaint was more one of seeking information. Minor matters can be conciliated with the complainant at the time. All the details of that are forwarded through the Ombudsman's office.

Senator CRANE—You said that tape recordings were taken of all proceedings while it was on. Does the person being investigated have a right to a copy of those tape recordings? Is that given to them or not?

Mr Williamson—Yes, they do. They have a right to a copy of the tape recordings and, if a transcript is made of any tape recording, they are provided with a copy of that transcript within seven days.

Senator CRANE—They get the tape recording or the transcript within seven days?

Mr Williamson—No, they would get the tape recording at the time of the event.

Mr Atkins—It is dual taped.

Mr Williamson—If those provisions are not applied, then anything contained in those tape recordings is not admissible in any subsequent proceedings.

Mr Atkins—That is an important point to note. This is all about gathering evidence and, leaving aside the complaints for the moment, if we get it wrong we lose our evidence at trial.

Senator CRANE—Can I follow that up. You said that, if you get it wrong, you have lost that evidence?

Mr Atkins—There is a risk of losing it at trial.

Senator CRANE—A risk of losing it at trial—that is quite different.

Mr Atkins—It is a discretion for the judge. If it is a serious defect in the warrant and it is seriously prejudicial to the accused, then there is a good prospect of losing it. If there is a serious defect, the DPP is likely to be reluctant to proceed to prosecution. There is a strong discipline on getting it right.

Senator CRANE—When there is a search warrant involved there is a certain amount of emotional pressure. If people inadvertently say something that they realise they have said incorrectly or not accurately—whatever way you want to put it—do they have any opportunity to say, 'This is what I should have said. I said that, but this is what I should have said'? In other words, we can correct *Hansard*, but do they have the opportunity to correct what they said?

Mr Crooks—During the interview process at the end, if it was an adversarial type of warrant that was being conducted, they would certainly have all the opportunity in the world to correct themselves.

Mr Atkins—But the original statement is still on.

Senator CRANE—Yes, I know it is there. But I am just asking whether they do have the opportunity at a later date. You said the interview process, yes.

Mr Williamson—We are talking about circumstances where the occupier is suspected of committing an offence—

Senator CRANE—Yes, I understand that.

Mr Williamson—and that is where the protections for a tape recording come through in the legislation. If they consent to be interviewed—and not all people do—then they have an opportunity to say anything they want to correct anything that might have been said earlier. All of our investigators would welcome people coming back, if, upon reflection, they realised that they had made a misstatement inadvertently. We would always welcome people to come back to clarify those matters.

Senator CRANE—I am not debating the process. I am just trying to get the process down in terms of that. This whole process started because we had so many pieces of legislation coming to us from the tax office on the one hand, and we had AQIS yesterday over a totally different and much stricter procedure than the others. There were inconsistencies right through the whole approach to entry and search, education of the individuals doing it, the rights of the investigating officer or the head of the department or whoever appointed them. So that is really what this is all about—the consistency and procedure. I think it is important that we get down the process which exists, whether it be the tax office, yourself, or the Ombudsman, in terms of their particular powers to see whether it is appropriate to have these wide ranging inconsistencies or whether we should have a more consistent approach across the board.

As AQIS said to us yesterday, if they get into a really serious situation then, obviously, more often than not, the AFP comes in to assist them in that particular investigation. Whereas, a lot of the work they do, particularly with the new QA processes, is almost a

direct education process in terms of quality assurance, for example. So what I would like to see on the record is the actual process you use and where the rights of the person being investigated click in, et cetera, no matter how big or small. We are not to really debate the issue with you. That is why I was following up on what Senator Murray said.

Senator MURRAY—I am happy—carry on.

Mr Atkins—I would like to make one observation that may be useful because it talks about the discipline of the process on us and the danger of losing evidence and also the backstop of the complaint process. Under the complaints legislation and under our discipline regime, our officers can be ordered to answer questions and it is a disciplinary offence if they do not answer questions. There is some protection for losing the—

CHAIR—Haven't they got the right to silence?

Mr Atkins—They lose the right to silence, that is, restriction on the use to which the answer can be put. But it means that the—

CHAIR—We have talked about this over the years and it always seems to me to be fairly rough in the way they carry out disciplinary measures at times—robust.

Mr Atkins—Robust. In terms of maintaining public confidence, it is the danger or the perception of somebody being wrong rather than necessarily the actuality of it. You need to be able to assure the public and the government that if there is a problem it can be properly ventilated and explored. But all of our people know that if something goes wrong they can be sat down and directed to answer a question. If they do not answer, they can be dealt with on the basis of a refusal to answer.

So if you are looking at the process you also have to look at that layer behind the actual execution of warrants to see our administrative context and the purpose of gathering evidence and the normal disciplines that apply to the police organisation, which I think are important.

It is also the fact that—there is certainly at times and not infrequently—there is the element of physical danger attaching to the execution of the warrant which is also relevant. That is not always present in other cases.

Senator MURRAY—There is a specific area I want to explore which we have not yet addressed in the inquiry and that is search and entry of the remote kind. I do not know how to describe it. But typically it is telephone tapping or computer access. You have rightly made the point in your submission that the changing environment we are facing requires you to have far more power and interest in technological access. If you suspect commercial crimes or criminal activity of any kind it is now often embedded in computer interactions—moving money around and all those sorts of things. I am aware of the legislation because we have had a lot of debate recently on telephone tapping and all that sort of thing, but how do you think the search and entry provisions should cope with that kind of remote, non-personal activity? Essentially, you are searching and entering—

Mr Atkins—Something.

Senator MURRAY—Something, yes.

Mr Atkins—Searching something. This is a general observation. Certainly with the attitude that the Federal Court and the High Court have taken to judicial warrants—this is the starting point of my argument about them not doing it—it has raised a question about the adequacy of the warranting system as a protection. A warrant gives you permission to do something; there is no protection of the process.

Senator MURRAY—But the protection is the presence of either the first party or the third party. If you do it on the first-party basis, the person is there to watch that you open the books, open the cupboards and look under the beds in an appropriate way, or if you go to the bank the bank is there. But the thing I am talking about there is that no third party—

Mr Atkins—There is effectively. With any computer system, if you do something with the system it leaves a trail.

Senator MURRAY—Yes, but somebody else is watching what you have done and somebody might not necessarily check that trail.

Mr Atkins—If it is to be used in evidence I think it would be. As I understand it, it is fairly self-evident from the face of the electronic record. There is also the point I made before that—certainly with the AFP—there is the prospect of the Ombudsman coming in to check compliance. The Ombudsman can do it at any time on a no motion. The Ombudsman can say, 'Okay, I have a concern about the way you are inspecting computer records.' We can seize a computer; we can take it away; we can—I do not understand it because it is technical—take apart the hard disk and find out what has happened. At any time the Ombudsman could, if the Ombudsman had a concern about that practice, say, 'Okay, I now want to look at what you are doing and I want to actually come in and investigate this practice of yours because I have a concern.' And certainly in relation to a particular complaint, they have.

So there is this ongoing compliance control that we have that also exists in relation to telecommunication interception warrants. I think there is a real protection there. The fact that we know, and all of our people know, that at any time that compliance can be checked, not just at the beginning and not just at the end of the process of the trial stage but during it, I think is a more effective protection than merely relying on the warrant.

Senator MURRAY—There is specific legislation to cover telephone tapping. Do you think there should be specific legislation to govern computer tapping?

Mr Atkins—It depends what you mean by tapping. Certainly communications between computers is governed by the telecommunications interception legislation.

Senator MURRAY—That is within—

Mr Atkins—Yes. It is quite complicated because normally you think of telecommunications as the phone. You are intercepting a voice going from there to there, but you can have data, particularly on the Internet, to one computer where it sits for a while then it is packaged off somewhere else. Essentially, yes, once we have worked it out we always get TI warrants for interception of computer data. If we wanted the computer itself we would get a search warrant.

Senator MURRAY—I was interested in the powers you have outlined with regard to the Ombudsman. Do you disagree with the view that the Ombudsman has limited powers or do you regard him or her as actually having pretty extensive powers of supervision, if you like?

Mr Atkins—In relation to the AFP, I think it has fairly extensive powers in relation to complaints and our operations. In terms of administration, it is the normal public sector power. Because complaints at this stage are relatively extensive—it is complex but it is relatively extensive—it is significant.

Senator MURRAY—Because if we wanted to use the language of this inquiry, he or she has automatic rights of search and entry without warrant at any time to your premises; isn't that so?

Mr Atkins—Isn't it the same with the Privacy Commissioner or the auditor? As we keep on pointing out to our state colleagues, there are lots of protections that we are subject to.

Senator MURRAY—And does the Ombudsman come in and give you a piece of paper which tells you your rights and so on?

Mr Atkins—Not that I have ever seen.

Mr Williamson—It has never been an adversarial situation. We welcome the Ombudsman's visits.

Senator MURRAY—I am just pointing out the fact that one standard in one area might perhaps apply in other areas, too.

Mr Atkins—I think, and this is a line that we have argued with our state colleagues and we have pointed out to other government authorities, we actually welcome the supervision and the oversight of bodies like the Ombudsman and the Privacy Commissioner. It is a protection for us organisationally and for individuals because you can say to someone, 'Look, if you have a problem with what we are doing you can go there.' For example, we routinely invite the Privacy Commissioner to come in and look at our databases. We will draw things to their attention.

Senator MURRAY—In your piece of paper that you give people—and we will see it in due course—when the ATO hand over their pamphlets which spell out in probably greater detail than you do the rights and obligations and so on, they specifically put on there, 'If you have a problem or complaint here is the phone number of the Privacy Commissioner, here is the phone number of the Ombudsman', et cetera. Do you do that?

Mr Williamson—No. It is not within the intention of the document. The intention of the document is to inform people of their rights in relation to that circumstance.

Senator MURRAY—Isn't one of their rights the right to complain that they are concerned?

Mr Williamson—That is generally as to the conduct of the AFP in general. It is not something that would be solely limited to the execution of some form of warrant. Those complaint procedures exist whether it is a warrant, an arrest, taking a complaint from somebody, whatever it may be.

Senator MURRAY—But the person may not be aware that your complaint procedures are available. What the ATO does is simply tell people, 'Look, if you are not aware'. Is it a point you would resist, letting people know that there is a complaint procedure?

Mr Atkins—I think probably the contrary. If a question was raised during the search, most officers would—

Mr Williamson—We train our members quite extensively in how to deal with complaints. That is so that there is an open and transparent system employed so that they do not attempt to stop complaints being made. It is true that we do not hand out pieces of paper saying, 'This is how you can complain.' But all our officers are trained to identify what a complaint is, even if it is not expressed in express words of complaint.

Mr Atkins—Because the fact is that you are obliged under the complaints legislation to report a complaint—

Senator MURRAY—Yes, I understand that. The ATO just goes that extra step. I read through their pamphlet briefly but I do not recall them saying, 'This is how you do it.' They simply gave the phone numbers and the names. The Privacy Commissioner and Ombudsman I think were the two; I do not know if there were any more. That is all I have, Mr Chair.

Senator CRANE—I would just like to follow up Senator Murray with a couple of questions. Once again I will come back to the situation of the ATO and AQIS yesterday, and I think we were rather fortunate we had the two extremes, in my view, alongside one another. The ATO was relatively casual, if I could put it that way, unless they really got on to serious things, but they also seemed to me to be a lot less precise, if you like, in what they were looking for in that casualness. In other words, if they said to the person, 'I have come to look at your PAYE slips to make sure you have taken all the tax out and done that,' and if they spotted something else they could zap around and have the authority to tell the person there—I think these are almost the exact words—'If you do not let us go into this room and look at that, well, then we will issue a warrant and we will get that right to go in there,' whereas AQIS were actually saying that they put a warrant in and they were specific about what they wanted to look for and did that. They also said, as I mentioned before, that their serious ones almost invariably involved the AFP. In terms of the AFP issuing warrants, how precise do they have to be with regard to the nature of the investigation they are carrying out?

Mr Atkins—The first point is we do not issue the warrants. We seek the issue of warrants.

Senator CRANE—Sorry, I put it around the wrong way.

Mr Atkins—We do not have the power—that is the point. We have the capacity to seek a warrant. We do not actually have the power to issue it.

Senator CRANE—My question is: in seeking that, how precise do you have to be when you go to the magistrate?

Mr Atkins—Reasonably precise.

Mr Williamson—I would have said very precise. We have had numerous experiences in the past where warrants have been ruled invalid because they were said to be too broad and not precise enough. There are guidelines prepared by the DPP which we follow as to the level of precision that we ought to follow.

Senator MURRAY—Could we have a copy of those guidelines as well, from the DPP?

CHAIR—You can take that on notice.

Mr Atkins—I think the answer is yes—

CHAIR—Do not commit yourself.

Mr Atkins—but I just need to check. There may be parts of it that we would not want to—

Senator MURRAY—That is right. Just those things which affect our—

Senator CRANE—What is available.

Mr Atkins—Yes. Another observation I can make—this has reminded me of it—is on the cost of litigation on these things. We executed a warrant a couple of years ago in Brisbane. It was a tax warrant. It was a major investigation—33 warrants—and we were in the Federal Court constantly. Apart from the financial cost, which is not small, you have your investigators tied up in litigation and they are not doing the investigation, so the investigation just drags out and out and out. The Federal Court is fairly strict on it now—both ways: if we get it wrong, it will be thrown out, and they are also fairly definite on litigants. But it is still a major incentive to get it right because if you do get it wrong, particularly on things like frauds and tax cases, you can say goodbye to it for a long, long time. The material is locked away, you do not see it and your investigators are tied up. It is a major impost. On that case I mentioned—

Mr Williamson—There were six.

Mr Atkins—Yes, it was just an enormous resource drain. So it is another discipline that we are faced with. Tax would be the same of course—it is probably no different to the others.

Senator CRANE—In terms of my question, that advice you have given to us there is very consistent with what the Attorney-General's Department said. They appeared before us and said that warrants should be precise and directed to whatever the complaint was and could not be, or should not be, wide-ranging things where you are picking things off the shelf, if you like.

In your submission you mention, on a number of occasions, serious fraud and organised crime, and there is a very strong emphasis on the words 'serious' and 'organised crime' and what have you. Do you have some sort of definition or explanation of what you refer to when you go over the line from what might be relatively minor to something that is of a serious nature?

Mr Atkins—First of all, it is situational. In the ACT we have a community policing role. If we leave that aside—

Senator CRANE—I am talking about the general.

Mr Williamson—What we do is assess all matters that are potential for investigation against a prioritisation model which enables us to make a decision as to which matters are investigated and which are not. In the course of that prioritisation process we consider the impact of the matter; and against different types of offences, be they drug offences or fraud offences, there are different criteria to say this is of very high impact or high impact or medium impact or low impact. We also look at the nature of the response which is required, that is, is it something that it is essential for us to do, is it something that we just do as a matter of routine, is it something that someone else can handle better? The AFP in that process is trying to ensure that its resources are directed at the more important and more serious matters.

In that model, very high impact drug matters, for instance, are those involving multiple commercial importations of narcotics, that is, a group of people involved more than once in bringing in more than a commercial quantity of narcotics into Australia. They are very high impact matters. High impact matters are groups of people bringing in once a commercial quantity of narcotics to Australia. At the other end of the scale, the low impact ones are the very small, less than trafficable quantities detected, say, at a mail exchange or on an incoming passenger. That is how those are gradated.

Similarly, with economic crime such as fraud there are criteria by which one matter will be assessed as very high impact and another as high or medium or low. In some instances the dollar value is considered, but the dollar value is probably the least significant matter. We look at: what is the impact of the actual thing which has occurred, what impact has it had on the Commonwealth agency involved, are there elements of corruption and are there other issues in that matter which would cause us to take it on or not take it on?

Senator CRANE—Do you have guidelines? Again, we heard yesterday that the ATO had limited training and limited guidelines, if they had any, whereas AQIS had what appeared to me to be very sophisticated training and guidelines.

Mr Williamson—Our guidelines on case selection are on the Internet and have been provided to all our client agencies.

Senator CRANE—I cannot use it, but I will get my staff to put it on for me.

Mr Williamson—We can certainly provide a copy of those documents and the explanatory material that goes with them. We want people to understand the basis on which we make a decision to accept a matter for investigation or not.

Senator CRANE—In my view, the AFP really should be the model from which we are operating. I realise that you have to have variations. I do not know whether my colleagues agree with me or not but we will obviously discuss that in due course. If you could do that it would be very good, thank you.

Mr Atkins—We would be happy to do a quick search and find all appropriate internal documents that we can and send them over.

Senator CRANE—Thank you, that would be very useful. Earlier on, when Senator Murray raised with you the bit of paper with regard to people's rights, et cetera, I think it was you, Mr Atkins, who said words to the effect that most people would be well versed in their rights. Or was it Mr Williamson?

Mr Atkins—I think it was Gordon.

Senator CRANE—Okay, but a comment like that was made. I can understand that applying to corporations or banks that might, over a period of time, have records being sought for. But when it comes down to an individual level I would question fairly strongly whether people are well versed in their rights in terms of this.

Mr Atkins—It depends how often the person has been arrested. But it is a valid comment and there are times—and the Ombudsman's report refers to a raid that went seriously wrong and we entered the wrong premises—where people will not know their rights.

Senator CRANE—That is a little bit wrong!

Mr Atkins—And that costs us a lot of money and it costs the people involved a lot of distress. In terms of the question, the bit of paper is important. But if you are going into premises in the middle of the morning, that is, at night, because you have intelligence that they are armed—noting that we have to get permission in the warrant if we are going to go in armed—it is a dangerous situation; and, if you do have the wrong address, our people going into that door are going to have to presume that the people on the other side are the right target and are armed, and it becomes very uncertain. In those situations—I am guessing

the reference in the Ombudsman's submission is to this particular incident—officers will act as if the people are armed, so the people will be subdued and—

Senator CRANE—I can understand that. I guess I am not talking at that level.

Mr Atkins—The fact is that they do not know their rights. The communication of rights in those situations becomes very difficult. Where it is not tense, it is far easier. They get the bit of paper; if they are a suspect they will get the cautioning. If they are not a suspect, it will be far friendlier. An innocent person on the street who has had no involvement with the criminal justice system would not know their rights in detail, hence the obligation on our people to ensure that they get the bit of paper and that they know it is authorised by law. If a complaint is made about their behaviour or about the way in which it is done, then it is passed through, in accordance with the law, to our internal investigations and then on to the Ombudsman.

Senator CRANE—I may have misunderstood what you said earlier, but I thought you said that the officer issuing the warrant gave an explanation and they did not actually get a piece of paper. Did you say they get a piece of paper?

Mr Atkins—No, they get a piece of paper which outlines the search warrant powers and what we can do, what we can take, and the basis upon which we can take it.

Senator CRANE—Does that go into the rights of the individual in terms of their position? Does it say there, for example, that you may contact your lawyer and advise them to be there?

Mr Williamson—No, that protection of legal representation comes through protections in part 1C of the Crimes Act. We were talking about the interviewing of persons who are suspected of offences. The requirements that any conversation be tape recorded; the right to have a legal representative available or attend, and the right to tell people where you are or what is happening are protections which come to persons who are suspected of committing offences. Those rights come from part 1C and we tape record those provisions.

If we were not to comply, then any evidence flowing from that, whilst it is not automatic, would most likely be not admissible. Similarly, if we were to act contrary to the rights of the occupier in the conduct of a search, it is most likely that anything that we achieved, or any evidence we found, would not be admissible. So there is a very significant pressure on our people to get it right, otherwise they have wasted their time in either searching the premises or interviewing the person because what they are after will simply not be admissible and useful.

Senator CRANE—On dealing with covert searches, on page 6 you mentioned that there are circumstances, which I can understand, where you would like to search premises. What if the occupier or owner of the building that is being searched, or the information you are trying to seek of a particular individual, are not there? Is there a time given for them to get there? Can the search proceed if somebody is not in occupation of the premises at the time? What is the situation there? What are the rights of the individual in that case?

Mr Williamson—If we go to premises and find that there is no-one there, and we are unable to have the owner/occupier attend at a reasonable time, then we find an independent third party to be present during that search to provide an external level of accountability.

Senator CRANE—What is a reasonable time? If you can get there in a couple of hours?

Mr Williamson—That would depend on the circumstances of the matter.

Mr Atkins—The life of the warrant is limited. You have to do it within a particular time sometimes, and that can be crucial, unless you want to go back to get a new warrant because of operational problems. If it is a live investigation, things are happening.

Mr Williamson—We would, as a rule, prefer people to be present for the whole of the search. The search is happening for a number of reasons. Number one, if the person is cooperative, then the search is much easier. If we identify what it is we are seeking, and they tell us where it is, it is much easier for all concerned. If the person is a suspect, then there is the opportunity to ask some questions about the matter at the same time. The circumstances that are described in our submission in terms of covert searches are where we clearly do not want the person to know.

Senator CRANE—I understand that and I accept that as being reasonable. I was just trying to establish the rights of the individual who owns the premises or the individual who may be subject to that particular search and whether they had an hour or two hours to get there or were absent. You said it depends on the circumstances and the seriousness of the nature of the crime.

Mr Williamson—The issue as well is that the legislation is directed at the entry of specific premises and the seizure of specific things. It is not directed at information, nor is it directed at the person whom the information relates to. Therefore, if we are talking about banking records, the warrant authorises us to go to the bank and seize what is there of a particular class.

Senator CRANE—Well, that is the third party.

Mr Williamson—In a third party sort of sense.

Senator CRANE—I have got a question about third party in a minute. I was dealing with the primary rights at that particular time of the individual and you said that, alternatively, if there is no-one, you have to get somebody who can seriously represent them as their representative. In terms of somebody who could represent someone else—let us say, the person was overseas or if they were from Western Australia over in the east or from the east over in the west, or whatever you like—do you have criteria as to who would be a suitable person to represent that individual or would you get in contact with the individual who is being searched, and say, 'Can you nominate somebody', maybe an executive officer? How would you handle that sort of a situation?

Mr Atkins—That could be problematic, particularly with frauds, if you want to protect documents. Putting someone on notice that you are about to turn up and—

Senator CRANE—I am not asking about when you turn up. I am talking about when you get there. For instance, you might have turned up at the door and walked in and that individual might not be there, for whatever reason. If they are within a couple of hours away, that person can be contacted and can be there. The AFP might have just knocked on the door, wanting to search for X, Y, Z. They would have a warrant. If it was a business, I would imagine the manager or somebody would be there. If they are overseas or interstate, obviously they could not get back there in an hour or two. What criteria would you put on an individual in order to represent them in that situation?

Mr Crooks—I am not aware of any specific procedures, but I can give you an example. We executed a warrant with the tax office in relation to tax offences. We turned up at the front door at 6 o'clock and there was no-one home. We rang his business associates—

Senator CRANE—Was this 6 o'clock in the morning or the evening?

Mr Crooks—This was 6 a.m. We rang his associates, who were also having search warrants executed on them at the time. We found out that he was in fact holidaying overseas. The team leader at the time spoke to the gentleman who was overseas and he nominated his grandmother. So his grandmother came around some hours later and we searched his house with her present. I am not aware of any specific guidelines but commonsense would prevail and we would find someone who was appropriate to represent that person. A family member would be a good start.

Senator CRANE—I think that is a good example. You have actually got somebody senior associated with that person. It is not a clerk who has just started on the job.

Mr Williamson—It has got to depend on the circumstances of the matter and the urgency which attaches to it.

Senator CRANE—My final question follows up once again from Senator Murray and the third party in the primary person's rights et cetera. I can understand that, in collecting evidence, you might need to keep things—if it is from a bank or something. At the end of the day, if you decided to discontinue your inquiries or if that evidence became irrelevant in terms of your investigation, when do the primary rights of the individual click in so that they can be informed that this has happened, that there has been no offence or that no information was obtained? Does that ever occur? Do you assume that they will never find out?

Mr Williamson—In terms of what is authorised by the warrant itself, once the decision has been made that there will be no prosecution, we are obliged under legislation to return the material which we have seized. Our right to retain the physical document goes back to the bank or whomever it was taken from. We would not, as a rule, notify an individual that this had occurred.

Senator CRANE—There is one thing which we did not tell you about but you might be aware of it. This inquiry was referred to the Scrutiny of Bills Committee. Our primary purpose in life as a committee is to check legislation and activities which protect civil liberties and the rights of the individuals, and what have you. We have a very clear direction in our terms of reference about how we conduct ourselves and we have to bring to the

attention of the parliament anything which we think goes beyond. Retrospectivity is a classic example—defining what is acceptable retrospectivity and what is not acceptable retrospectivity. Part of our report will go into a fair amount of detail about the rights of individuals and how their rights are protected.

Mr Atkins—There is an interesting line of cases based on the Freedom of Information Act that go into ongoing police investigations and the withholding of information under FOI, claiming an exemption under FOI in relation to an ongoing police investigation. From memory, there was a case about Dr Edelsten where effectively the court said that you can never say when a police investigation has ended. A phase of it may end. You may have a very successful prosecution and the information you have, which may have helped you get there, has not expired and it is still valid information. It may be directly linked to another investigation or it may spring to life years later. To point to a particular bit of information and say, 'That bit of intelligence has now expired, has either been shown to be useless or has not been used, therefore you should disclose it to the world', I think, follows a similar line.

We do not know when the investigation ends. We do not know when that information has lost its utility. Particularly with serious offences and serious circumstances, it would be difficult to judge when you could disclose something without prejudicing the prospect of it being looked at in the future. The fact that we have looked at someone or a circumstance could alert people that we do not know about, that a particular thing has been looked at. People who are suspects could start changing evidence, people could start altering circumstances. It is a real danger.

I do not know whether this assists the committee but it is one that we are very alive to. We are careful with the information we have. We are careful with ensuring that, as far as possible, it does not become public, that people do not find out about it because of privacy obligations and because that information is in the hands of police. Even if it was otherwise publicly available, the fact that it is police information gives a certain weight to it and gives a certain meaning to it that sometimes is not justified, and there is a real concern about that. But they are also very effective in real operational concern. Premature disclosure of information can prejudice not only investigations that we know about but things that may happen in the future. There is a tension and balance there that, at the moment, has not been addressed and I think it would be very difficult to address because it is so circumstance driven.

Senator CRANE—I hear what you are saying, but nonetheless individuals do have rights.

Mr Atkins—Yes, but if you look at the Freedom of Information Act as a reflection of one attempt to balance those rights, access to operational information is protected.

Senator CRANE—Do you have the same problem with the Freedom of Information Act as people like myself trying to get information and all the good bits are blanked out?

Mr Atkins—We usually win. With regard to FOI, we have a fairly careful process. We have had a couple of spectacular losses in the AAT and we have learned lessons from that.

You need to look at the whole legislative structure lined up behind it. You have the Privacy Commission, the FOI Act and the Ombudsman in both arms. There is the Ombudsman in the normal public sector sense and the Ombudsman as our complaints mechanism. The auditor is also behind us. Everything we do is in that context.

In terms of protection of rights, it is not only an individual's right to know as a result of our searching; it is also an individual's right under our legislation such as it is under the FOI legislation and under the other things. I look at it as a whole. Information we gather on someone as a result of a search warrant is protected by the Privacy Act and the complaints legislation. There is a strong secrecy provision in our act, section 60A. There is a discipline regulation which expands that slightly. But 60A is an absolute prohibition on disclosure of any information in the possession of an AFP employee, unless it is effectively required for an AFP function. There is a whole structure governing disclosure of information by AFP employees.

Senator MURRAY—What is the archival consequence of that? Is stuff released after 30 years, or 50 years, or 100 years, or not at all, or is it destroyed after—

Mr Atkins—We would seek protection if it is appropriate. With other cases we happily release information of historical value. It is an archives policy matter more than anything else.

Senator MURRAY—But many laws specify the archival life of material before it becomes public.

Mr Williamson—We have records disposal authorities which are approved by Australian Archives as to the time frames under which we must keep certain material. Some material we dispose of routinely very quickly; other material we must keep forever. They are classed according to various schedules which Archives issues as to how long we retain what classes of material.

Mr Atkins—These days there is a fairly disciplined intelligence gathering regime. Information is not collected and kept for the sake of information, it is kept for a purpose. Computerisation helps that. The old paper based regimes which led some forces into problems have mainly gone.

Mr Williamson—One of the practical issues is that we are conducting investigations today using material which might have been seized 10 or 15 years ago because organised crime groups tend to be quite persistent. Whilst there is material seized in investigation A, that material may become relevant in investigation B later on, and it may become relevant in investigation C. Whilst we have disrupted one syndicate, the information we have got then could still be useful in other circumstances. To have a requirement to advise somebody that the information had been gained about them, by whatever means, would prejudice that subsequent use.

Mr Atkins—And if you are heading towards national security interests, it is more acute.

Senator CRANE—I can understand what you are saying there in terms of those types of investigations and the flowthrough, but I am talking more about individual operations. With some of the things that we dealt with with AQIS yesterday, for example, they were dealing with a single meatworks, a single owner. An activity there would be under investigation. It is limited. It is obvious that it is limited to that particular thing. It is not a syndicated type operation. The syndicated things just flow from one to another, we all understand that. I am talking more about the individual case because, one way or another, these things seem to get out and you leave somebody with a permanent black mark against their name.

Mr Atkins—It is hard for us to comment. We are a police organisation. Our function is set by statute. The emphasis of our functions is on criminal investigations. Our interest is not to have information get out. It is ironic that, to some extent, our interests may align with those of the Privacy Commissioner—and the Privacy Commissioner's officers have observed this. We do not want our information to get out unless we choose—

CHAIR—Did Mr Crooks want to say something?

Mr Crooks—I was going to say perhaps the model that we use to prioritise the work that we do might answer some of the problems or concerns that you have. Most of our jobs or operations at the moment are focused on organised crime. The types of jobs that we are taking on are not, in the main, smaller localised type jobs that you describe.

CHAIR—Are you all based in Canberra?

Mr Atkins—Yes.

CHAIR—I think we are only half-way through. Are there any problems with you coming back, say, one night? Is that going to disturb the families of Williamson, Atkins and Crooks?

Mr Crooks—As long as it is not this week.

CHAIR—Not this week, no.

Senator CRANE—It will not be this week because I will not be here.

Mr Atkins—Yes, subject to—

CHAIR—All right. Are you finished on that one?

Senator CRANE—If it is possible to come back—

CHAIR—I was speaking to you beforehand. There was an inquiry—not so much directly on this. I will just read the second reading speech of Michael Tate, the minister at the time:

This decision—

this is the decision they were talking about on this occasion—

> has created a real and serious dilemma for me. I come to the Parliament with two important competing responsibilities: my responsibility to maintain and defend the civil liberties which we have inherited through the centuries in our common law, and my responsibility to ensure that the laws made by the Parliament are able to be properly enforced, so as to afford appropriate protection to the community. Law enforcement agencies cannot be expected to function effectively with their hands tied behind their backs.

That was the principle he was talking about there. I noticed that, in your submission, you were saying that science and the times have moved on and that the force is not altogether happy with the way things are now. I do not know whether you feel able to talk about that when you come back, because I suppose you are bound by policy and your duty to that and to the government.

What was being talked about in 1990 was arrest and questioning. There was an exchange which I thought I might be able to give you, but when I read it I think it is a robust exchange which I will just leave as is. The people who came along from the Australian Federal Police Association were Chris Eaton, Garry Fulton and Pat Jumeau. What they were really saying was: 'Look, we went right through this issue of the balancing of those two rights.' It might be like telling you how to run your submission, but it might be worthwhile talking to them. I remember that at the time the force felt a bit restrained because of government policy and their obligations to remain neutral. It was the police association that talked about that. If you want to develop that material that appears in your submission, and you feel that you are able to, it might be helpful to the committee.

Mr Atkins—Are there other areas we could assist you with? To some extent it could be handy to outline the stages of an operation, including when decisions are taken to seek warrants.

Senator MURRAY—It may not be appropriate, so I will leave it to your judgment, but quite often this parliament takes the lead for other parliaments, and our reports are noted and followed up. As you know, legislation and procedures are reported and followed up. In many respects, as individual members of the committee, our views on search and entry are affected by our experience in our own states, which are often state related, not federally related. I would be interested—and only if you believe it is appropriate—if you are able to highlight to us any key differences you see between the way you operate search and entry provisions and your procedures—training, accreditation, the rights issue, et cetera—and the way in which you govern with legislation, and those of other police jurisdictions in this country. I think it would be difficult for you to comment on other government agencies, but it would be interesting to see whether in fact you believe the federal government and you are taking the lead or whether you are behind—or maybe other jurisdictions are doing a bit better or have laws or processes which are better for you. That would assist us. We would not necessarily be aware of that, but operationally you might be aware of it.

CHAIR—Did we ask the association whether they wanted to make a submission? What did they say?

Secretary—As yet there has been no reply.

Mr Atkins—On that point, yes, it could be valuable. I come back to the early observation that, apart from the ACT, and given that the ACT is still a small community, a

lot of the things we do are different from most of the work done by state police agencies. A lot of our work is more akin to the work done by the NCA, of course. It could be worth speaking to the Crime Commission in New South Wales—Phil Bradley's people.

Senator MURRAY—I will leave it to your judgment. You respond as you see fit but it may be helpful to us.

Mr Atkins—We can certainly do something else. We will gather up our internal documents and bring them over.

CHAIR—Thank you very much, Mr Atkins, Mr Williamson and Mr Crooks.

[10.22 a.m.]

HAMPEL, Ms Felicity Pia QC, President, Liberty Victoria—The Victorian Council for Civil Liberties

CHAIR—Welcome, Ms Hampel. Do you want to make some preliminary remarks?

Ms Hampel—I need about five minutes.

CHAIR—Take as long as you like.

Ms Hampel—There is a little framework that I thought of, if that is convenient to you. The committee secretary sent me the terms of reference last week and also some of the submissions that had been made, particularly the submissions by the Acting Privacy Commissioner, the transcript of the appearance before you of the representatives of the Attorney-General's Department, as well as the Australian Federal Police and Australian Taxation Office submissions. So I have had the opportunity of looking at those.

Unfortunately, I have had no opportunity really to do any other independent research. I do apologise for that because it is a very important issue and it has been very heartening listening to this and seeing the emphasis on the rights of the individual. I do not want my lack of time and capacity to do further research into it to undervalue what I want to say about the importance of the protection of the rights of the individual in what is a difficult balancing process of law enforcement.

As you know, Liberty Victoria is a volunteer organisation. We are a small, membership based organisation. We just do not have the resources to have people do the research. I have to try and fit this in alongside my practice, basically. So that is my little apologia.

Senator CRANE—We hear what you say. It might be worthwhile, after we have got all the transcripts, that you have a look at those and then give us some sort of a commentary on some of the issues that are raised there.

Ms Hampel—I would be very grateful to have that opportunity because I have done my best to deal with the matters in the submissions that I have seen, and they do raise some important points of principle. Given the nature of the questions that I have heard asked in this hearing this morning and the nature of the questions that were asked during the appearance by the representatives from the Attorney-General's Department, this is not just a cursory inquiry, obviously, but a really serious and deep one. If there are other matters on which you would be interested in hearing from me from a civil liberties point of view then I would be very happy to accept another invitation.

There were four touchstones in the terms of reference: fairness, purpose, effectiveness and consistency. I thought, if it suited you, that I would speak briefly about each of those from the civil libertarian aspect. I start from the fundamental principle that not only is a person entitled to their privacy, to their right of integrity of existing, of doing what they want to in freedom and free from scrutiny, but there is also the presumption of innocence,

that people should not have to expect visits from government authorities or agencies in order to prove that they are not doing anything wrong.

I start from not only the right to privacy but the premise that, if citizens appear to be lawfully going about their affairs then they should be entitled to continue to do that and there has to be a trigger, a justification, for any intrusion into looking at their documents, into looking at their houses, at their possessions, or to asking questions.

So even where we look at the right to enter and inspect documents for essentially audit purposes, I have a grave concern from the civil libertarian aspect about whether people have to prove they are complying or whether there has to be a threshold question of suspicion of lack of compliance before there should be a proper right of entry. That is the philosophical basis.

I would like to take the four touchstones in reverse order. The last that was mentioned was consistency. It is clear that the powers of entry and search are not consistent amongst Commonwealth agencies. Both the Privacy Commissioner's report and the Attorney-General's Department evidence make that clear.

From my perspective there is no proper justification for inconsistency. The reason for the inconsistency seems to be historical accident or anomaly rather than any application of principle. The tax office seems to have, at a very early stage, obtained an unfettered right of entry and power to search documents and search premises, as the Attorney-General's Department said, at a time when civil liberties issues were not as prominent in the minds of parliamentarians, it seemed, as they currently are. So it is important to look at how that arose.

We are faced now with the situation that has evolved over the years, not necessarily by application of principle but more because it is the historical accident and the grafting on of later principles to an existing system. Tax has been able to say, 'Our benchmark is X. We can enter whenever we like and at whatever time we like.' Tax can say that without there being any purpose other than existence of taxpayer records. Therefore, any other powers they get in respect of ancillary legislation, they say, has to meet that benchmark.

On the other hand the Attorney-General's Department has set out some very good guidelines in relation to triggering powers; the basis for entry; the need to prove your identity; the need to have an independent scrutineer of the proper basis for entry, and that includes whether there is reasonable suspicion or reasonable belief; judicial imprimatur; and return of information to that person. There has to be that type of control, which I think is a very good framework and should be the benchmark for working out the framework for powers of entry and search. That, essentially, is what I want to say about consistency.

Senator CRANE—Are you saying that if there needs to be an inconsistency then there should be a justification for that inconsistency?

Ms Hampel—Yes, indeed. It should not just be because it has always been there. That is no justification for taking away a person's rights.

Senator CRANE—I am sorry to interrupt, Mr Chairman.

CHAIR—I think that is probably a good way to do it, by dropping in a question.

Ms Hampel—I am happy with that, if that suits you. The principles that have been set out in the Privacy Commissioner's report were taken from the Australian Law Reform Commission report. They are very sound principles, coming as they do from the international covenants. I think they have fundamental importance to those true rights of an individual. They have to be the starting point, rather than the need to regulate, the need to control, the fear that people are doing bad things and we have got to make sure they do not.

I think we start with an assumption that those rights, if we are truly to give them weight, have to be valued. Therefore, you do not say that just because Tax has had it forever, they can continue to have it. Rather, you start with the right and there has to be a proper cause for deviation from it, rather than saying, 'We're going to do this and there's a justification for doing it because we believe that some people avoid paying their tax' or, 'We believe that some people don't keep their records properly.' That is the first part on consistency.

The next point I wanted to make on that was that I take the powers given to the Australian Federal Police as the benchmark also and as a general principle to say that other authorities should have no greater powers of entry and search than those conferred upon the AFP under the Crimes Act, unless for a very good and defined purpose that is subject to scrutiny. As a matter of principle, the starting point should be the incursions that we allow into individual rights and freedoms in the context of the criminal law in the regulating of people's behaviour vis-a-vis each other and vis-a-vis the state by the criminal law.

The powers that are given to those who are enforcing civil law and civil rights should not impose greater incursions on an individual's liberties than the powers that are given to those who are charged with the investigation and enforcement of the criminal law. That seems to me to be a fairly simple but principled benchmark for assessing powers to be given to various regulatory authorities. You start, firstly, with the premise that no-one has to prove they are innocent or that they are complying with the law; secondly, that those rights of privacy and freedom of existence are very important; thirdly, when you are going to justify an incursion, because there is a principled basis for doing so, your starting point should be no greater than the powers given to those charged with investigating breaches of the criminal law.

The second aspect—and it was the third in your list—was the effectiveness of these powers of search and entry. I think there are two aspects of that: the first is whether they are effective in obtaining access and information; the second is whether there is any effective review of the exercise of the power and whether there is any effective remedy or sanction for abuse. So it is not just whether the investigating authorities get in and get what they need, but what happens if they abuse their power.

As to the first aspect, the effectiveness in obtaining access to information, generally the Commonwealth laws are effective. They do allow access and, if you use your AFP benchmark where you have to get a warrant from a court, you have to satisfy a court that there is a reasonable suspicion and a justification for breaking in and obtaining the

information. You have to account for all the information that you obtain by putting a return on the warrant; you have to either deal with the material for the purpose of an investigation or return it within a limited time. These are all, in principle, sensible measures of achieving the balance.

There are obviously bits of fine tuning that can be done here and there. The making of a consistent rule would make that much easier. A person should not be subject to a different regulatory regime where the Australian Taxation Office, Quarantine or the AFP go in. You should have a uniform system of obtaining information, accounting for the information you obtain, and returning it or keeping it for a particular purpose.

From a civil liberties point of view, I think it is the second aspect that is particularly problematical—that is the review of the exercise of the power and the remedies or sanctions for abuse. I do not think that they are adequate at the moment. That is the area that needs real tightening and a consistency of approach. It seems to me to be important. This is almost saying we need a code or we would be well served, short of having a bill of rights, having a set of legislatively sanctioned guidelines by which all powers of search and seizure will—

Senator MURRAY—Like a charter?

Ms Hampel—Yes, like a charter.

Senator MURRAY—The Canadians have done that.

Ms Hampel—Yes, but this related particularly to the powers of access and entry to premises and search or seizure of materials. Those powers exercised by whomever under Commonwealth fiat have to conform in a legislative form with particular principles or guidelines, similar to the privacy principles, enshrining that there should be, save in emergency circumstances, a warrant issued by a magistrate or other judicial officer with the emergency procedures in a similar way to how the AFP search warrants in emergencies operate. Only designated people are authorised to execute the warrant. They must carry adequate ID and they must identify themselves to the occupiers of the premises. People must be informed of their rights. The materials have to be logged. There is a proper procedure for dealing with disputed seizures, and not only documents subject to legal professional privilege, but anything else that is a subject of dispute, for example, outside the terms of the warrant.

Senator CRANE—You have raised a number of issues. In particular, I am interested in this one of dispute with what is claimed in a warrant. As I understand it, your opportunity is to go to the Federal Court and have that warrant disputed and try and have some of those things withdrawn or not admissible or taken out of the system. Nonetheless, they have been seized.

Ms Hampel—Yes.

Senator CRANE—Federal Court is a very expensive exercise, particularly for an individual. Are you saying that there should be some independent authority officially set up who could examine what has been taken against the warrant and make a determination as to

whether that should be allowed to stay in there or not? Obviously, we have right of appeal to a Federal Court. What exactly are you saying?

Ms Hampel—I am not sure of the exact mechanism. I do not think there needs to be a vetting automatically of every one.

Senator CRANE—I am not asking for that. The individual would make that request.

Ms Hampel—If the individual says, 'I think you have acted beyond your warrant; you have taken things that are beyond your power,' and the individual rightly says, 'You have no right to access them; I want them back; I do not want you to look at them just because you have them,' then I think that there should be a mechanism short of the Federal Court because that is really only for the wealthy.

Senator MURRAY—There is an additional aspect. The Federal Court is not only expensive but takes a long time.

Senator CRANE—Yes.

Senator MURRAY—But, particularly, it is public. All applications for warrants are not public.

Ms Hampel—That is right.

Senator MURRAY—The execution of warrants is generally not public, unless somebody with a rather nasty motive leaks them, which does happen. If somebody experiences the embarrassment of a wrongly served warrant, if they want to have redress, they have to make it public. To me, that is one of the prime problems with resolving the issue. You have to take a private embarrassment and make it a public embarrassment, whereas you should be able to get private redress for a private embarrassment. I do not know if you agree with that, but that is a fundamental issue.

Ms Hampel—There are suppression powers within the Federal Court Act, and rules which are exercised from time to time but, nonetheless, the nature of the process means that these things will often leak into the public domain.

Senator CRANE—And the application is on the public record. You can read it in the *West Australian* in WA.

Ms Hampel—Unless the suppression order is sought before the application is filed so that a pseudonym can be used. That has been done from time to time.

Senator CRANE—It is very difficult.

Ms Hampel—Yes, it is very difficult because of this very important principle of court proceedings being open. I understand why warrant applications should be private. Your point about making the challenge to the breadth of the warrant private is a very good point. There is no doubt that once it comes into the public domain, there is the assumption that if a

warrant has been executed there must be something suspicious, and suspicion very quickly turns to guilt in the court of public opinion.

Senator MURRAY—It is the same problem I have with a police file: the presence of a police file implies there is something that has gone wrong.

Ms Hampel—Yes.

Senator MURRAY—I happen to know of an instance, again, in Western Australia—it is not related to search and entry—where somebody who had a friendly relationship, if you want to describe it that way, with a senior police officer made an allegation against somebody and suggested that they would open a police file and have it kept. The fact is that that is there forever and a day unless there are archival reasons for its being destroyed. If ever that is leaked, the simple presence of a police file implies that there was something worth investigating. That is my concern with those things. Sorry, I should not have interrupted you.

CHAIR—Just on that matter, do you notice any tendency for the media to be present at arrests and at the execution of warrants more so than there used to be?

Ms Hampel—I think it has actually abated a bit in the last couple of years. There had been what I thought was a very sorry phase with some investigating agencies of alerting the media to the 6 a.m. arrest of a person of public prominence or the 6 a.m. raids on the offices of people in the public eye. I think that is inappropriate.

CHAIR—And you think that is fading?

Ms Hampel—Yes.

Senator MURRAY—But there is no sanction in the law against that, is there?

Ms Hampel—No.

Senator MURRAY—There is no set punishment laid out in terms of the Crimes Act—either state or federal—to stop that, whereas you heard the AFP say that if they do not comply with certain elements of the Crimes Act there are very serious penalties. I would have thought the deliberate provocation of public embarrassment, whether people are prominent or not, is a serious offence and should become a serious offence.

Ms Hampel—And whether or not charges are laid and whether or not a conviction occurs. This is one of my concerns about the inadequacy of the remedies for review of the exercise of power and sanction for abuse of power. There will be circumstances where a court will hold that the evidence has been unlawfully obtained and excluded. Equally, there will be circumstances where the court will hold that, notwithstanding the unlawfulness of the exercise of power, they will nonetheless admit the evidence.

So, whilst it hurts the AFP and the DPP if they lose evidence, it will not always happen, because sometimes it will end up being an exercise of discretion by a court as to whether

they so want to condemn the conduct that they impose the ultimate sanction of excluding the evidence or whether they say, 'Yes, this was bad but the importance of the evidence outweighs the breach of authority, or the principle of breach of authority, by the individuals involved.' So it is not a hard and fast sanction; it is not like the American situation where, if it is unlawful, it is out no matter what. There still is the question of no sanction even if the evidence was obtained unlawfully or even if there was a breach of guidelines, a breach of authority, leaking of information, the use of abusive language, intimidation or the over-powering of people—things that do not actually go to the legality of the seizure.

Senator MURRAY—Without a charter or some establishment of fundamental principles you cannot rely on parliament itself to protect rights. I will give you an instance: we are dealing here with search and entry provisions into premises, but there are also search and entry provisions into people which are far more intrusive, in my view. We have always protected search and entry provisions into the mind, because that is what the right to be summoned is about. It is the avoidance of self-incrimination; it is related to your mental exposure, if you like. You outlined earlier that the greatest and most intrusive powers are those attached to criminal activity and therefore the AFP should perhaps be the highest authority, yet with regard to the right to silence, for instance, the ATO has greater power than the AFP. You do not have the right to silence in certain areas of tax law, whereas you do in criminal law.

Ms Hampel—That is right, and I think they should be brought into line with the AFP criminal standard.

Senator MURRAY—That is right. If you look at the Crimes Amendment (Forensic Procedures) Act which was passed by this parliament, this parliament permitted people who have not been charged and who are not suspects to have samples taken from them for the purpose of eliminating them as suspects in a crime. I could never fathom the parliament doing that. I opposed it utterly. I fought tooth and nail and lost. I could never understand the parliament adopting that approach.

Ms Hampel—That is a true reversal of the onus of proof.

Senator MURRAY—That is right.

Ms Hampel—I think that is fundamentally wrong. I was visited by a Western Australian parliamentary committee inquiring into similar legislation. I argued very strongly before them that it was fundamentally wrong in principle to make people prove that they were not a suspect.

Senator MURRAY—Where I am leading to with this line is to confirm my belief that you need a set of standards against which other things are measured. If there are to be exceptions they have to be for a very good reason. At the moment, within parliamentary practice and guidelines, the set of standards we have got are relatively loose and, in fact, such as exists by and large exists out of the Scrutiny of Bills Committee because, to my knowledge, that is the only body which has a clearly defined set of terms of reference which actually spell out a civil libertarian charter. Senator Crane raised it earlier—elements such as

retrospectivity and inappropriate delegation of powers and inappropriate attacks on a person's liberties and rights. But it is very loose and vague.

Ms Hampel—There is a trend at times to run law and order campaigns and where political expediency will often dictate a taking away of individuals' rights. That is one of the reasons why I would like to see some of them enshrined in a charter so that a politically expedient removal of rights cannot occur, or cannot occur as easily. That is one of the reasons why I think it should exist.

The Attorney-General's submission was very interesting in that sense because they spoke of the almost inevitable conflict between the brief they will get from another authority to draw up legislation which gives powers of entry and search and how they will be trying to pull it back to conform with the guidelines they have. But ultimately it is the parliamentary will as to how broad a power will be given, whether it will be in legislation or subordinate legislation, whether it will be triggered by a reasonable belief in the commission of an offence or the breach of a particular act or regulation, whether it will be given by a magistrate exercising a form of judicial or administrative power, or whether it will be by the head of department or a delegate of the head of a department. The Attorney-General's Department can have guidelines but parliament ultimately has to decide. That is a concern.

Senator MURRAY—One of the problems for political parties, the political process, and particularly those parties which have the opportunity to govern, is the demand by society for there to be an ordered society. These days government is not regarded as running the country and dealing with foreign affairs but in fact producing legislation. If you compare the legislative production of parliament over the last 10 or 15 years to that over the previous 50 years, there is an exponential increase. We go through something like 200 acts of parliament a year.

Senator CRANE—We did in the last couple of years.

Senator MURRAY—A consequence of that is that individuals and organisations have a massive degree of legislation to cope with. As a result there are people needed to police it, and so it goes. This is not just an Australian problem, it is an international problem.

I do not know if it is the reason for it but, as I understand it, all tax returns are public in Finland. They are published. So what you pay in tax and what you earn and what you declare is listed. They have a kind of neighbourhood tax watch. If you happen to be living in a wealthy area but declaring a low tax and so on, your mates would ring up and say, 'There is something funny going on here because this person has a boat and a car and a great job yet they are not paying much tax.' In other words, they have made a transparent situation so their tax authority then does not have to use powers of search and entry. It is a public duty to pay taxes and your taxes are published and the community self-polices it.

One of the ways you get over the demand of society for order and policing and intrusion and search and entry is self-declaration, which is the ATO's preferred approach. You sign annually your tax certificate. With ASIC you sign your corporations certificate and say you have done what you were supposed to do during the year, and they accept that unless there is reason not to. One other way to get round that is a transparency, that as much as possible

of what we do should be transparent. If we all run around naked then there is no reason for clothes kind of thing is the philosophy.

As a civil libertarian organisation, how would you deal with the conflict between the demand of society for an ordered society, the demand for this massive legislative production through the political process, and therefore the demand for policing? Consequent to that are search and entry provisions and intrusion on people's rights. How do you help us fix that demand problem?

Ms Hampel—It is a big question.

Senator MURRAY—It is, but it is at the heart of it.

Ms Hampel—Yes, it is. I start from wanting to have a society and a regulatory framework that works on a belief in essential goodness and compliance of people within a community. So you have laws in a sense as a gate at the end to catch those who do not comply with the general framework. But you work to have compliance with society's values and laws by more of a process of education and identity with the society than just the sanction. So the sanction, including the power to investigate, come at the end as part as an educated community process that understands its rights and responsibilities, rather than imposing regulation on the top and making everybody comply, which seems to ignore any sense of individual commonweal. That is the philosophical part of it, I suppose. What I am concerned about in your Finnish example is that it really establishes a civilian militia.

Senator MURRAY—I think it is Finland. I know it is somewhere in Scandinavia.

Ms Hampel—Wherever it is it has aspects of a civilian militia to it, and I do not like the idea of setting citizen against citizen, a having a look at everybody and dobbing everybody in sort of situation. That seems to me to be a little bit like that.

Senator MURRAY—But isn't that a common theme in our society? We have a phone-in on drugs. With this latest GST tax change it is the community which will advise the ACCC where there is going to be price rorting by retailers. It is a theme in our society, that self-regulation, that neighbourhood watch kind of thing.

Ms Hampel—I would like to take it the other way round. I think the idea of the assumption that your tax return is correct, and that your company return is correct, because you are warranting that by signing it and putting it in, should be taken to be so unless there is something that gives rise to suspicion. What gives rise to suspicion should not arise from a citizen militia but from those who are then charged with looking at your return to see whether there is something that looks aberrant—whether they think that by your occupation this seems to be a low income, or whether they do random searches in order to pick patterns and to see whether people comply. I would much rather have that than create the system where everybody is looking at everybody else to see what people can dob others in about—whether it is failing to flush the toilet if you are in Singapore, or whether it is understating your income or seeming to have a more affluent lifestyle than you would appear to justify.

Senator MURRAY—Let me give you another example. Health and safety is a major issue. That is very much a search and entry thing. You can go in to make sure the premises are clean and all that sort of thing—that is very widespread. There was a somewhat alarmist program last Sunday on food standards in this country, and how many people have stomach upsets because food standards are not complied with.

Ms Hampel—Was that all right?

Senator MURRAY—Who knows? One prospect of the self-regulation is that you sign that your shop, your restaurant or your deli is kept to the absolute standard of cleanliness required. If you are not going to have a search and entry kind of power then the penalty for failing to do what you have said you will do needs to be very great. For instance, you can say that you run it perfectly cleanly but if they find out you do not then you actually have to close down your business. Are you with me?

Ms Hampel—Yes.

Senator MURRAY—Are you suggesting that, if you adopt a process for greater self-regulation, the penalty for not telling the truth should be greater than it is at present? One of the problems we also have is that, in many respects, the generalised search and entry provisions to premises in our society for checking standards in factories, shops and public facilities, do not have a significant consequence if you do not comply, even though there might be matters which are fairly important.

Ms Hampel—Self-regulation does not mean that there is an abdication of responsibility by government or regulatory authorities to tell people what the law is and what they must comply with. With self-regulation, I think, has to come a greater degree of education and information so that people know what it is they have to comply with. One of the problems with this plethora of legislation is that not even lawyers and senators can be taken to know what the law is, let alone ordinary citizens going about their business.

CHAIR—On the issue of society being, as it were, a civil militia or a bit of a wholesale—

Ms Hampel—Dobbing crew?

CHAIR—Yes. Would you agree with a radio broadcast by Winston Churchill to the USA on 16 October 1938—well before you were born but not before I was born. He was assessing the Nazi society and it was, he said:

> A state where men may not speak their minds. Where children denounce their parents to the police. Where a business man or small shop keeper ruins a competitor by telling tales about his private opinion. Such a state of society cannot long endure if it is brought continually in contact with the healthy outside world.

I take it that what you are a bit concerned about is that if we have a system of civil informers we will get to that sort of situation.

Ms Hampel—Indeed. I think it is an unhealthy premise for a society generally and, as Winston Churchill so eloquently points out, it has such prospects for abuse and for true and

real harm and destruction of people as a result of abuse. I think it is something we should steer well clear of.

CHAIR—On the issue of judges exercising discretion where the evidence has been wrongfully obtained, you would have to be a fairly courageous judge to put aside evidence that is going to go to the heart of the matter, wouldn't you?

Ms Hampel—Discretions are always very difficult, aren't they? It depends on how important the individual judge thinks the breach is and how important the principle behind the breach is.

The breach may be very serious but, if the judge is satisfied that it was inadvertent in the sense that it was not a deliberate flouting of the law by the particular officer but rather it sprang from a reprehensible ignorance, then that is going to affect the exercise of discretion, but it does not affect the rights that have been violated by the person. So the remedies that exist may not indeed be adequate to deal with the violations and they are not directly connected. The report that was attached to the Ombudsman's submission highlighted some of the problems to do with that.

There are real concerns about the investigators investigating complaints into their own conduct. There are ineffective sanctions against police or other people charged with those types of investigatory powers if they do breach. As the Ombudsman's report in that particular case showed, there may not be necessarily a will to change if you can do it and get away with it and all you will get is a rap over the knuckles in an Ombudsman's report but you do not lose the evidence, or you do not get fined, or you do not get charged, or you do not lose your powers.

Similarly, the awarding of compensation to an individual usually is not an adequate remedy. If it occurs at all it will occur a long way down the track and it will only be awarded to those who have got the strength and the persistence to actually pursue something all the way through.

Senator CRANE—And can afford it.

Ms Hampel—Yes. That is right. And given that you are looking at it in the context of investigations of criminal offences or other types of breaches, you start with an assumption that people have done something wrong or might have—so there is always some dirt that can be thrown back—so it takes real bloody-mindedness and a lot of money and a lot of moral strength to pursue something like that. So they are, I think, at the moment inadequate remedies.

There is no doubt that the sanction of losing the evidence is the best sanction for keeping law enforcement authorities on line, but it will not always work. And it should not always work, either, because sometimes the breach may be minor and technical, the evidence may have enormous significance, and it would be one of those true affronts to justice if the evidence were excluded. I think that is why we do not have a hard and fast rule of exclusion of every bit of evidence that is unlawfully obtained in the way that the United States does because we have grappled with this affront to justice notion, and we must. But the balance is

an uneasy one and an inadequate one because you will not always have curial proceedings in the first place so as to exercise the sanction of excluding the evidence, and you will not always get the evidence excluded, and the other remedies just are not there. So again, making sure there is some charter of obligations, and building within that some form of accountability—and I think it is really accountability rather than punishing individuals that we have to talk about—is going to ensure that we achieve a proper balance between that significant importance of protecting the individual's rights but understanding the law enforcement and the investigatory needs that we must have in a society.

But, there is no point in just having a punishment without telling people what it is that they are allowed to do and not allowed to do. So, if you are going to have a regime of self-regulation—to come back to the last part of Senator Murray's question—should there be a higher penalty for non-disclosure or for lying? To me, the answer to that depends on how much information you give the individuals who need to comply, in a form that they can actually understand and comply with. A law is not a good law if people do not know it exists and are not given the means of complying with it. And a law is not a good law if people have an inadequate remedy for a breach of it, and at the moment the remedies for breach are inadequate. I think that deals with those aspects.

Senator CRANE—You have raised a lot of issues and some of them cover what we did before in terms of what this inquiry is about. I wanted to highlight a fact that you might not be aware of. We did an inquiry recently into appropriate sentences and inconsistency across the law in terms of jail sentences and what might happen through different legislation. In some instances some of the penalties seemed absolutely draconian vis-a-vis the crime that could be committed, vis-a-vis what happened in other legislation in terms of similar offences.

This inquiry followed directly out of that because it became obvious to us there were a number of search and entry provisions being brought in which were very inconsistent across the board—very similar to the sentencing thing. The minister, Daryl Williams, supports this inquiry very strongly because he has raised it as well in terms of the structure of government. So that is some of the background of it.

I would like to go directly to the code and the necessity to get a consistent set of guidelines. I am reluctant to use the words 'charter' and 'bill of rights' or that type of thing because, whenever those words come up in Australian society, you are split down the middle.

Ms Hampel—I agree with that.

Senator CRANE—I think we have to talk about a code or guidelines. They are acceptable in terms of the Australian psyche whereas, with the others, people think that is an infringement of their rights going the other way. Just coming to that, is it possible—which you cannot do today, I do not believe, and we have not got the time to do it—for you to give a little bit of thought to this subject—which obviously you have—so you can come back to this committee with, say, half a dozen or seven or eight key points you think we should include in that code if we were to suggest a code?

As I think you will have guessed from my questioning earlier on—which you heard, I think—it is incredibly important, when somebody is landed with a search and entry warrant—and I am talking more now about the individual and not syndicated crime or that sort of thing, or people who might know their rights, the banks and what have you—for those people to actually know what their rights are because it sends most people into absolute trauma. With inconsistencies in a warrant and whether it goes beyond what the power should be or whether they can obtain evidence—and I would like your comment on this—if in fact the education process is right within the various authorities, there is no excuse whatsoever for going beyond the powers that come under that particular warrant. Hence, that would make it a lot simpler for a judge to make a decision about whether evidence should be admissible or not admissible.

Let me give you an example. I think you were here before when the AFP were here. They said it was the right of that individual to have the tape or a transcript of it within seven days. That is pretty explicit and simple. I would suggest that if they have not got that within seven days then in fact they should be told, straight out, 'That is off the agenda; you have not complied with the rules.' That basically gets down to training. I use that as an example. So this whole process should actually have firm guidelines, be backed by parliament, so that, firstly, the people who are issuing them and operating them know what the rules are and, secondly, they should be spelt out in the code so that those people who are being investigated know what their rights are. As far as you can go you should get rid of the grey and have a black and white situation. What would be your reaction to that type of approach? Am I going too far?

Ms Hampel—So far as a code informing people of their rights and having a means of ensuring compliance with them, I agree entirely. The automatic sanction of, 'If you do not get the transcript within seven days the product seized as a result of the search and entry is unable to be used', I think may be a concern because, if you have a hard and fast rule where there is a trivial breach or what might be a minor breach in the overall context and you lose all the evidence as a result, then you may end up having an affront to justice sort of response. But, on the other hand, unless you have a serious sanction for failure to comply with every step along the way which enshrines the individual's rights, then you are going to render those rights nugatory because, unless the police or others know that they must comply with those obligations and they face serious sanction, they will just flout them—as happens.

Senator CRANE—Where do you drawn the line then?

Ms Hampel—I come from a background as a barrister.

Senator CRANE—If they sit here and say what they said—let us say it was out in the Warburton Ranges, to pick a place in Western Australia—and there was a physical problem with getting that process through and getting it back to them, then you can have an allowance for time for travelling and that type of thing. Even in the Warburton Ranges, I am not quite sure in Australia where you go when you have not got modern communications to move these things pretty quickly.

Ms Hampel—Exactly.

Senator CRANE—But if you do not spell these things out pretty precisely you really end up with an omelette of nothing.

Ms Hampel—That is right, because a right without a means of enforcing it is not a right. One of the reasons I am concerned is that these can often turn out to be resources arguments or to be used as the industrial arm of a resource argument, so police will say, 'We can't provide the transcript because we haven't got the budget funding to have the typist there to type it up.' I have sat in court and heard that. My background is as a barrister and much of it has been as a criminal barrister so I have spent years sitting in courts arguing about these things.

Senator CRANE—But that is a pathetic excuse.

Ms Hampel—Of course it is, but it happens. And where you have got somebody who has been, say, in custody for a year, and they want to get their trial on—they do not want to have another day or another week in gaol before their trial starts—and they are all geared up psychologically for their trial, what are you going to do: adjourn the trial so you get your extra bit of transcript and another five days to look at it or try and push on and get the transcript when they eventually decide to transcribe it and have a look at it?

Senator CRANE—Let me put it another way. They sat here today and said the individual can have the transcript, or 'We will provide the transcript'—I would have to look at their exact words—within seven days. That is their discipline. I guess it comes out of the Crimes Act. I am not sure where it emanates from but that is what they said. We had the Attorney-General's representatives tell us that, in fact, warrants had to be precise. We got exactly the same answer from the AFP this morning.

If they are not precise when they know what the rules are and identify what they are doing—and I am talking about with a code there it would specify it even more so—I think in terms of that we need to eliminate those grey areas so that there is certainly consistency in the law.

Ms Hampel—I agree with that.

Senator CRANE—And, if you go one step further, the difference yesterday between the ATO's position and attitude—it was not just a position thing, it was an attitude thing—and that of AQIS, to me, was like chalk and cheese. I do not know whether my colleagues agree with me or not. Yet it is AQIS who tends from time to time for industry reasons to cop some of the flack that floats pretty regularly around the place.

I think one of the things that is very important in terms of our inquiry is for us to sort some of these things out so that people know where they stand—not only individual people but also the AFP or the tax office or whoever it might be carrying out the thing. We have to get down to a pretty firm black and white code, and there has to be a real exception to break that particular code or those particular rules that are set down.

Ms Hampel—That might be the solution, that, save in exceptional circumstances, the evidence would be excluded. The hard and fast rule without the base for any discretion or

exercise of judgment I think is a real concern. But certainly a principle that tends in favour of exclusion of unlawfully obtained evidence or evidence obtained in obvious breach of guidelines or code, unless those seeking to tender the evidence can justify the breach or justify the importance of its inclusion notwithstanding the breach, might be an approach that would be worth considering. I would certainly like to think about that and come back to you on that.

Senator CRANE—If you would. We are taking longer with all these things than we anticipated but I just want to go into the area where searches are done. With that there is the imputation of guilt and all the things that go with this where you can choose the route, if you like, through interlocutory means of proving yourself innocent. Once again that is a bit like the Federal Court—it costs an arm and a leg. I know a number of people who have decided they would go down that particular route because they reckoned they were going to get off the agenda and get their name cleared much quicker than the processes that were going on. Do you see any method or mechanism or way—and obviously they would have to demonstrate that they had themselves a prima facie position that they were innocent—by which that could be facilitated?

Ms Hampel—Short of appointing lots more judges, lots more investigators—

Senator CRANE—I am talking more about the cost of it. It does not matter how many judges there are, you do not remove the cost.

Ms Hampel—Removing delay will certainly improve the situation, and removing delay in itself reduces cost because you basically have to prepare it once and go ahead, whereas the longer you delay the more you have to go back and reconstruct. That is a hard one. I would like to take that one on notice too because, again, you have the balancing or the competing rights.

Senator CRANE—I will have to try a question you do not have to take on notice.

Ms Hampel—There is no doubt that access to justice is expensive.

Senator CRANE—This follows out of provisions which exist in law in terms of search and entry and out of what occurs in a whole range of areas. When you were speaking I passed a note to Senator Cooney because one of my little complaints—I was going to use another word but I will not—in Western Australia is the power that the APB man, for example, has to come onto farmers' properties without any search and warrant provisions. They can walk in and inspect your pantry for weevils; if the neighbour complains about rabbits in the back paddock they can just drive in, they can pop in and have a look. The general process is that they do notify people they are coming, but it does not always occur. The weevils in the pantry are not going to run away, no more are the rabbits in the paddock. Yet they seem to have incredible powers in terms of being able to just come onto property which the AFP, for example, do not have.

Ms Hampel—Yes. It is often a misguided paternalism or a misguided 'we're here to protect people'. That is why I come back to this first principle that investigating authorities should not have greater powers of entry and search than police who have the powers to

investigate criminal offences. It seems to me fundamentally wrong in principle that somebody can walk into somebody's property and inspect for weevils unless there is good cause and they have either obtained a warrant setting out their good cause or they have put the person on notice. If, for example, there is an anonymous report that a child is at risk, we know that everybody is going to be very concerned to ensure that a child is not put at risk. But nor can you allow people from a—

Senator CRANE—The child at risk is the extreme case out on that limb.

Ms Hampel—Exactly.

Senator CRANE—I do not necessarily think you need the local APB officer who lives in Ravensthorpe, where I live, to have to go and get a warrant, but there should be a provision where there must be contact made to arrange to come on the property.

Ms Hampel—Or there has to be a proportionality: is there in fact a need to have these unannounced inspections for weevils today? Again, if we are looking at this overall, we can say that some of these have been there but just because they are there it does not mean that they are actually needed any more or it does not mean that we still think they are a proportionate response to the harm. So your balance for, 'Why do you have this power of search and entry?' is: is it because the social or criminal harm is so great that it justifies the incursion or not? Where we hear of, say, a child at risk we will say the risk to the child outweighs the rights of an individual, but you would still want the person who receives the complaint about the child at risk to be satisfied that it is a bona fide, well-founded complaint. That seems to me to be a fundamental threshold. But why you need someone to walk in and look for weevils—

Senator CRANE—There are industry reasons why you should: it is very important to get them under control because they can destroy an export market overnight. I did not want to go into that in detail, but I used that as an extreme example.

Senator MURRAY—I just want to follow on from your line of questioning. What we are dealing with here are principles, and I am very pleased with your assistance. We have been talking about government agencies but, of course, parliament's laws also give search and entry rights to non-government agencies. I am particularly thinking of unions. Unions have rights under the law to access premises, access wages, all that sort of thing—and I see the representative of the ACCI is here and I will ask him these sorts of questions—but they regard that as absolutely essential to progressing industrial rights and to ensuring people are properly paid and their rights and conditions are protected. They make the same arguments, incidentally, about health and safety things and so on. What is your attitude to that area?

Ms Hampel—Watchdog roles are very important. Historically, unions have played a very important role where it was perceived that government was not doing enough to protect the rights of workers. It was essentially unions who were able to organise collectively and to produce a force that would say, 'You must do things to respect the rights of workers.' Again, I suppose it follows that just because something has happened historically does not mean it should necessarily continue. But the social reason behind the unions having the power to exercise powers with respect to occupational health and safety or to compliance with wages

and conditions is if there is a well-founded concern that otherwise those rights are not protected. So whilst I do not like this idea of a citizen militia—of people looking at the tax returns and saying, 'Well, Senator Murray looks as if he has a very affluent lifestyle. How can he possibly manage that on his parliamentary income?' or 'Felicity Hampel has—

Senator MURRAY—I don't! Fortunately, I have independent means.

Senator CRANE—If I can just interrupt there, what is really the difference between a watchdog role and self-regulation?

Ms Hampel—I see a difference between a body that has some form of authority, be it a union with its historical origins in Australia and its authority for the workers in a particular workplace, and a self-appointed individual who thinks that they have got a right to pry into another person's affairs.

Senator CRANE—There are many examples where industries have agreed to self-regulation. The problem of weevils is one; it is a very good example in terms of managing the thing because of the impact not only on the export market but also on the domestic market. And you go through quality assurance now in the meatworks. I find it very difficult to differentiate the principle between the two. Senator Cooney is much more aware of the detail on this but there used to be a time when a union official could just walk onto your property while you were shearing and have everybody down tools and have a chat about things and inspect things. They cannot do that anymore. Now there has to be a notification of a period of time and they can only do it when they are not working—I am not familiar with all the details—so there has been some self-regulation put into that particular process. At the end of the day, what really is the difference? Self-appointed is appointing yourself as a policeman—that is quite different.

Ms Hampel—Yes.

Senator CRANE—But if you look around where we live, we have this house watch or whatever you call it.

Ms Hampel—Neighbourhood Watch.

Senator CRANE—We have got Neighbourhood Watch down where we are farming and it has almost eliminated sheep stealing—it has not quite eliminated it. We have an agreement between ourselves that when anybody sees a truck going onto a property we will ring up the person whose property it is going onto. It is amazing the impact that that has had. I am just trying to get the definitions of where you see those things fitting.

Ms Hampel—There is a big difference between your seeing a truck going onto a property and ringing somebody up, and your saying, 'Because I have seen a truck going onto somebody's property, I have got the right either to walk onto somebody else's property without an express or implied authority or to ask the person driving the truck who they are and what they are doing without any express or implied authority from the owner of the property.' In self-regulation, I see a difference between people who, having an equality in bargaining position, come together and agree to do something and thereby give each other

authorities to ask questions about each other's affairs or to look into each other's affairs, and those who have not been a party to such an agreement but are nonetheless having an incursion into their privacy.

Senator CRANE—So you are differentiating on the basis of self-appointment?

Ms Hampel—Yes. The Neighbourhood Watch group is a group of people who agree that they will have a particular organisation where they will have—

Senator MURRAY—Have a process.

Ms Hampel—Yes, have a process, but by that you have clearly been given an express or implied authority to walk on to somebody else's property. But if you were not part of the neighbourhood watch and you saw a suspicious truck, and you had no basis for believing that you had a right to enter somebody else's property, you would be trespassing to go on to the property. That is the analogy—

Senator CRANE—You have the address of somebody else's property—the person who is in trouble is the person who owns the property. It is a pity if the dog bites them.

Ms Hampel—Yes. That is where the self-regulation aspect comes in. If people agree to cede power to a group, their representative, that is fine, but if it is imposed upon them where they have not agreed to—

Senator CRANE—I was just trying to get you to differentiate.

Ms Hampel—Yes. Have I made my distinction?

Senator CRANE—I believe it really gets down to whether you appoint yourself to be a policeman and you ring up or just take action unilaterally, rather than a group of people who put themselves together—

Ms Hampel—Yes.

Senator CRANE—It was actually the police in Western Australia who organised the Neighbourhood Watch. I think it has extended to the other states now.

Ms Hampel—Yes. In principle, that can be very good. It is part of community or collective responsibility for others within the community, but it does not mean that by that you necessarily have a right to enter somebody's premises or to access their records. There has to be a capacity to enter into a free agreement about it.

CHAIR—We have gone extraordinarily over time, and I apologise to the next witnesses. I could hardly ask you to come here again, but we could write to you and discuss issues.

Ms Hampel—Yes, you could indeed.

CHAIR—Thank you, very much.

Ms Hampel—I come here from time to time.

CHAIR—Do you? When is your next case?

Ms Hampel—Next Wednesday.

CHAIR—We would not get you during a case.

Senator CRANE—The other thing is that you live in Melbourne and Andrew and I quite often go through Melbourne—in fact, just about every time we come here. If it was necessary, we might even be able to have a short meeting in Melbourne.

Ms Hampel—That would be much easier for me to accommodate, I must say, and it would save you money because you have paid for my air fare here, or you are about to.

CHAIR—I hope we have.

Ms Hampel—Thank you, very much.

[11.28 a.m.]

HASSELL, Mr Peter George, Senior Investigation Officer, Office of the Commonwealth Ombudsman

McLEOD, Mr Ronald Neville, Commonwealth Ombudsman, Office of the Commonwealth Ombudsman

TAYLOR, Mr John Richmond, Senior Assistant Ombudsman, Office of the Commonwealth Ombudsman

CHAIR—Welcome. Would you like to make a short opening statement or would you like to go into discussion?

Mr McLeod—I am conscious of your time. Maybe if I could just say a few words by way of introduction. We were very pleased to have the opportunity to make a contribution to the work of the committee in this inquiry into search warrants throughout the Commonwealth area. Over the years, my office has dealt, from time to time, with problems that have been raised in relation to the execution of warrants, particularly in relation to the Australian Federal Police, the Department of Immigration and Multicultural Affairs and, perhaps to a lesser extent, the Customs organisation.

So far as the police are concerned, my office has no great difficulty with the legal framework which exists by which warrants may be issued to give authority to the police to enter premises and to undertake searches. But we have had a range of difficulties over the years with particular instances involving members of the Federal Police where there has not been proper compliance with the terms of the warrant. We have found cases where police at times do not appear to be sufficiently well-informed about the nature of the warrant process and their obligations in the exercise of the warrants, and we deal with those situations as they arise.

Senator CRANE—What about magistrates?

Mr McLeod—We have not had, in my experience, any great difficulty with the way in which magistrates have exercised their discretion to issue warrants. We have at times had concerns about the nature of the information that is put before the magistrates, on which basis they then make their judgments about whether or not to issue a warrant. In some instances we have questioned the accuracy and, indeed, the validity of some of the material that has been put forward as a basis for encouraging a magistrate to issue a warrant. But these are individual instances where there is a failure of due process.

We have over the years made a number of recommendations to the Federal Police about the need to improve the training of their police constables in having a proper understanding and respect for the obligations and the limitations that are associated with the proper execution of warrants. That is an ongoing area of interest for us because naturally the way in which the police can intrude into the lives of citizens is a very sensitive issue from the community's point of view. It is an area of our relationship with the police that we do watch

very closely, and when we believe errors have occurred, we are quick to point out those to the police and to make appropriate recommendations.

In the Customs area, we have not over the years had as many complaints lodged with us about Customs's exercise of warrants as in the case of the police or the immigration area. But some of the areas with Customs have involved allegations of abuse of the Customs personal searches that can be executed under their warrants.

We have also had problems with law enforcement agencies, the AFP and the National Crime Authority, on occasions in a sense riding on the back of warrants that are issued in relation to Immigration or Customs, where there may be a joint operation. The warrant may have been issued for Immigration or Customs to enable those officials to carry out their responsibilities and the police may also be present. On occasions, the police have gone beyond the terms of the warrant to collect information—through the access that they have through being present—for their own purposes. We have always taken the view in instances like that that the law enforcement agencies should not have the opportunity to have access to premises which would otherwise not be available to them if they sought a warrant under the Crimes Act, simply by being present when these other two agencies are exercising warrants which have a narrower purpose. Both the Federal Police and the National Crime Authority do accept that they do need to be careful about that issue, but from time to time we have had cases where problems of that nature arose.

I think the main area of interest to your committee is the work that we have been doing more recently in relation to immigration. Two years ago we decided to embark on a major inquiry into the circumstances in which DIMA officials are able to have warrants issued to enable them to enter premises to search for people who either do not have a legal basis to be in Australia or have overstayed their visas. Our feeling after we had completed that inquiry was that the powers under the immigration act, which dated back to something like 30 years ago, do not have the same range of accountability mechanisms and checks and balances which are imposed under other legislation where the power of search and entry is available. I think that probably reflects the fact that the immigration powers were, in fact, introduced 30 years ago and have remained unchanged since then—during a period when there has been quite a change in our society and in the attitude of parliaments and governments towards the issue of personal privacy.

I think the law enforcement area over time in recent years has been exposed to a more rigorous framework in which search and entry warrants continue to be made available within a tighter framework. It was our conclusion that the immigration act ought to be amended to create a more accountable framework which will still continue to allow officials in the immigration area to carry out these searches when they are obliged to, but it would be in a more transparent and a more accountable framework than the somewhat general relatively unrestricted framework that currently applies under the immigration act.

We made a range of detailed recommendations, which we advised your committee of in our submission, about ways in which we thought it would be appropriate to tighten up the administration of the issue of warrants in immigration. We have had detailed discussions with the department over the last year or so, and I think it is fair to say there is a fairly reasonable consensus between our office and the department of immigration about the

appropriateness of our recommendations. But the matter has not yet been able to be proceeded to the point where the minister has endorsed a course of action which, if he were to accept our recommendations, I would imagine would involve the matter being raised with cabinet and eventually legislation being drafted to amend the immigration act. In the knowledge that you will be dealing with immigration later on in this inquiry, it may be that your inquiry will help to encourage a high priority being given to this issue within the department if your committee shares similar views to those of my office.

CHAIR—Thank you very much, Mr McLeod.

Senator CRANE—I would just like to come back, coming from your perspective, to one of the key reasons behind this inquiry in its genesis. I think you were here when I went through the issue of the appropriateness of penalties with the previous witness. Following that, a number of pieces of

legislation came before us where there were quite significant differences between the search and entry provisions.

That was highlighted yesterday with the ATO and AQIS and the way they handle things—the different approach, the level of training and what appeared to me to be different powers. To me, one was very loose and the other was pretty darned tight in terms of what they could do. Do you see a necessity for having a consistent approach across the board, bearing in mind that there obviously have to be some differences in different areas of search and entry? Following the questioning of the previous witness, what is your reaction to the proposition of having some sort of code set down so that, when people are being searched, they know what the code is from go to whoa and if they think they are aggrieved and need to get in touch with somebody they know what their rights are?

Mr McLeod—As a general proposition, I think it is a very sound basis to be looking across the board at a different set of circumstances where search and entry powers are available to different areas of government and that the accountability framework that surrounds the way in which those powers can be invoked in different areas should have a basic consistency about it.

I think you acknowledge that maybe the detail of the way in which some of these powers can be obtained or exercised might need to vary from case to case. But I think there are some general principles that really ought to be satisfied in all cases. They include things like the warrants being required to be quite explicit in terms of the people they are targeted against, the addresses which are the subject of the warrant and the time period during which the warrant is available for operation. There need to be proper standards of documentation so that an audit trail is available in the agencies so that if problems do arise it is possible to reconstruct events and to understand clearly the way the circumstances emerged.

It is no light issue that officials do have the right in certain circumstances to enter the personal premises and property of individuals for a variety of purposes, and I think individual members of the community would understand that there ought to be a reasonably consistent application of a set of principles that govern the way in which the state, in its various forms, has that right of access to private property.

Senator CRANE—I asked you a question with regard to magistrates. As a result of this inquiry, I have been contacted by a number of people who have issues out there now. I cannot name them, but maybe one day they will get to you. We have had evidence from the Attorney-General's Department, from the Federal Police, from AQIS yesterday and from you now that warrants have to be precise, yet in each of these instances the warrant has virtually had a clause hooked onto the end of it which says 'and any other matter which you might find of interest'—basically that they can investigate any other matter. That, to me, does not seem to fit the model put before us.

The exception to that is the ATO. They certainly had a much broader interpretation of their powers. They used the example of PAYE tax operations. If they were checking to make sure the right amount of tax, et cetera, had been complied with and they happened to discover something in the next room, they would say, 'We want to get access to that, otherwise we will issue a warrant.' They would then zap it out of their pocket and away they would go. In actual fact, should there be some trail of information to magistrates so that you do not have to have a clause on the warrant which say 'and any other matter'? It is not as simplistic as that, but that is what the clause means.

Mr McLeod—I think a warrant should be limited to the nature of the responsibilities of the agency which is seeking to have access to a person's premises. For example, if it is the department of immigration and they are exercising an obligation to ensure that people only remain in our country who are entitled to remain in our country, I think it is appropriate to argue that the warrant that is issued to enable immigration officials to carry out their responsibilities ought to be confined to the exercise of that agency's charter. It was against that background that I made the comments in my introductory remarks about how we do not consider it appropriate that the police, for example, with their broader charter of ensuring law and order, should be able to ride on the back of an immigration warrant where the warrant is issued essentially for the purposes of that agency's responsibilities.

The same would be true in the case of Customs. A warrant should be confined to the collection of material related to the responsibilities of the agency in whose name the warrant has been issued.

I think the police area is slightly more complicated, in the sense that police exist to protect us all against crime and they have a general law and order responsibility. I can understand it may be argued by law enforcement agencies that if they suspect a certain kind of criminal activity may be occurring which would warrant them being given a warrant to enter a premises for that purpose and, if in the course of the execution of that warrant they uncover other completely unrelated evidence of the commission of a crime, it would seem to me to be fairly absurd to suggest that the police should be denied the opportunity to collect other evidence that is still related to their general responsibility to pursue the criminal element in the community. So maybe in the police case it could be argued that there is a slightly broader set of considerations.

Mr Taylor—A very simple example, Senator, is where the police executing a warrant to recover stolen goods find marijuana growing in the backyard. If they did not have the general power to seize anything else relating to the commission of a crime, they would have to ignore that. The police, of course, have a common law responsibility to enforce the laws

of the land, and that would also involve seizing anything else relevant to any other crime. Where we do have concerns is where a law enforcement agency, as the Ombudsman said, piggybacks on another agency's power to gain entry for their own purposes, not the agency who is seeking to gain entry.

Senator CRANE—Can I just get a little bit more precise in terms of my question? You have given a general answer and you have used the example of marijuana. I do not think that there is an argument in that type of thing. What I am talking about is more the seizure of documents and things—this general power. In fact, in one particular exercise that was carried out, virtually every document was taken. Most of the documents, I am informed—and I can pass the information on—had absolutely nothing to do with the search warrant. They then take all that stuff away and toothcomb it, just trying to pick up maybe things of a technical nature. That is more the area that I am talking about.

Obviously, the Federal Police—or anybody else who goes in, when a murder has been committed or something of that nature, which is a bit more extreme than the marijuana case—take action. That is pretty clear stuff, but when you get into this other thing, it is a witch hunt. How precise should a warrant be, bearing in mind what we have been told? It is one thing to say that we have to be precise, but the other thing is that you can add a clause on there that makes it totally general.

Mr McLeod—I think there are questions of practicality that do need to be recognised. If you are, for example, dealing with a white collar crime or a suspicion that there is some form of white collar crime and if the police, the Securities Commission or the Taxation Office are able to convince a warrant issuing authority that they have a reasonable basis for suspecting criminal activity that then encourages the issue of a warrant, I think that often they are faced with, once they gain entry to premises, a vast amount of documentary information which is essentially what they are seeking, which requires a process of sifting, analysis and consideration to be able to seek out the information that is relevant to the issue that gave rise to the warrant being issued in the first instance.

I think it would be improper for those agencies to be abusing their rights in seeking out information that is unrelated to their area of interest. I think it would be unreasonable to, for example, suggest that they have to remain on the premises indefinitely until such time as they have completed all of their analysis of the material. It is often indeed far better for the occupier of the premises for certain material to be able to be seized and then analysed in a more convenient way after the material has been seized. I think it is inevitable with those sorts of situations that there may well be a mass of material which, on analysis, proves to be quite innocent material and unrelated to the nature of the investigation. I think there has to be a means available to that agency to be able to sift through that material and to judge what is appropriate.

Senator CRANE—I hear what you are saying, and I think Senator Murray raised this earlier in the day about obtaining a complete print-out of all computer records and taking it away and looking for particular things. Computer records can have all sorts of things in terms of information—I cannot even work a computer so I am no expert on it. Should there be a mechanism put in place while that material is being examined, or should somebody of equal expertise in operating a computer pull the things off the hard disks—I might stand to

be technically corrected here. Should there be some mechanism or right of the person to have somebody there with equal expertise who can make some sort of judgment? It could be private material in a diary, for example, and the person could say that is not relevant to your investigation. Where do you draw the line?

Mr McLeod—I think what you are suggesting has an element of sense, but I think my view would be that there is always a balancing of the individual rights of a person against the collective rights of a community. Issues of public interest inevitably will involve contradictions and clashes between, at times, the rights of the individual and the rights of society as a whole. If everybody in a community were completely honest and completely open we would have no difficulties but, unfortunately, human nature being what it is—

Senator CRANE—We know that is not the case.

Mr McLeod—That is not the case, so society has judged that certain authorities need to act in the interests of all of us in being able to ensure that there are not members of society who are infringing in one way or another. It is entirely appropriate that there be safeguards, checks and balances, and clearly enunciated legal frameworks to limit the opportunities for abuse by officials who are given access to highly intrusive powers. They must be shown to be exercising those powers strictly in accordance with the reasons for which those powers were made available and not for any other broader purpose.

I think you can develop legislation, guidelines, monitoring mechanisms, auditing arrangements and so on that will ensure that, by and large, the community can have confidence that officials are not going to abuse these extreme powers that they occasionally are given the right to exercise. That is part of why it is necessary to have a good accountability framework when people are placed in this position. You can also go too far the other way in saying that there has to be absolute protection to the individual. There needs to be a total balancing of the intrusion from the point of view of the individual's protection against the interests of the state.

Senator CRANE—Currently, once that material has been seized, the individual does not have any protection other than the officer seeking the information and doing the right thing. We would not be sitting here with this inquiry if the Senate had not been concerned about the direction and what was happening. That is why we are sitting here. It has been raised with a number of us in different areas and, of course, it comes before our committee and our terms of reference.

The point I wanted to make is that there is a concern that, with the new technological age, you will never quite get the perfect system in terms of this. It just seems that from some of the propositions that have been put to us—certainly, as a committee, we have not talked about making judgments about things; we are seeking the information—there is a concern that the balance is tipped towards the people who are making the investigations. I am not talking so much about serious crime and the things that are obvious. They are the things that are relatively easy to pick up. Sometimes they are very hard to deal with, and I accept that, but we are talking about the other side of the equation and how things exist. This is following on—I am certain that Senator Murray would be asking this question or a similar

question if he were sitting where I am now—from where in the modern world the balance appears—and I am not saying it has—to have tipped the other way.

Mr McLeod—This is an opportunity for a commercial, I suppose, but my organisation exists to be able to provide some kind of confidence to anyone in the community who believes that there has been an abuse of power by a government official.

Senator CRANE—What I am talking about, though, is some form of prevention. I happen to take the philosophical position that prevention is better than cure. Even if there is a mechanism there which you do use, and you do a very good job, the taint or the stamp is there. It is very hard to get rid of. The more we can prevent that, the better off we are as a society and the more confidence we have in our organisations, whether they be AQIS, the Australian Taxation Office or whoever.

Mr McLeod—The threshold issue is that if public officials are occasionally able to exercise highly intrusive powers then they have to be able to go through a threshold before they are able to exercise those powers. They must be able to convince someone else in authority that they have a satisfactory prima facie basis for seeking to be given authority to exercise those powers. That is a very important first hurdle—

Senator CRANE—I agree with you.

Mr McLeod—before officials are given the right merely to do what they might be inclined to do, if they were not accountable to some other body; to justify, in a fairly specific way, why it is they believe it is necessary to exercise these powers.

If that hurdle is properly applied and properly exercised, I think it is a very important protection for the community, that officials are not going to be in a position of being able to abuse these powers by their misuse. Once they are granted the right it becomes a question of having arrangements in place to ensure that in the execution of those powers they have confined their activities to the purposes for which they have been given authority.

That is where bodies like mine have a role to play, if complaints are lodged, in investigating after the event the activities to be satisfied whether an official agency has exceeded its brief or not. There are other mechanisms of a similar nature in certain areas of government, activities that provide similar opportunities for citizens to complain if they believe that they have been mistreated or there has been an abuse of power by a particular government agency.

It is through those sorts of checks and balances that society receives its protection. I think they are more effective in the long run than to be suggesting that a citizen should always have the right to have their representative, for example, involved in an activity. That would carry with it other difficulties and maybe on occasions make it difficult for the government agencies to properly exercise their responsibilities.

Senator CRANE—In effect, you are saying that if records of a personal nature are taken in the process of the broadening of the warrants that I refer to—and who knows whether they go on a file or whether they do not, you never know this—that that should be merely

accepted? Then, if the person has a complaint afterwards, they lodge it and follow it up. There is the old adage, 'Where there's smoke, there's fire,' and it stinks.

Mr McLeod—I am not sure that there is an easy answer to that question.

Senator CRANE—No, there is not.

Mr McLeod—It would clearly not be proper for an agency to be taking material that is obviously personal in nature unless there is a reasonable reason to believe that that personal information could well be relevant to the purpose of the inquiry. Personal information can be relevant to issues that relate to criminality, but if on the other hand it is clearly irrelevant, and it is obviously identified as such by casual observation, then obviously it would be inappropriate for the agency to be removing it.

Mr Taylor—Senator, we often get complaints from people who have had documents and other things seized and who claim that those documents are not relevant to the police investigation, and we will intervene if it is appropriate.

Senator CRANE—I am not limiting this to police investigations, I am saying across the board.

Mr Taylor—Indeed. With any Commonwealth agency, if the documents are not relevant to the investigation and it is clear that they are not, we will intervene and we have done so. I can think of a recent example where I took a call from a person from another state who said that police were there executing a search warrant on his business premises as we spoke. I spoke to the officer and it was quite clear that they were there legitimately with a proper warrant and were seizing things that were in the bounds of the warrant, so there was no need for us to intervene. But It is not uncommon for us to deal with the agency and encourage them to return the unnecessary documents immediately.

Senator CRANE—That is fine if you have a precise warrant but when you get these all-encompassing clauses that have been on some of them, that ceases to apply. They are operating within the warrant.

Mr Taylor—Sometimes it will cause a lot of disruption if a business's computers are seized, where the whole lot is taken away.

Senator CRANE—That was an issue that Senator Murray raised this morning.

Mr Taylor—We recognise the problems that that causes and we will encourage the agency, particularly the police which would be the organisation most likely to do this—and perhaps the tax authorities—to examine the material and return what they do not need as soon as possible.

Senator CRANE—I have no problem with taking what is required if there is a prima facie case. It is the material beyond that, particularly when you get into the electronic age and what have you where it is not separated. You almost need the operator of the computer to separate it which, as I said in my case, I could not do.

I think I had better stop there, Mr Chairman, or we will not get to Mr Hamilton today at the rate I am going.

CHAIR—Mr Taylor, do you live in Melbourne?

Mr Taylor—Yes.

CHAIR—If we wanted to take up further matters—

Mr McLeod—We could meet either in Melbourne or in Canberra. We could meet you in Melbourne, or whatever is convenient to the committee.

As I said earlier, what we thought was probably of greatest interest to the committee was the work that we have been doing with the immigration department. I do believe that that is an area that is really crying out for some attention from a legislative point of view. It really is anachronistic the way those powers are expressed in the Migration Act. It is out of line with most other areas. I think if nothing else we could simply leave that thought with the committee, that we do have real concerns about the immigration legislative framework.

CHAIR—Would you be happy to look at the material that comes out of this discussion and others?

Mr McLeod—By all means. We would be very interested in it.

Senator CRANE—Are you suggesting we have a further hearing in Melbourne?

CHAIR—If we want to. I am just asking if it would be inconvenient, and Mr McLeod said no.

Senator CRANE—I think we should because I have only scratched the surface.

CHAIR—If we give Mr McLeod this material and keep exchanging material, that would focus the issues.

Senator CRANE—We raised with the previous witness the issue of a possible general code of consistency. That is something that maybe you could address in the interim and come back to us one way or the other.

Mr McLeod—As I said, there certainly are some common principles that would lend themselves to application right across the board. That is essentially what a code would seek to express.

Mr Taylor—Senator, you may be interested to know that we have done a lot of work in terms of the police's management of property and exhibits, which is the consequence of seizing things under a search warrant. We are currently discussing that with them in detail.

CHAIR—Those discussions would be of interest to us but you would want to clear that with the police. We would not want to intrude on discussions which may be detailed and

personal. But if you and the police were happy, we would be interested. We do not want to step in and in any way embarrass what you are doing here.

Mr McLeod—Sure. We would be more than happy to cooperate in any further way that we can with the committee. We will look at the material that is coming out of the committee with considerable interest.

CHAIR—Thank you very much Mr McLeod, Mr Taylor and Mr Hassell.

[12.10 p.m.]

HAMILTON, Mr Reginald, Manager, Labour Relations, Australian Chamber of Commerce and Industry

CHAIR—Welcome. Did you want to make an opening statement or just go into a discussion?

Mr Hamilton—I have got a few brief points to make, if that would help. I will not take long, but it might set the scene.

CHAIR—Don't feel that we are rushing you along.

Mr Hamilton—I would like to start by saying that there is essentially—

Senator CRANE—Can I just interrupt, I am sorry, Reg. Mr Chairman, in view of the time that we are taking, and as a couple of these witnesses we have to deal with today are in Canberra, I think it could be wise if we rang one of them to see if it would be convenient to hear them on another day. What do you think?

CHAIR—We will see how we go. We could ask the Health Insurance Commission, as they are the last.

Senator CRANE—We are a long way behind now. I think we should take that action.

CHAIR—All right, we will see how we go. I am sorry, Mr Hamilton, please continue.

Mr Hamilton—Our submission relates to a scheme of trade union right of entry that exists under the Workplace Relations Act, a federal act. There are essentially two models of trade unionism which can be used to approach this issue. One is a sort of service model, that unions are service providers like accountants, lawyers, other service providers. A different or separate model is that they are a quasi-government institution which should entitle them to special rights. The debates between these two models are not confined to us employers or government; these debates are taking place within the union movement, and there are proponents of both views within the union movement. Our approach essentially is that unions should be seen as service providers. Employer associations are seen as service providers. We have never claimed to be quasi-government institutions or claimed special rights or preference, or any of that sort of thing.

The present act really does adopt the institution approach, not the service provider approach. It is quite unique in many ways in giving what are essentially non-government organisations special quasi-government institutional rights of entry. There are also rights of entry which duplicate what government institutions perform. There are award inspectorate functions, which are functions of federal and state governments; there are special inspectorate functions regarding health and safety legislation which Felicity Hampel mentioned before. So there is duplication.

Our essential approach to union right of entry is that it should look something like this. Union right of entry should first of all be based on authorisation by a member of that union. That is the first step.

Senator MURRAY—I am terribly sorry, my apologies for missing the beginning of your statement.

Mr Hamilton—Just briefly, for the purposes of Senator Murray, who has an important role in this debate, or will have later this year—

Senator MURRAY—Yes, this poor unfortunate—nobody else wants the portfolio!

Mr Hamilton—Senator Murray, I was pointing out that there is a debate about what the appropriate function of a union is. One is the service model, that they are like lawyers, accountants or employer associations which have never claimed anything beyond the role of service provider. Another role is that they are quasi-government institutions to be given special functions as such. The present act essentially does the second. Our approach is based on the first model. As institutions with extra functions, they duplicate government functions in many respects. There are arbitration inspectorates to inspect suspected breaches of awards; there are special inspectorates to look after alleged breaches of health and safety legislation which I note Felicity Hampel mentioned. So there is duplication resulting from adopting the institutional model which is what the present act does. I will come to what the present act does.

Our service provider approach is that, firstly, right of entry for unions should be based on authorisation by a member of that union; secondly, there should be appropriate notice; thirdly, right of entry for the purposes of interviewing employees should be restricted to meal breaks or out of hours, so it does not disrupt the workplace; fourthly, the employer should have the right to direct movements of union officials, having regard to health and safety considerations—a lot of workplaces are extremely dangerous; fifthly, the activity should be restricted to those relevant to the request; and, finally, there should be a quick and appropriate set of measures to deal with abuses of right of entry that occur.

The present act is an institutional type model. It is not restricted to right of entry on authorisation; it is an automatic right of entry which exists once a union officer has a permit from the registrar. So there is no requirement that a member specifically authorise that right of entry or that the right of entry be restricted to the purpose of the authorisation. I notice we have had a lot of debate today about the purpose of warrants. That debate is relevant here because there is no such requirement here. There is an appropriate notice period, and we do not have a problem with that.

The provisions which are essentially lacking are, firstly, lack of a restriction to member authorisation. There are a lot of disputes about premises where interviews and so on occur. There are a lot of practical problems occurring in workplaces. Employers do not seem to have the ability to direct movement of union officials, having regard to the need to minimise disruption in the workplace or for health and safety concerns. And I do not think there is a restriction to the right of entry to certain stated purposes in the member authorisation

because there is no requirement for member authorisation. There also seem to be problems with the remedies for dealing with abuses of right of entry.

If I had had time I would have produced more information about the problems that do occur from right of entry—there are a lot of practical problems, a lot of disputes do occur.

CHAIR—What seems to be happening in the inquiry is that issues are arising so, de facto, we have reached the position where people are coming back. If you wanted to come back, we could get the Senate—

Senator MURRAY—We might be going to Melbourne.

CHAIR—That is right, but we would probably need an extension from the Senate and we would do that.

Mr Hamilton—If I have time I will seek to do that. Thank you for telling me that.

Senator MURRAY—I wonder if I could add something to that, with the permission of the chairman. As you are aware, there is industrial relations legislation before the parliament. There will be a Senate inquiry into that. Your organisation will make a submission in the normal course of events. I would like to ask you whether you would perhaps consider—and it is entirely at your discretion—doing a separate submission just on the search and entry provisions and then copying that for this committee.

As we are progressing through this—I think I can speak for all of us—it is a very educative process. The purpose of the inquiry is to discover the ranges of issues and the principles and the possibilities that arise from it. You might well find that a reading of the transcripts of the evidence to date, and perhaps some of the submissions which the secretary could provide you with, would assist you as well in terms of reviewing this area in a way which you might not have formerly thought of. Speaking for myself, I am now seeing the issue quite differently from ways in which I might have before the inquiry started. If you are willing to consider that proposition, it would mean that, instead of us in this committee having to plough through a lot of extraneous stuff, there would be perhaps a chapter out of your submission which could deal specifically with this and inform us on the matter. Is that acceptable to you, Mr Chairman?

CHAIR—Yes, I am happy with that. Are you happy with that, Senator Crane?

Senator CRANE—It would be very helpful because I am sitting on this inquiry and I will be on that inquiry. I suspect that Senator Murray will be on that inquiry too.

Mr Hamilton—And perhaps Senator Cooney.

Senator CRANE—You can come along too or get on the committee. That will solve the problem.

Mr Hamilton—I am happy to adopt that approach. If that is suitable to members of this committee, I do not have a problem. There are interesting areas of overlap between these

issues and the issues I have been hearing today, like the scope of warrants, for example. I suppose it is a strange and different area in many ways.

Senator CRANE—If you include the issues you have raised with us today, as suggested, would you object now if we went onto some general questions?

Mr Hamilton—That is fine.

Senator CRANE—Your organisation deals with a lot more than just industrial matters, as we all know. Do you get any feedback or have you sought any feedback on the general issues? Some of these will be raised today. I will not repeat all the questions because you have heard a lot of them, but do you have any comment? Do you get any feedback at all from members within your organisation with regard to search and entry provisions in terms of the need for consistency and how the different acts apply? You have membership right across the board.

Senator MURRAY—Before you respond, I was thinking specifically of ASIC, because they do have search and entry provisions as I understand the Corporations Law. ASIC would be a major one, and ATO would be a major one.

CHAIR—Professor Allan Fels?

Mr Hamilton—ASIC is quarantine, is it not?

CHAIR—No, it is the Australian Securities and Investment Commission.

Mr Hamilton—Sorry.

Senator CRANE—But you could include AQIS as well, because we heard very good evidence from them yesterday.

Senator MURRAY—And there is the competition authority. There are probably just those three but you can add any others. In asking you to respond, if you are insufficiently informed, perhaps we could put on notice that a supplementary submission on those areas would be helpful.

CHAIR—You will probably go through perfectly, I do not know, but we have the issue of people going around and looking at small businesses in particular to see whether they are charging the right price or not. That is typical of what happens. It is good practice to make sure prices are low, but that also involves intrusiveness—I would use the word in its proper sense—spying on what goes on. Does your organisation have any thoughts about that?

Mr Hamilton—Perhaps I could approach it this way: firstly, I do not really deal with those issues a lot, personally. I look after the labour relations side and, I can assure you, that keeps me more than busy and I have no wish to enter into AQIS and deal with other areas. However all the issues that I have heard raised by members of this committee are clearly of importance and of concern to businesses—that is, the intrusiveness, the scope of searches—material, documents and computers being removed. All of those issues are very relevant and

of great concern. How you balance out the need for a proper investigation role with the need to avoid intrusion and disruption of businesses is obviously not a straightforward question. But it is very important that businesses not be disrupted.

Senator MURRAY—The committee has already become aware of quite large inconsistencies between the parliament's legislation for search and entry provisions. My first question to you is: would you believe that, as a general point of principle, if search and entry provisions were to be part of workplace relations law they should be consistent with similar provisions in other legislation so that business people could be more easily aware of common rights and process, and ways in which they are dealt with? If you like, we are focusing not only on what powers people have, but also on who can exercise the power.

My memory of the Workplace Relations Act is that there is no cut-off point. If you look in the police powers, for instance, police people, generally speaking, can exercise the powers of search and entry right down to the lowest rank. But in some law such as the forensic procedures act, it is limited, I think, to senior constables—the powers and certain laws.

The ATO tell us that they do not have a cut-off but that practically, because of the skills required, it tends to end up as what they call level 4—about halfway through their rank—their qualifications—

Mr Hamilton—By cut-off, you mean 'hierarchy?'

Senator MURRAY—Yes.

Mr Hamilton—I understand.

Senator MURRAY—And seniority. So the question is: if there are to be search and entry provisions in workplace relations legislation, should there be a minimum qualification of persons such as a senior union official or a senior person from an employers organisation? I would like to have that question answered.

Mr Hamilton—Employer associations do not have right of entry so this is a union only—

Senator MURRAY—And should they? That is a question.

CHAIR—Who is that?

Senator MURRAY—The employers. Should you have the same provisions to, for instance, access wages? If you then go through that, there is an accreditation process. The police force automatically accredit their ranks because you have to pass exams in all the various areas. The ATO conduct a formal training process so that the search and entry provisions are conducted properly—proper process, a proper procedure, a proper understanding.

The next area of interest is the informing of the other person of rights. Some organisations do it as a matter of procedure, for instance the police. The AFP, we have heard

today, provide—over and above the normal caution if you are in a criminal matter—a statement a rights. The ATO have pamphlets and leaflets. So should a person be aware of what his or her obligations and rights are under the search and entry provisions?

The last one I can recall—my colleagues will add others—is the question of dispute procedures. If somebody has a grievance about the way the ATO, AQIS or the Federal Police have approached them, they have the right to talk to the Ombudsman or the Privacy Commissioner et cetera. These are things which are in other legislation, other procedures and other agencies. Whilst you would have a view as to whether there should or should not be search and entry provisions, really we need to be guided. If the parliament and the government believe there should be, how should they be designed and in what way does that differ from how they are presently designed? That is a long question.

Mr Hamilton—Briefly going through those important points, each of these areas has really developed differently, having regard to different types of functions. And the workplace relations area certainly has developed in its own way. So I am really not sure about the degree to which there should be commonality. However, going through the issues you have raised, there are no cut-off points, I think, in the Workplace Relations Act relating to hierarchy, or the like. It is simply an officer or employee of the union. There may be a case for a cut-off point.

Secondly, the only accreditation seems to be that the person is an officer or employee of the union. There is no formal training process or the like. There may be a good case for having such a formal training process. Thirdly, I think the only informing of rights is indication, is production by the person seeking to enter, of a permit permitting that person to enter. There is nothing beyond that.

Senator MURRAY—And that is a piece of paper, is it not?

Mr Hamilton—Yes, I think it is.

Senator MURRAY—So the question would be, should that piece of paper which is, I think, provided by the government include a statement of what is allowed under law and whether there is a dispute procedure approach?

Mr Hamilton—I think there could well be grounds for saying that should occur because right of entry in workplaces by unions is very contentious. There are a lot of stoppages and disputes. That relates to the third issue of dispute processes. There are dispute processes for revocation of permits where there has been improper conduct. There is a test in there in section 285A(3) which is essentially improper hindering or obstructing—

Senator MURRAY—Who deals with it?

Mr Hamilton—The workplace relations registrar who is an officer established under the Workplace Relations Act.

Senator MURRAY—Again, the question to you would be—and you would need to think about it and return to us—should it be somebody who normally has experience in this

matter? As you know, there is the formal administrative tribunal, the AAT, there are the Ombudsman and the Privacy Commissioner, or should it remain purely with the registrar?

Mr Hamilton—I would have thought it should remain with the registrar. These are very specialist sorts of disputes. The current bill before the parliament, Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 does establish a new process for dealing with disputes and we are very supportive of that process. I had intended to bring it; unfortunately, I do not have it with me. I think it provides for an improved method of dealing with disputes of which we are quite supportive.

Senator MURRAY—But they may have gone that route because they have not considered that. As an example, the ATO might argue that they have a specialised area, that there should be a specific ATO registrar. They have never argued that because the Ombudsman deals with that—there is a generalised thing.

My last area of questioning, before you move back onto whatever you were doing before, was that one of the things which has emerged from this discussion, in broad terms, is the description of matters as adversarial and non-adversarial. In the police sense, adversarial is when you are likely to move to a criminal prosecution or a criminal investigation, whereas non-adversarial is when people are simply helping with inquiries and giving information and so on. In the ATO sense, non-adversarial is when it is part of an inquiry—an audit process—and there is simply an interaction of correspondence or discussions, and it ends there. Whereas the adversarial stuff is when you start getting penalties and prosecutions et cetera.

I would like to know how you would classify the search and entry provisions in workplace relations law. Is it adversarial when it is occasional and people are not experienced in dealing with it—such as a small business person who is suddenly inspected? Whereas in a large company, where they are used to it happening all the time, it is non-adversarial. What is the culture or the framework in which these things go on?

Mr Hamilton—There are two types of right of entry. One is where the union official or employee suspects a breach of award or a breach of act—so it is a suspicion—and they enter to ascertain whether or not that breach is in existence. So they look at time and wages records, pay sheets and other documents. They look at any machinery and so on to see whether there are breaches.

Senator MURRAY—But, generally speaking, how is that, would you know? Is that generally adversarial or is that non-adversarial, or wouldn't you know?

Mr Hamilton—That is the legal form of it. In practice, it seems to be more associated with issues of recruitment—a sort of union presence in the workplace, that sort of thing. It is industrial, if you like. It is not—

Senator MURRAY—I would have thought that is non-adversarial.

Mr Hamilton—I think it is.

Senator MURRAY—It is a relationship thing.

Mr Hamilton—Yes, that is right. But, quite frankly, they are very contentious. Often these rights of entry are very contentious, so I would not say it is non-adversarial. There is a strong, contentious adversarial element to it.

Senator MURRAY—But the union person talking to the manager about this, has it got that tension and aggression you might see between a policeman and a suspect or between a potential ATO serious matter and the ATO person?

Mr Hamilton—It varies according to the union involved, the union policy, the person involved.

Senator MURRAY—This is not an idle question because I thought the ATO—if my interpretation is correct, and again I look to you to correct me—made it quite plain that they felt that the majority of their interactions on a search and entry basis were, in fact, non-adversarial. They sat down. They discussed the problem and they resolved it. That is really the question I am asking you. Is that generally the climate between a union person and the business person or is it not?

Mr Hamilton—It is not; it varies. Sometimes that is the case, but often it is not. There is a great variation. There is no rule, if you like. Right of entry involves many different unions with many different workplaces, many different levels of unionisation, many different industrial relations environments. It is not like the ATO where they have a set of policy manuals, formal training and a formal approach. This involves different unions with different approaches and going into workplaces with completely different labour relations environments. So it could be anything on the spectrum.

Senator CRANE—I wanted to come in here because I think it is a very important series of questions in terms of the situation. It differs from anything else because you have a whole series of unions who have different approaches. You have a whole series of work forces, some of which are unionised and some of which are non-unionised.

Senator MURRAY—Or partly unionised.

Senator CRANE—I have now sat on three major IR inquiries. We have buzzed around Australia since 1990. I think I could say with absolute confidence that, if the workplace was totally unionised, there was not too much concern ever expressed from the employers. When they came on board, they sort of had an organised arrangement. Some of them complained about not having enough notice.

If it was partly unionised there was some hostility because of a concern about the interference in the workplace due to pitting union against non-union people. Then when you got on to the non-unionised work force, the attitude was very much against it because they saw it as an intrusion on their right of freedom of association and all those other things. It became a very different situation. Different unions handled it differently. There was no consistency in terms of the evidence that was given to any of those inquiries.

Mr Hamilton—I do not have any great disagreement with that as a general description. It is a unique area because it does involve such different organisations. It is not just the

ATO, it is the CFMEU, the AWU, even APESMA, all of which have quite different internal policies, culture, history and philosophical approaches to unionism. They all have training courses. What is the SDA all about? They tell you the history and inculcate you into the culture of it. Then the CFMEU will do it quite differently and approach employers in a quite different manner. I am not here to criticise any unions but I am just pointing out that they do often have very different approaches.

The other type of right of entry—it is not just to investigate breaches—is to interview employees. There are those which are different again. That does not involve the employer, it is interviewing employees. Then you get a lot of the problems, the recruitment issues and conflicts between the employer, between different sections of the work force and between different unions. You get demarcation brawls and terrible recruitment battles as different unions try to recruit an employee's support or resent the activities in different degrees. There is no rule about whether this union right of entry is adversarial or non-adversarial in the sense you have put to us. It is both, depending on the circumstances.

Senator CRANE—There is one other aspect of this discussion which came through. I recall that there were certainly significant differences in the approaches of unions as well.

Mr Hamilton—Very much so.

Senator CRANE—Some were quite happy to come in the lunchbreak or after work provided the premises were made available, whereas others demanded an absolute right to come in at any time. Hence that piece of paper. That came out of the last round of legislation.

Mr Hamilton—It did indeed.

Senator CRANE—That never used to exist.

Mr Hamilton—I think a notice as well—

Senator MURRAY—It was. It was put in. Have matters improved?

Mr Hamilton—It is a better system than the previous system. Our view is that it should be improved even more. There are a lot of further changes that should be made. That is also the government's view and it is reflected in the government's better pay, better jobs bill.

A key part of that is the issue of unionisation levels and member authorisation. There is a vastly improved process for dealing with abuses of right of entry which do occur. We should not be surprised they occur because these issues are far more informal than, for example, the ATO's right of entry or the police right of entry where there are all sorts of internal training processes and guidelines and legal opinions going to the like. The union right of entry stuff is a lot more informal because it is done by a whole range of different associations, all with different resources and different philosophical approaches.

Senator MURRAY—You mentioned that employer organisations do not have that right.

Mr Hamilton—I might have been wrong on that.

Senator MURRAY—I understood that they do have that right but they just do not exercise it.

Mr Hamilton—You are correct. I have just checked the provision. It has never been used. Employer organisations do not do that. It is not appropriate. They see themselves as service providers. They are there to provide a service to their members.

Senator MURRAY—One of the ways in which rights are protected is to ensure that they are properly monitored either by a witness or by somebody accompanying or whatever. For instance, with some agencies, including those where criminal action is possible, the person on whom a warrant has been served or where search and entry provisions are being enacted, will have the right to have a witness, a friend, a relative, a lawyer or whatever, in attendance. I think the Crimes Act spells out those sorts of things.

If in some instances search and entry provisions by unions are contentious or adversarial, would it assist if an employer's representative could be there if it was asked for, in other words, to make it more formal and more objective? I am thinking of instances where the business person concerned may neither be at the level nor have the experience or the culture to deal with it.

Ford Australia, with their giant organisation, has got the people, whereas somebody who is running a little engineering workshop might not. Once again, you might be able to answer off the top of your head. It is a safeguard which is present in other legislation. Should that safeguard be developed or is apparent in workplace relations, or would it simply gum it up and make it too cumbersome?

Mr Hamilton—The answer might be that notice is given of right of entry. The workplace is the employer's premises. Who they have with them is entirely a matter for them. However, where the problem might be is that they may not have notice of exactly what the union official wants to do. That may be the issue which guides the employer as to whether they have their legal representative with them or not.

There may be grounds for improving the right of entry provisions by requiring some sort of specific notice of exactly what the union official wants to inspect or what they suspect is wrong, in the same way that warrants should be specific about what they are on about.

Senator MURRAY—I am not even thinking necessarily of a legal representative, I am thinking of the possibility of a member of the ACCI. You would send down one of your specialists, for instance.

Mr Hamilton—As you know, ACCI does not have company members. We are the peak council of employer associations. Most of the main employer associations are members.

Senator MURRAY—I mean the relevant chambers.

Mr Hamilton—Yes, the chambers and the national industry bodies that make it up. You are quite right, they often do use us, but it might help if they had a bit more notice of what the union wants, or suspected was wrong. It might be a legal issue such as the interpretation of an award. On the other hand it might be health and safety, in which case they might want to have some health and safety representative from the local chamber or whatever.

Senator MURRAY—And then there is the question of immediacy. Senator Crane has a very interesting analogy with the weevils.

CHAIR—It is a weevil issue!

Mr Hamilton—I wondered what that was.

Senator MURRAY—He says weevils do not suddenly disappear. In other words, an appropriate notice period is possible. You do not have to rush on to premises because there is an urgent or immediate need to deal with it. Again I would ask that question relative to search and entry provisions here. If it is a question of books, of documents, then a longer notice period is quite possible. If it is a question of health and safety, it might be an urgent matter. If it is not dealt with today, somebody could be hurt.

Mr Hamilton—There are specialist health and safety provisions which really do deal with that.

Senator MURRAY—I understand that.

Mr Hamilton—There is a separate set of laws and inspectors.

Senator MURRAY—But it still falls within your ambit.

Mr Hamilton—It does in general, but I do not think this sort of right of entry is much about that because there is very detailed regulation of health and safety issues—

Senator MURRAY—What is the notice period here?

Mr Hamilton—Twenty-four hours. Under the state health and safety acts there is a whole scheme of very carefully thought through regulations that deal with exactly the problem you mention. This stuff really is not much about health and safety because there is so much specialist regulation of health and safety issues.

CHAIR—Can I just say something here apropos of what Senator Murray has said. One of the tests is—and I would like you to think about this—what is the result? Victoria, which is my state, has had a series of industrial deaths. You would know about the reaction to that. One of the most fundamental tests is: how do we achieve the object we want? We want fewer deaths, a safer workplace, people paid what they are meant to be paid and all those sorts of things, which you know all about. How can we do that and balance that against people's rights, which include the right to go about your business as you should? Could you make an analysis of how your organisation conceives balancing that up?

We have had a series of things. The tax office say, 'We balance that up by going about this in a mild mannered and cooperative way.' The police say, 'We go about this because we have the Ombudsman or other people ensuring that we do the right thing.' Say we said, 'There should be no right of entry. Business is going to function as it wants.' If there were a whole series of deaths or people were not paid properly or there were a lot of injuries, then there is that reaction. Do you understand that dilemma?

Mr Hamilton—I understand.

CHAIR—I have a quote which, although not in this context, comes from the second reading speech of Michael Tate, who was the then Minister for Justice and Consumer Affairs. This was in the context of arrest and questioning by the federal police. He said:

> This decision has created a real and serious dilemma for me. I come to the Parliament with two important competing responsibilities: my responsibility to maintain and defend the civil liberties which we have inherited through the centuries in our common law, and my responsibility to ensure that the laws made by the Parliament are able to be properly enforced, so as to afford appropriate protection to the community. Law enforcement agencies cannot be expected to function effectively with their hands tied behind their backs. Not only must they be able to investigate and prosecute offences effectively, but they need to ensure that they do not proceed to invoke the inexorable machinery of prosecution against a suspect, with all the suffering and expense for the person that that entails, when an early period of questioning and investigation may disclose that prosecution is not justified.

I am not saying that you are being prosecuted but it is that dilemma of getting some sort of effective law, a need to see that the law is carried out and that people are protected—there is no doubt your organisation wants to—and balancing that against the sorts of rights you have been talking about and you have been listening to this morning.

Mr Hamilton—Could I first make the point that the submission we have put is about federal laws—a scheme of right of entry. Accompanying that scheme of federal right of entry is an extremely detailed specialist set of state legislation dealing with health and safety matters. Those are state laws. They are state breaches, and every state has an extremely detailed set of legislation to ensure that all the issues you raise are properly dealt with. That is really a specialist area. What I am trying to talk about are the federal legislation issues in the Workplace Relations Act, which do not really have a lot to do with health and safety because there is that vast amount of state apparatus designed to deal with those issues. So that is the first point.

The second point is that there is duplication in the sense that the right of entry of trade unions is additional to state-run arbitration inspectorate services. This is an additional set of protection right of entry. So it is slightly different from the tax office, which I assume is the only body dealing with federal tax law. This is about private associations topping up the legislative scheme of arbitration inspectorates.

How you balance the rights and so on has to be looked at in that context, since it is duplication or topping up and since we do not oppose union right of entry. We are not saying to this committee there should be no union right of entry; that is a possible submission we could put. What we are saying is that this existing, duplicating scheme of union right of entry should be more limited than it is at present—limited to situations where a union member actually authorises, for a specific purpose, union right of entry. Never have

we said that this scheme of union right of entry which duplicates the legislative arbitration inspectorate should be removed. Given that there is that context that I have put, I think there is in our approach a fair balancing of the rights of employees to have their awards and acts observed, and the rights of employers to not have their workplaces disrupted unnecessarily.

CHAIR—I did not want to confine this just to the unions, although that is very important—in fact, essential—and you do not oppose it, except that there is discussion about the model and the process.

Mr Hamilton—The extent of it, yes.

CHAIR—Just as business might have some problems about the unions coming in, you would also, I would have thought, have some problems about safety inspectorates and what have you coming in—or haven't you?

Mr Hamilton—We put those to state parliaments when those schemes are reviewed. There is not a federal scheme of that sort. We have what I suppose you call cooperative federalism—perhaps that is a joke in some areas, but there is a cooperative federalism in this area. There is a NOHSC—National Occupational Health and Safety Commission—and that really is a coordinating body. The primary responsibility for those issues is with state parliaments. Every state parliament has a committee of this sort and reviews that issue, and our state bodies contribute to that.

CHAIR—We cannot just cut ourselves off on this issue on the basis that the states do this and the Commonwealth does that. In fact, as you know, as far as the industrial relations and workplace relations process is concerned in Victoria, where I come from—these other senators are people from Western Australia; they do not understand these processes—that has got more pertinent.

Mr Hamilton—I do not want to get into state versus state arguments.

CHAIR—I would be interested for you to grapple with that issue. Of course the states are central to workplace safety, but there is this issue of entry itself and that philosophy. At the start of your submission you said there is a way of looking at unions.

Mr Hamilton—As a service provider, yes.

CHAIR—That is a sort of philosophical point of view and I just want to see what you say on the philosophical issue that is involved with this right of entry, not confined to unions—although we obviously want to hear about that—but generally, and what you say about that in terms of the need to see people protected in relation to having their wages paid properly and their safety assured and the need to protect people from intrusions which are unacceptable unless they are justified in some ways.

Mr Hamilton—Yes, I understand.

Senator CRANE—Could I add that we also have state committees and we do meet from time to time in relation to that. I would be very surprised, once we have finished our inquiry

report and providing parliament accepts it—which I believe they will—if it does not become a subject of the committee with the aim of getting consistency with state legislation which we endeavour to do on a number of things. So I think it will probably help to overcome some of the inconsistencies which exist between Commonwealth and state laws or between states themselves.

The other general question I want to ask, which I know is not your department but does go into other departments, was about some of the general questions that we were dealing with before. You have provisions within your organisation dealing with them. If it was possible to get a note into your newsletter through the appropriate person which got around the states and into other businesses, there could be some other information you have not heard about which would be very useful to our inquiry.

Mr Hamilton—I would be happy to try and do that.

Senator CRANE—Senator Murray, while you were out we decided that we might as well follow up the Ombudsman in Melbourne as well, as we did with the previous witness. That certainly would be of convenience to you, if it was appropriate. I just raise that because far more issues have come out of this already than I anticipated, and we have not been here long.

CHAIR—That is right. I think Senator Murray, Senator Crane and I are thinking aloud as we go along, and it has developed in a way that I did not quite expect. So I am sorry to have kept you waiting but you can see what has happened, that we have become quite exercised by it all.

Mr Hamilton—There was a lot interesting debate that I heard while I was waiting.

CHAIR—I do not know what your resources are like generally but it would be very helpful if you could go through all those.

Mr Hamilton—Perhaps not what they could be, so I apologise for that. I will see if there is much I can add. I will certainly try and get information about other areas. OHS is really very different because there are immediacy problems, obviously, which are not present for most of the provisions I have been talking about. Where there is a safety issue on site there is a real immediacy problem. I do not have any problem with that, with a different type of approach—no problems at all—but it is a very specialist area because of its nature. I will see if there is anything else I can add on that.

CHAIR—For example, the chemical people talked yesterday about the need for specialist people who understand what is going on. That is what I think you are saying about the occupational health and safety.

Mr Hamilton—We will try and get a response to that NICNAS submission, which relates to dangerous chemicals, as I understand it, and there is a special scheme for that.

CHAIR—We will send you down all the *Hansard* transcript. Thank you very much.

Mr Hamilton—Thank you.

Proceedings suspended from 1.03 p.m. to 1.52 p.m.

BURNS, Mr Phil, National Manager, Imports/Exports Management, Australian Customs Service

LONERGAN, Mr Paul, Assistant Director, Investigation Policy, Australian Customs Service

NAYLOR, Mr Peter Charles, National Manager, Investigations, Australian Customs Service

CHAIR—Welcome. Do you want to make any preliminary remarks or just go to straight into a discussion? The committee is happy to do it either way.

Mr Naylor—I have some very brief preliminary remarks to outline the paper you have only just received and obviously have not had a chance to look at. It briefly summarises the state of play in terms of Customs and rights of entry. The introduction briefly touches on the areas where Customs is active. It notes that we also use entry powers in relation to the Wildlife Protection (Regulation of Exports and Imports) Act. We then move through a discourse on the background to the current arrangements, a comparison, if you like, between the pre-1995 and post-1995 positions, 1995 being significant in the sense of the review of the Australian Customs Service by Mr Conroy's committee and the subsequent legislation. Towards the end it raises, under the heading of 'Effectiveness', some difficulties or shortcomings, as we describe them, in some of the warrant provisions that we currently have.

Senator CRANE—What page is that on?

Mr Naylor—The annexe 2, at page 10, is a summary of some of the shortcomings we have come across in the current provisions.

Senator CRANE—I believe you handle the fuel excise question too. Is that in your hands now or not?

Mr Naylor—No longer. Under the administration arrangements orders that is now in the Australian Taxation Office.

Senator CRANE—So it has been shifted?

Mr Naylor—Yes.

Senator CRANE—So I do not have to declare an interest then. I had it in the back of my mind that it had been shifted.

Mr Naylor—Yes. The responsibility for the excise moved to Taxation, the ATO, in October last year. In fact, the investigation of alleged excise offences continued to be done in Customs until July this year, a few weeks ago.

Senator CRANE—In terms of an audit on a farmer, a miner, a fisherman or a forester now—

Mr Naylor—Do you mean in diesel fuel rebates?

Senator CRANE—Yes. Is that completely out of your hands?

Mr Naylor—Yes.

Senator CRANE—Do you do any auditing at all of any fuels with regard to excises that are paid or collected?

Mr Naylor—I do not think we do.

Mr Burns—We would audit importers and exporters of fuel products. There are importers and exporters of fuel products. That is Customs's share of the excise issue, if you like. As soon as those products have entered Australia and entered into home consumption, they become an issue for the tax office. Our compliance audit teams would, in accordance with their audit program, occasionally visit an importer of fuel.

Senator CRANE—Do you audit them for quality?

Mr Burns—No. We audit them in terms of the importation transaction. We make sure that the valuation was right, the quantities were right and the description was right. Are they paying the right duty? Are they paying, at the moment, the right sales tax? We look at those sorts of issues. Do they have a process in their business that acquits and accounts for those sorts of things automatically? Is there reporting to Customs of those matters or to their brokers and then to Customs in an adverse way? If that is the case, we would say, 'Thank you. That's the end of our interest.'

Senator CRANE—So you actually do test fuel that comes in to make sure it meets the quality standards of the claims it makes?

Mr Burns—Only if we suspect that it does not. You do not go off and test it for the sake of testing it. If we had some serious doubt that something was being imported as one thing and, in fact, it was another—and that then went to the revenue issue of duty because one was free and one was not—then we may well get into that situation of testing. But that would be a very rare situation.

Senator CRANE—In terms of the announcement last week by Premier Court, BP is now going to supply diesel in Western Australia down to 500 parts per million, I think, of sulfur or something. It has been reduced from 5,000, which means the importers competing against that are going to be bringing fuel in. I am looking at the future now. Would you test for that sort of thing to make sure that fuel coming in now was of the required standard of diesel being used in Western Australia? You can take that question on notice if you like.

Mr Burns—I think you are probably starting to look at quality control through the states as much as through other Commonwealth agencies. The Customs concern would be if it was described as kerosene and it was, in fact, petrol. Generally speaking, we are not interested in whether it is good kerosene or bad kerosene—so long as it is kerosene. That is the requirement: to report it to Customs. We would probably say, 'That's it for us,' but that does

not mean to say the sorts of issues of quality and composition are not something that somebody else might take an interest in.

Senator CRANE—I understand where your roles come in. In carrying out that function, is that done randomly or do you need somebody to make a complaint? What would bring on the fact where you might go to assess, not necessarily fuel, something coming into Australia? What would be necessary for you to go and have a look at? Is it a normal sort of thing—adversarial or non-adversarial?

Mr Burns—It depends at what stage in the process we are talking about. In terms of a trigger for Customs, it might be an industry complaint. It might be a suspicion that we have arrived at from our audit compliance methodology of, say, the last 12 months, the last year or the last two years or whatever it might be. It might be something that we have discovered through our own systems ourselves. It is something we need to check on. It might be an issue that is one of an array of issues that we need to check on from time to time. It could be any one of those sorts of things that triggers an interest. In terms of adversarial or not, it depends very much on at what stage in the process it is done. If it is a compliance order and you knock on the door and say, 'Can I please test your fuel?' then, generally speaking, consent is part of that process. There is no compulsory entry by our people. It is just a matter of, 'Do you mind if we test it?'

Senator CRANE—There is no warrant for that?

Mr Burns—There is no warrant for that.

Senator CRANE—When will you get to the point where you would actually take a warrant?

Mr Burns—Basically, we would take a warrant when we start off with a suspicion of an offence and we put that through a working situation where we analyse that suspicion using information we can glean from other agencies, information from other parts of Customs. We might do some checks around the place—bank checks and those sorts of things. We might do surveillance. All of that builds up into an impression that we have that somebody is committing an offence. It is a serious offence because warrant action is not taken lightly and then we go down the track of swearing the information in front of the judicial officer, and so on.

Senator MURRAY—But if you knocked on that door and said, 'Can I test your fuel?' and they said, 'No,' you would go away and get a warrant?

Mr Burns—Not necessarily.

Senator MURRAY—Those people know you have got that warrant power lying behind that request, 'Can I test your fuel?', don't they?

Mr Burns—We are getting very quickly into the fuel substitution legislation that the excise and tax people deal with. In terms of the importation, yes, generally speaking, people

in this sort of course of trade would know that Customs has got an incremental approach to investigation.

Senator MURRAY—You need to understand why Senator Crane was asking that question because the ATO have that power of warrant or enforcement behind them. But they do not have to exercise it, because when they ask the client, the taxpayer, whether they can come in and talk to them, the taxpayer is aware of that authority lying behind and therefore they do not feel obliged to take it on to the more formal step.

Mr Burns—Without getting into their bailiwick they have, under their substitution legislation which we used to administer, a regime that starts at a consent process where not only do they knock on the door and say, 'Excuse me. I am from tax. I would like to come and test your fuel,' but they are obliged to say, 'You do not have to let me in.' They are obliged to identify themselves. They are obliged to identify what it is they want them to do because all of that is spelt out in the legislation. That is the consent process. If that consent is refused or withdrawn somewhere during that process, there are a series of steps that lead to monitoring warrants, and then search warrants, if indeed that is the way it goes. Yes, those sorts of people are well and truly aware that there is a ratcheting effect in terms of upgraded powers of entry, starting with consent and finishing with, 'Here I am. Excuse me. I am coming in.' Just to make it quite clear, we do not administer that legislation any longer. That is the tax legislation.

Senator CRANE—Who would be an issuing officer in terms of a warrant? Is that a magistrate?

Mr Naylor—Yes.

Senator CRANE—Do you basically operate under the same rules as the AFP? For example, yesterday we had the Australian Taxation Office, the National Registration Authority, who were somewhere in between the Australian Taxation Office, and then we had AQIS who had a pretty precise, exact format under which they operated and people knew exactly what the rules were. They said that they basically used the AFP model—that is what we heard this morning—tighter than the AFP. Where would you fit into the scale of things? You have got this consent arrangement where you can knock on the door.

Mr Burns—That is the tax fuel substitution legislation. We do not have the same warrant model as the fuel substitution legislation has. We have a model that was put into place before the fuel substitution legislation was introduced in 1997, 1998—something of that order.

The search and seizure provisions of the Customs Act are based on the Crimes Act—as they were in about 1994-95. That is the legislation that the AFP uses. There are some differences. There were some powers in the Crimes Act warrant provisions that were not deemed to be appropriate for an agency like Customs to use. There were some provisions in the Crimes Act legislation at the time that were made more stringent for us than for the AFP, such as how long we can retain evidence before we have to go back to the court to argue that we should keep it or that we need to hand it back. There are some differences, but by and large—

Senator CRANE—So you have a statutory limitation on how long you can hold evidence without having to justify keeping it longer?

Mr Burns—That is right.

Senator CRANE—How often does that turn over?

Mr Burns—Every 60 days.

Senator CRANE—I probably should have prefaced my comments—as I think we have all tended to do—by telling you what this is about. We had an inquiry into penalties in legislation. There were a lot of inconsistencies appearing in different bills coming before the Senate Standing Committee for the Scrutiny of Bills. I do not know whether you have seen the terms of reference of the committee itself—not of this inquiry—which are really based on the rights of the individual, civil liberties, retrospectivity, reversal of onus of proof and all these types of issues.

We had a series of pieces of legislation which, on the surface, appeared to be quite inconsistent with one another in terms of how they operated. Some of us were of the view, as a result of comment, that this was causing some confusion out in the community. What we are trying to get to—and we talked about this with earlier witnesses—is whether there needs to be some code which would act as a general principle on how search and entry operates and whether, in your case or in somebody else's case, there needs to be a justification as to why a deviation should occur so that people know their rights and know what they can and cannot do, et cetera. That is the basis behind this.

Having said that, could you briefly tell us, using the AFP as the model, what the differences are between your powers of search and entry vis-a-vis the AFP and what you would require? One of the answers you gave me before related to what is now a Taxation Office power, but do you get a search warrant from a magistrate? What is the process for you to get a search warrant? What is the deviation, or the difference, in terms of how the AFP and you might go about doing business? In your answer you might give us some feel for who you would regularly link up with in your operations—such as the AFP. If you have a major issue, do you do that in conjunction with the AFP, are there other authorities, or are you totally independent in what you do?

Mr Burns—Perhaps we should just introduce ourselves. I am the national manager of imports/exports management in Customs. I was the previous national manager of investigations until January this year, and Peter has taken over from me. If I answer, it is more to do with the history of all this. Paul used to work for me and now works for Peter as the policy person in the Customs Investigations Branch.

By and large, the template that we used to introduce the new search and seizure provisions in the Customs Act, as I said previously, was modelled on the Crimes Act. That is the act that the AFP uses. It is a criminal powers piece of legislation, but it is still essentially what we use. The process that we and the AFP go through to obtain a warrant is essentially the same in the sense that our officers go to a judicial officer and swear an information. The information is based upon the provisions of the Customs Act which require that we convince

the magistrate of the necessity for that warrant. There is a whole series of issues that the magistrate takes into account in the granting or otherwise of that warrant. There is a series of conditions that can be applied to the warrant. There is a different warrant for seizure of evidence from the one for the seizure of goods, but the process is pretty much the same. Our Customs officers carry out that process in front of the judicial officer under the Customs Act.

We swear our information, generally speaking, with the assistance of DPP and/or AGS, the Government Solicitor, depending on whether or not we are working under the Crimes Act or under the Customs Act. So we have legal advice as we prepare that information. I cannot say that we do that on every occasion because there will be urgency situations where you just cannot get your hands on a lawyer and you are out in the middle of nowhere and you have to do something. But, generally speaking, the practice is that we will get legal advice before we go into this process of swearing information.

There is an administrative requirement dictated by the CEO of Customs that is spelt out in his directions that are a disallowable instrument under the Customs Act in terms of the criteria and the process we will go through in terms of seeking warrants. For example, there is in the CEO's direction a provision for only investigation officers or officers in the Investigations Branch who are appropriately trained, et cetera, in seeking warrants and in executing them and all of those sorts of things are allowed to do this sort of work within Customs. So, by and large, the CEO has said all other officers of Customs defer any sort of warrant action to the investigation officers. The idea of that was to maintain the expertise and the skill levels in that group of people. Perhaps I should say there is a section of investigation officers in each regional office, so there is no problem with having to come to Canberra or anything like that. Each state has its own group of investigating officers.

Senator CRANE—Can I just say that one of the things that brought this inquiry on in fact was that, in some of the legislation coming before us, all it said was that the CEO or administrative officer could appoint somebody to do the job and there was no sort of restrictive control, if you like, or guideline on that. Could you tell us in terms of that—and I think you are about to move on—firstly, how precise does a warrant have to be in terms of doing something? Secondly, in those guidelines you talked about—and they are my words, not yours, and can the committee have a copy of those, if it is possible—you used the words 'appropriately trained'. Could you expand on that a little?

Mr Naylor—The guidelines, et cetera, we have submitted as an attachment to the submission. You only got one copy because it is a doorstep thick. That has the detail of all the procedures that we must follow for search and seizure ones.

CHAIR—Senator Murray might want to read it before he questions you.

Mr Burns—We do not have any difficulty. We look forward to the opportunity of tabling those as part of the rejuvenation, if you like, of the Investigations Branch following the review into Customs in 1993. It spells out a process, as I said, of who can do this sort of thing within Customs, reporting before you are about to seek a warrant. There must be a senior officer involved, and the senior officer must be at the head of Customs in the region, or the national manager of Investigation Branch in Canberra has the power of veto in terms

of stopping any warrant going forward if there is some policy problem or some question of the appropriateness of the warrant and those sorts of issues. There is a reporting and an accountability process in that, after the warrant has been executed, they must report back as to what occurred. There is a requirement for officers to report—if they break anything, for example—on any criticism that they might have received, or on those sorts of issues. So they are sensitive to the feedback aspect of all of that. They are contained in the CEO's directions and, as I say, they are a disallowable instrument.

In terms of training, Customs is, as part of the law enforcement community, if you like, for the Commonwealth, one of a number of agencies that benefit from the work done by the AFP and the old Commonwealth law enforcement board people, who are now OLEC, under the Attorney-General's Department banner. OLEC and the AFP developed some best practice principles in terms of investigation and investigators. They went to a plan, if you like, of how an investigation should be undertaken. They also went to the training and the competence of the people who undertake that sort of work.

I am pleased to say that Customs is the only agency beside the AFP that I am aware of that has implemented a fully-blown training program totally consistent with those guidelines and what have you promulgated by CLEB. Our training package was approved by them and the AFP. Up until about last year, all of our investigators had successfully completed that training in one way or another. The training goes to the technical matters of the powers of officers, the appropriateness of using warrants and all of those sorts of issues. The training regime has set out what they call minimum best practice. We sought all along to improve the performance of our officers. We sought to ensure that we did not put people who did not like investigation work—because it is confrontational and those sorts of things—to make sure that the system, as they go through the training, weeds them out and says that they are not appropriate for that sort of thing and gives them something else to do.

It is a training package that, by the time we have put it through all our officers—and Customs has invested hundreds of thousands of dollars in this training; most of the people have got through, but some have not—has also been an opportunity for us to reinvigorate the work force in the Investigations Branch in the sense that over the last few years there has been a 30 or 40 per cent increase in new arrivals. Those new arrivals did not put a finger on an investigation case until they had finished and completed that investigation training.

The way we put the syllabus for the training together was to employ the University of Canberra as a consultant. They developed the syllabus. John Knott, who is one of their lecturers, has been actively involved in the program ever since the syllabus was prepared. He is part of the process at the very end to say that the competencies and the what have you of the people have been met in terms of the tests that people have done as they have gone through the various modules of this thing.

Senator MURRAY—So they are accredited?

Mr Burns—Yes.

Mr Naylor—And the fraud control policy of the Commonwealth, which is partly in its last draft stage—and our minister has circulated it to her ministerial colleagues for

comment—will require all investigators of fraud in the Commonwealth to have a minimum standard, which is ASF certificate level 4 standard, which, as Phil says, Customs investigators already have. So that will be a mandatory requirement should the policy be promulgated as it is now in draft form by the end of next year. So that means that all investigators in the Commonwealth will have that minimum standard.

Senator CRANE—I have one final question. You arrive at the door with your search warrant. You knock on it; they open the door—whoever is there. What do you do to inform that individual—assuming they have got a gun pointed at you, because that was raised this morning—of their rights in terms of a search warrant? Have you got a handout pamphlet you give them or some information, or is that included in that booklet?

Mr Burns—The legislation under the Customs Act requires the officer to identify themselves. They all wear a badge. It requires us to explain what is in the warrant. It requires us, if they so wish, to get a copy of the warrant. Generally speaking, as a matter of practice, we will tape record warrant executions. It is not a covert thing; it is an overt thing. The tape recorder is in somebody's hand. We find that works as much for the other side as for our people. I do not need to go on. You know what that means in that sense—everybody stays controlled—and there is a record of what in fact is said and done.

Senator CRANE—But are there provisions, for example—

Mr Burns—We hand over a document that spells out a statement of rights for the occupier—where they stand in the scheme of things.

Mr Naylor—It is attached to the warrant.

Mr Burns—Of course, they do not have the right to refuse us entry once we have the warrant. If it is a consensual thing—

Senator CRANE—It would be a strange one if they did, wouldn't it?

Mr Burns—We occasionally do take along state or federal police to assist us in situations where we think there may be some agro. We have some history and experience in this area. People who we visit with a warrant who are allegedly importing steroids or those sorts of things—

Senator MURRAY—They might have been using them.

Mr Burns—Let me assure you they do. They get very angry and have a very short fuse. We have had people threaten to kill them and all that sort of thing. So we do have the police along to help us in that situation. Generally speaking, that is a state police relationship because we can be anywhere at any time. We generally go to the local police station and say, 'We are going down the road to look at this person. Do we need to have your assistance or not?' If the police know of this person, they may well come along. We also do that in advance so we do not just turn up on their doorstep.

The other niggling issue for us at the moment with those people is not only the police; those people sometimes have dogs. Protection of our officers from the dogs is an important issue. It is not one way in terms of being frightened about some of these things or being a bit concerned about it, let me assure you. That is basically the process.

We try to get the people in the same room. You will see in our submission that one of the shortcomings of the current arrangements is that we do not have power to order that. But, generally speaking, it goes a lot better if we can sit down and talk to people, talk them through what we are about to do so we can get in, do what we have to do and get the hell out of there as quickly as we possibly can. We do not stay there any longer than we have to. Generally speaking, ours is a document based search—we are after documents; we are not after goods. We can be after goods but, generally speaking, in private premises we are after documents. We simply want to know where we do not have to search and where we do have to search, get on and do it and get out.

Senator CRANE—Thank you very much. I am interested to know how you deal with those dogs because I have doorknocked in places like Dampier where they have dogs as big as elephants with mouths as big as those of hippopotamuses.

CHAIR—It is mentioned in their submission.

Senator CRANE—I have not had a chance to look through that. Thank you, Mr Chairman. I had better give somebody else a go.

Senator MURRAY—I have had the impression from the Federal Police and the ATO that you need a very different style of approach and a different climate is generated according to the issue at hand. It seems to me that mostly the bias in Federal Police work is towards the adversarial side because seldom are they involved unless there is a matter of criminal investigation, whereas I had the impression from the ATO that most of their stuff is non-adversarial in that a lot of it is resolved simply. If there is a problem established, it either goes away or there is a penalty or there is some sort of low level or relatively low level consequence to it.

Where do you fall in the range of these things? Do you do a lot of non-adversarial stuff where you go to visit—I am talking about the current legislation, not the past legislation—premises in order to do routine inspections or to satisfy yourselves that a problem that might have occurred in the past is no longer occurring? Do you do a lot of that? Or is nearly all your work with the expectation that it is going to develop into something more serious? I am talking about search and entry of premises, not everything else you do.

Mr Burns—All our non-adversarial work—using that term—is what we would call audit compliance work. It does not involve warrants.

Senator MURRAY—And that includes search and entry?

Mr Burns—On consent, search of documents. It is a compliance audit, basically. We have no reason to suspect that your business has committed an offence. We just want to make sure that what you have reported to us in the last six months is in fact the information,

et cetera. It might take a day or so to do that. We do it in correspondence. We arrange a time that is appropriate for you. We send a couple of people along. We try to keep out of the way of your business as you go about doing that sort of thing. That is non-adversarial—no warrants, no force, by agreement.

Senator MURRAY—Is that the bulk of your work?

Mr Burns—That is nothing to do with investigations.

Senator MURRAY—No, but is that the bulk of the search and entry work that Customs do?

Mr Burns—No. The bulk of the search and entry work by the Investigations Branch is warrant based where we suspect offences. That has to be a prerequisite of our starting, in which case most of that, if you like, is adversarial.

Senator MURRAY—With the ATO, the bulk is non-warrant.

Mr Burns—Yes.

Mr Naylor—Just let me clarify. You asked the question: is the bulk of the work that Customs does compliance based?

Senator MURRAY—Yes.

Mr Naylor—I think he answered that it certainly is not in the Investigations Branch, but I think, overall, in Customs—

Senator MURRAY—I am looking at the search and entry provisions overall, and I know that there is a spectrum—that they all entail entry of premises. I want to know: if there are a hundred entries to premises by Customs, would 70 or 80 of them be the non-adversarial type—some of them visiting? Is it that kind of set-up?

Mr Burns—It is probably two, three, four or five to 95.

Senator MURRAY—So, in that sense, you are similar to the ATO?

Mr Burns—The ATO has a process whereby they go through their self-assessment arrangements where they penalise people for making false assessments and what have you, and then they prosecute the worst of those. We have a process whereby somebody imports goods, or exports goods, and on the compliance side of our business we go and check. It is also self-assessment—

Senator MURRAY—How much of a check is done? Is it a risk assessment or is it a sampling process?

Mr Burns—The audit process is risk assessed.

Senator MURRAY—That, too, is the same as the ATO.

Mr Burns—Yes, that is the same, but, instead of the investigators flowing from that, in Customs it is a totally separate arm where, if you go down the administrative audit process, you do not get tripped up by the investigation process. It is either/or in Customs, whereas in Tax one follows the other.

Senator MURRAY—Surely, if it is an administrative process and in that process problems are discovered—

Mr Burns—Then it is referred to the investigation. It stops.

Senator MURRAY—The audit does not do the—

Mr Burns—No. The audit stops. They do not have the training. They are more on the checking side, complying with the legislation.

Senator MURRAY—So, from that point of view, the business person affected is immediately aware of the change of climate, because there is a change in personnel and the nature of the—

Mr Burns—Yes, it is much softer, much more convivial. They are the same people who go and check them every two or three years. They have seen these people before. If the owner of the business has no reason to believe that they have made anything other than innocent mistakes, they have no major traumas in terms of Customs coming along and auditing them. It is just like any other audit.

Senator MURRAY—We have established that, particularly on the investigative side, it is very much like the AFP, and it sounds as though, on the administrative side, it is very much like the ATO. But both the ATO and the AFP have a very defined complaints procedure, which lands very heavily, it seems, with the Ombudsman. If there are queries but there are also other bodies, the AAT and the Privacy Commissioner come into play. In terms of search and entry provisions, where do people go who complain about the process with you?

Mr Burns—We have not had one. I do not think the Ombudsman is disqualified—or the Federal Court is disqualified.

Mr Naylor—The Ombudsman is in the frame, certainly.

Mr Burns—Generally speaking, the defendants in an investigation, which is the adversarial side of the business, will have their day in court when we prosecute them. They will use any shortcomings, obviously, that are in our process that they can discover or test as part of their defence as to why the charge should not be proven. In the 4½ years that I was the national manager of investigations, I think that, out of hundreds of cases, we would not have had more than one or two Ombudsman issues. I mean in the Investigations Branch; I do not mean in Customs.

Senator MURRAY—And on the non-adversarial side the normal administrative process—

Mr Naylor—Certainly, Customs has a complaints and compliments system. If you are asking for statistics, I will have to take that on notice.

Senator MURRAY—The reason we ask this question specifically is that the ATO have been at pains in their charter, and in their pamphlets that they give people when they go to visit them, to say, 'These are your obligations in terms of this process. These are you rights.' They very clearly spell out that, if you have a problem and you want to pursue it, you can pursue it in a number of ways. They have an internal disputes mechanism but they also refer people to the phone numbers and the access points for the Privacy Commissioner and the Ombudsman. You do not have anything of that sort?

Mr Naylor—We certainly do have service charters.

Senator MURRAY—You do or you do not?

Mr Naylor—We do in various areas—not in every area of Customs as yet. There is the travellers charter, the importers charter and those kind of things, details of which I do not have in my head or with me.

Senator MURRAY—Let me understand—you are just skipping past it: what does a travellers charter and so on mean?

Mr Naylor—As I understand it, it is the service charter arrangements that all government agencies are now implementing, telling a passenger, 'This is the way you can expect to be treated by a Customs officer,' and that kind of thing.

Senator MURRAY—Okay. And, within there, there is a disputes system set out?

Mr Naylor—Yes—how you can lodge a complaint, these are the contact points and so forth.

CHAIR—I think the Ombudsman gave Customs, comparatively at least, a bit of a tick.

Mr Burns—We have had years where some of our procedures at airports, for example, dealing with passengers, personal search, those sorts of issues, have been dealt with by the Ombudsman. But when you get into the sphere of the investigators, when we have warrants, the rights of the other side are protected by the legislation as distinct from by the Ombudsman. The Ombudsman may well have concerns with us about the procedures we apply and the reasons we are knocking on the door and those sorts of things, or if somebody is abusive and rude—those sorts of issues. Sometimes they have complained, but there certainly have not been any complaints of that nature made to the Ombudsman. Mind you, I would also say we do not tell them to go to the Ombudsman either in terms of warrant situations. Certainly, our other arms of Customs do.

Senator MURRAY—The Ombudsman has formal own motion powers under section 21A of the complaints act. Does that apply to Customs as well?

Mr Naylor—Yes. I think the previous ombudsman did, in fact, initiate one on personal searches of passengers, I think it was, about a year ago.

Mr Burns—I think it was rolling for some time.

Mr Naylor—That was on frisk searches and personal searches of passengers at airports.

Senator MURRAY—I get the impression from the three of you and from your job descriptions that your expertise is in investigations, and that is where your answers are. Would you think we as a committee would need to talk to people who deal with the other areas of search and entry or do you think you are across it enough for our purposes?

Mr Naylor—I think we have covered everything. In the submission we do mention the commercial audit verification type powers, under sections of our act, on page 7. If you needed to delve into that in more detail, it may be necessary to consider that.

Senator MURRAY—What about foreigners? In our law, I think, there is quite often a distinction between the rights attaching to Australian residents and citizens and those of foreigners. Have you got much greater powers in terms of your act as to how you deal with search and entry on foreign vessels and anything to do with foreigners at airports and so on as opposed to Australians, or are the rights the same?

Mr Lonergan—Just to get the basics out of the road, as far as how we deal with foreign persons is concerned—those who have committed offences—it is basically the same under part 1C of the Crimes Act which we are obliged to follow. I think everybody on vessels is pretty well treated the same; there are no differences. A person we apprehend who is a foreigner has some different rights under the Crimes Act, though.

Senator MURRAY—To call on a consular official and all that stuff?

Mr Lonergan—Exactly. You are aware of all that?

Senator MURRAY—Yes.

Mr Lonergan—They are the essential differences.

Senator MURRAY—So there is no reason for the committee to look at those categories differently?

Mr Naylor—There is no mention of nationality of persons in the Customs Act at all.

Mr Burns—No.

CHAIR—It is more of a Migration Act issue, I suppose.

Mr Naylor—Yes.

CHAIR—Do you cross over with the Migration Act at all?

Mr Burns—Customs certainly does. The border side of our business certainly does, but that is not the investigators in terms of the search and entry.

CHAIR—Does Customs turn around an illegal immigrant—what do they call them?

Mr Burns—Suspect illegal immigrant vessels?

CHAIR—No, a non-citizen.

Mr Naylor—Unlawful non-citizen.

CHAIR—Unlawful non-citizen is the phraseology. Do you turn them around or does Immigration turn them around?

Mr Naylor—You mean when we detect them at an airport?

CHAIR—Yes.

Mr Naylor—I think they are brought to the attention of Immigration.

Mr Burns—Our officers deal with them because our officers are the ones they come to with their papers. If there is any suspicion or any question about them they are handed over to Immigration officials at the airport. If you want to get into that sort of search and ask questions on those sorts of issues we ought to get different people to talk to you.

CHAIR—We have got Immigration coming. Would it only be for Immigration that Senator Murray's question has relevance?

Mr Naylor—Yes; apart from what Paul has said—

CHAIR—We can check that up, if needs be.

Mr Naylor—there is no mention of nationality in the Customs Act.

Senator MURRAY—Let us talk about foreign vessels. You administer AMSA, the Australian Maritime Safety Authority?

Mr Naylor—No, it is part of the Department of Transport and Regional Services.

Senator MURRAY—But you are called on to do the inspections, aren't you?

Mr Naylor—Inspections of vessels?

Senator MURRAY—Yes.

Mr Naylor—In terms of seaworthiness and so on? No.

Senator MURRAY—I have read the report on AMSA but—

Senator CRANE—The ones that had the fish on that came up from the south. That is what you mean, is it?

Mr Naylor—Do you mean the illegal fishing?

Senator CRANE—The confiscated ship, the illegal fish.

Senator MURRAY—No, I mean the inspection of vessels, and there are a number of things which run on from that—in other words, over and above the question of illegal—

Mr Burns—You mean the seaworthiness of vessels?

Senator MURRAY—Seaworthiness, safety, hygiene.

Mr Naylor—That is the Maritime Safety Authority, which is not part of Customs.

Senator MURRAY—But it is not you who do the work on their behalf?

Mr Burns—No.

Mr Naylor—We get involved in vessels, obviously, because of the potential that they are carrying prohibited imports, for example.

Senator MURRAY—The reason I asked that question is because my impression is that they do a terrific job but, of course, it is very much a search and entry job, and attached to it are many of the issues which, by and large, are left with the states but which in this case I think are federal—for instance, occupational health and safety issues, many of the environmental safeguards and so on.

Mr Burns—They are not Customs functions.

Senator MURRAY—So you do not interact with them?

Mr Naylor—No.

Mr Burns—I am concerned that perhaps we have not quite answered your question about explaining the compliance side of our business and the investigation side of the business. The reason that you have got the Investigations Branch represented here is that we do not classify our audit compliance work as search and entry because it is only conducted with the permission and the authority and the agreement of the client whose premises we are going to audit.

Senator MURRAY—Except, as I understand the law, if the client refused, you could go away and get a warrant. So it is backed by law.

Mr Burns—At the moment under the Customs Act there are provisions, at 214AA and AB, where we can force our way in as an audit situation, but they are basically not being used at the moment. There are problems with those parts of the legislation. The government is looking at proposals to possibly change that situation in accordance with the template that Attorney-General's criminal law policy people are using of monitoring warrants, search warrants and formal agreement to come into the premises.

Senator MURRAY—Let me put it bluntly to you. On the compliance side, I see Customs having the same powers as the ATO. Essentially, what they are saying to somebody is, 'If you do not consent to me walking through the door and looking at your books and discussing these matters, I am going to make you consent.' That is what I understand the law has allowed.

Mr Naylor—But we would have to get a judicial warrant.

Mr Burns—If you wish to pursue that sort of question we need to get the audit side of Customs along.

Senator MURRAY—And that is why it comes within our ambit.

Mr Burns—I understand that. It is a vexed question. But I think it is better that you speak to our experts in that area who deal with it on a daily basis.

CHAIR—We will give you all the *Hansard* from the various people who have given us evidence. If you read through that, we might get your comments on it, and that will probably make it more sensible.

Mr Burns—The context that we use search and entry is the compulsion situation. As I say, that is only our investigators; it is not our auditors.

CHAIR—Suppose the auditor was refused. Is there anything he or she can do about it?

Mr Burns—Customs would say, 'You can refuse and we will come back with some warrant.' Generally speaking, that is not the way it is done. But if you wish to pursue that, we need to get our experts here to talk to you about that.

Mr Naylor—On page 7 of our submission we have a few paragraphs about 214AA of the Customs Act and the powers that that confers on Customs officers. As it says in the second paragraph, confirming what Senator Murray said, if access to premises is denied then it can be followed by access by judicial warrant.

Senator MURRAY—That is why I describe it as an ATO power.

CHAIR—Apropos of what has arisen so far, there is a suggestion of one authority using the power that lies in another authority. A policing authority might get the Taxation Office to use its powers to get evidence or intelligence that it would not otherwise get. Does that happen with Customs at all? You might say, 'We can't get this evidence under our powers.'

Senator MURRAY—A kind of Trojan Horse.

CHAIR—You might say, 'We will ask one of the other authorities to use their powers to back us up.' In which case, that might indicate that there should be a balancing up of powers.

Mr Burns—There are two issues here. There is the issue of us acting as agents of another agency, which is not the same as what you have just said. We are simply stopping goods leaving or entering the country that an environment department or wildlife department or somebody might have an interest in. That is not us collecting evidence on their behalf because, generally speaking, they do their own investigations and prosecutions. We do not collect the evidence. We simply hand over the goods or whatever it happens to be because we are the border agency and that is that.

However, getting to the gist of your question of whether we hand over to other agencies information that they then use as evidence, generally speaking the answer is no. But there are provisions under the Customs Administration Act for the Customs Service to provide another agency with information. The other agency, by and large, as section 16 of the Customs Administration Act is now structured, says that that information should be used as part of an investigation. That happens in terms of our links with other law enforcement agencies, particularly the AFP. But, generally speaking, it does not happen with the other agencies. We certainly would not, I am sure, willingly go forward with a view to doing something that was the Trojan Horse type situation.

Senator MURRAY—Particularly for tax, it would be an obvious one. You might find something on the import-export side which has a customs consequence but might signal to you there is a tax problem as well.

Mr Burns—I would say to you that, if somebody is defrauding Customs of revenue on importations, it is not beyond the realms of Einstein to work out that they might also be having a go at the tax department.

Senator MURRAY—But the tax department has an automatic link with the Federal Police and the NCA in particular. That is quite proper. What we want to establish is whether you have that kind of link as well.

Mr Burns—We have a similar link with the AFP and the NCA in the sense that we do exchange information in law enforcement. We do not have the same link with Tax albeit that, if Tax do want to know something about one of our clients, they are able to ask and, provided their request falls within the legislative prerequisites, if we can provide them with information then we will.

CHAIR—One of the points behind my question was your annexe 2 where you set out the perceived deficiencies in the present system. I was wondering whether those sorts of problems can be overcome by an exchange of powers between the various bodies. That is the first point.

The second point that has come up again and again is that there is a disparity of powers amongst the authorities and I wonder whether those powers should be equalised, if you like, across the board. If you have to use the powers of other authorities, I think that is fairly significant. Can you answer those two questions?

Mr Burns—Customs investigates its own offences. We do not ask other agencies to investigate offences on our behalf. We do go overseas and we might ask foreign governments for mutual assistance in terms of the investigation of some sort of an offence. That is certainly possible. We do ask the AFP, because the Crimes Act says they must, to execute Crimes Act warrants if we are going to pursue a case criminally, but then our investigators do the work. We do the investigation. The AFP do not do the investigation. In that sense we are very much our own agency. I cannot think of a situation where we have actually done investigations for other agencies, so we are neither their Trojan Horse nor they ours.

In terms of consistency of powers, that is exactly what the Attorney-General's criminal law policy people are trying to achieve in terms of the template for powers of search and seizure and all that goes with it before and after.

CHAIR—I am not sure whether this question is relevant, but it is a question I was asking in Senate estimates hearings. Concerning the level of intelligence gathering overseas, it seems to me that in areas like migration and customs we have not got all that much in the way of people overseas properly gathering intelligence. You cannot go around in friendly countries, or any country for that matter, and investigate. Have we got any relationships with authorities overseas that would enter and search for us? I do not want to go too deeply into this.

Mr Burns—In an intrusive manner?

CHAIR—Yes.

Mr Burns—There is provision under the mutual assistance treaties that Australia has with other governments, and they have with us, so we can do that as well. In Australia the agency that would do work that was referred to Australia is the AFP. It is not Customs. Even if it is a customs matter from another country, the AFP would do it. It would not come to us to do. It is not being channelled through the AFP for us to do. They actually do it because it needs the approval of the Attorney-General and his department to get into this sort of issue.

CHAIR—What would you do if you wanted some knowledge from overseas?

Mr Burns—We do have very robust relationships with all members of the world customs organisation. And having regard to the fact that customs offences are either goods going to some place overseas or coming from some place overseas, often the question is raised of, 'What could we find over there?' Generally speaking the offences that we tend to investigate are matters where you can get the documents in Australia of the orders and the money transfers and all of that sort of thing. You can basically recreate the whole thing

without having to go very far. Then you put it to the alleged offender and say, 'This is the evidence. What do you say about this?'

CHAIR—Concerning the 60-day rule, how does that come about? Why is it in there?

Mr Burns—The essence of the concept is that an agency that seizes documents or goods ought not to simply keep them ad infinitum without justifying to the other side why they have got them. There is no problem with that. The issue then became one of whether 60 days was a good period of time after which you ought to be called to account, so to speak. The calling to account issue is not in question. We do not have any difficulty with that.

CHAIR—But 60 days is too short a period is what you are saying.

Mr Burns—Yes, we spend all our time getting ready for the next thing because it is basically swearing the information, back into court—60 days is two months—and a week to prepare the information by the time you put it all together. The other side raises questions, such as: 'How many officers did you have involved? Could you have put more on and therefore you would not need the 60 days?'

No agency has unlimited resources. All those issues come up to be tested. All we say is that the discipline of being asked to explain why we need to keep the documents is not a problem. We need to have a period which gives us enough time to then go and do the investigation so we can usefully report back to the court, and 60 days is much too short. A hundred and eighty days is what we have suggested and we have sought amendments to our legislation to achieve that.

CHAIR—As for the collection of evidence of criminal matters, do you want to go beyond the comment in this document?

Mr Burns—Under the Crimes Act, as I recall, the period is unlimited.

Mr Lonergan—On the 60 days: there is no 60-day limit in a comparable situation in the Crimes Act. There is a general requirement in both the Customs Act and the Crimes Act that evidence or potential evidence is to be handed back when it is no longer required. That is an in-principle position. We are given 60 days under the Customs Act; for the AFP there is no limit.

Senator MURRAY—That is an important point that you are making, Mr Lonergan, because the AFP stressed to us that they needed—and would fight to retain—an open-ended situation. They said that sometimes their investigative files, if I recall correctly, would extend 15 years. How do you react to that? Is it similar with you?

Mr Burns—It is certainly not 15 years. Two to three years to get an investigation to brief stage, to get it into court, is not unusual on our big cases and then, generally speaking, we have a two-year wait, for example, in the New South Wales Supreme Court.

CHAIR—Just in case you get jealous of the police, they were not talking of the evidence so much as their records of the intelligence that they have gathered.

Mr Burns—I can imagine that the AFP or any police force would have unsolved cases and that they would not want to hand all that information back after some arbitrary number of years, months or whatever has gone by. It is an open case for them, particularly if it is a serious case. But we have had situations where we have had to go back to court to argue to retain documents. Once the charge is laid, the 60 days stops. But we have had a situation where we have had to go back and argue in the court that if only we were not there arguing we could in fact be doing the putting together of the brief and then the whole thing would become clear for everybody.

CHAIR—With the time limits on the execution of a warrant, I think you have the same complaint as the Federal Police although I do not think we reached that in our first discussion with them. This is the situation where you just get on to some important matter and the clock stops you. Is that the situation?

Mr Burns—That is one. The other is if you start halfway through the day. You might have been waiting for the person to come home because you would rather have them there when you are going through the person's house. They come home at four in the afternoon and the warrant expires at six. You do as much as you can in the two hours and then it becomes a matter of having, via the telephone, to go back to the magistrate to seek extensions, et cetera, because the feeling is that, once you leave, the evidence—if it is there—will disappear, be altered or whatever. The risk is that it will not be there and we have great concerns about that. So the idea is that, in principle, you start early in the morning so you have all day to do it. But that is not always possible.

CHAIR—Then you want the same provision in the Customs Act as in the Crimes Act dealing with the ability to give other agencies evidentiary material. I think we have discussed that already.

Mr Lonergan—I think that really was an oversight in the drafting of the act—that is what Attorney-General's has told us anyway. It was an oversight. It should have been there.

CHAIR—If the Attorney-General says that, that must be true.

Mr Lonergan—Precisely.

Mr Burns—We are not interested in reaching a situation where information just flows, but there are situations where it would be useful for them and useful for Customs or other agencies to be able to exchange information or for them to have access to our information. At the moment that is very difficult sometimes.

CHAIR—The current provisions draw a distinction between forfeited goods and evidence. They do not permit the seizure of goods as evidence. There is also a forfeited good. What is the difference? What is that all about?

Mr Lonergan—One could perhaps explain this best if one were to talk about the operation in Victoria where we took all that machinery over excise—tobacco making machinery, tobacco cutting machinery and cigarette making machinery. I am not too sure even now whether we took that as evidence or as forfeited goods. I will try to explain the

difference. We know what evidence is—we are fine on that. A forfeited good is something which is forfeited to the Commonwealth by virtue of what it is and by force of law. That does not mean it is necessarily ours.

We had occasion in Victoria to find a factory that was making cigarettes unlawfully. The revenue at risk was probably over $1 million a week. That is what it was costing in terms of loss of revenue to the Commonwealth. The idea of the forfeited goods provision under the Excise Act—and I have to stress that we do not do excise any more—is that we took the evidence of all the activity and then we removed the wherewithal by means of which that activity might continue.

So we did two things: we took the evidence of the offences and the commission of them, and we closed the place down. It would be absolutely silly to say, 'We will charge you with those offences,' and turn one's back as they turn the machines on again. Those machines are forfeited. They can be seized under either the Crimes Act or the Customs Act. As for what we do with them after that, the Customs Act does not help us. We need them as evidence and we want them forfeited, and the Customs Act talks in terms of one or the other.

Mr Burns—If they are not evidence, we have to give them back. If they are not forfeited, we have to give them back.

Mr Lonergan—We need to be able to use the Customs Act in a way so that we can dispose of these things, if that is considered to be fair.

CHAIR—The next is the one that is of real concern and I do not think we have so far spoken about this to any other authority: the safety of officers on warrant premises. Do you go armed?

Mr Burns—No. We take police as assisting officers if indeed being armed is important. Let me say that just the presence of the police officers normally takes the heat out of the situation.

CHAIR—The sort of thing that one from outside does not envisage, I must confess, is the idea of being attacked by animals such as dogs.

Mr Burns—We have had that experience.

CHAIR—What are you asking for here?

Mr Burns—We are simply highlighting that this is a problem for our officers and that the legislation at the moment is silent about provisions to protect those officers.

CHAIR—Things like chemical sprays and ultrasound devices?

Mr Burns—They are the sorts of things that you look at. I suspect that if we gave officers capsicum sprays to spray at dogs the RSPCA would be down on top of us. I do not know what the answer is. It is just highlighting the fact that the protection of officers is important and that it is better to have the power.

Senator MURRAY—Do you have less protection than the police?

Mr Burns—We are not armed. We do not have batons and those sorts of things.

Senator MURRAY—But I am talking in terms of your rights and the ability to exercise rights.

Mr Burns—I would not say that we have had very many examples where we have not been able to do what we have to do with the powers that we have. Given the situation and the environment that Customs operates in, that does not mean to say that there have not been situations where it has been very unfriendly or people have been very jittery about the dog in the other room or something like that, but it has not stopped us doing our job.

Senator MURRAY—I meant differently. If a policeman is punched in the eye and you are punched in the eye as a Customs officer, surely the right to recourse and the way it is dealt with are the same?

Mr Burns—Yes, they are.

Mr Lonergan—But our arrest powers are extremely limited. We have only an arrest power in domestic situations. So under a warrant—for assault and that is all—we would have to have the strength and the capability to do it, and that is often not the case. That is why the police are there.

Mr Burns—We would argue that, if we can foresee a situation arising where that is likely to happen, we take the police with us and let them deal with that part of it. In the event of it occurring—coming and bubbling out of nothing—we would say that our training program is such that people can see that that situation has arisen and that it is time to leave the premises and go out and have another think about how then to go about it. The answer might be to go and get the police, if they are not already there.

CHAIR—Yes, but it is not an issue to which we have turned our minds until now.

Mr Burns—That is not the only issue. We have situations where on entering premises we find syringes and needles in drawers when we are looking for documents. Our officers are at risk. There are a range of OH&S situations—the fear of the dog coming out at you is one issue; getting punched in the eye is another; needle-stick injuries; the cleanliness of some premises. We have had some pretty nasty situations like that.

CHAIR—Could you give us some examples of that at a later stage? It does seem to be an occupational health and safety issue, if nothing else.

Mr Burns—We certainly can. We have had some pretty horrifying situations for some people.

Senator MURRAY—Is it ever used as a means to get you out of the building so they can destroy evidence? If you were in a building searching for drugs and the person concerned knew that punching you in the eye might result in a six-month gaol sentence

instead of a drug sentence of several years, it might be a temptation to get you out of the building by punching you in the eye so that they can get rid of the drugs. Do you ever have that happen?

Mr Burns—We have had the odd situation where somebody has said they are going to complain to the minister and allege harassment, and all of that sort of thing, as a means to get us out before we are finished—it has not worked. We have not had to leave a premises because somebody has been punched in the eye, because the sorts of things I have just talked about have come into play; that is, either the police were already there or we assessed the situation as having deteriorated such that we got out before somebody did get punched in the eye. We make decisions about how best to deal with that situation later on. Quite obviously, if you are trying to intimidate an officer into not searching a room or trying to convince them there is nothing in the room so they do not need to bother to try, those are the sorts of techniques available.

The other very important issue for our people is the authority to demand an answer to the question: 'Is there a firearm on the premises?' We have had a number of situations where we will be searching things—in a bedroom, for example—and the bloke will pull a shotgun out from under the bed, not point it at anybody, and say, 'Look what I have got, ha, ha!' or it is behind the door or something. For the officers concerned, whether it is loaded or not, those sorts of things are traumatic.

Generally, when we arrive we say, 'Have you got a firearm?' We have already checked to see whether they are licensed, because that is part of the process that we go through, but even if they are not licensed it still does not mean there are no firearms in the place. We like to know where they are and isolate them so that they can be put somewhere where nobody has to worry about whether somebody is going to go and get one. We have had a couple of situations where people have pulled them out only to show them, not to use them. The issue for us is having the power to demand an answer for questions such as, 'Is there a firearm on the premises? Where are they so we can disable them?'

Senator CRANE—You would not be hanging around waiting to find out, would you? I would not be anyhow.

Mr Burns—That then goes back to a point I made earlier that the lack of a power to corral people or to put them in the one room when you walk in means that they can walk through the house unattended. If they have access to rooms, and you do not have enough people to go with them all the time, it is quite possible for somebody to wander in a room unaccompanied by a Customs officer and come out with a gun, or come out with a dog, or come out with a document that we did not know was there and shred it, or eat it, or burn it, or flush it down the toilet.

Senator CRANE—With regard to your communications with the police when you go in there, you said if there is cause you take them in but that in a lot of cases you would not. Do you notify them that you are there at a particular time?

Mr Burns—Yes, as part of our preparations for executing the warrant, we will have driven by the premises to see what it is, where it is and whatever problems there are. As part

of that lead-up process, we will be in contact with the local police to say that next week, tomorrow or whatever, we will be meeting Mr Smith at 12 whatever street. If they know Mr Smith is a known dealer in amphetamines or steroids or he has a history of assault, or that sort of stuff, the police will say, 'We'll come with you.' You know how serious they consider the other person by the number of police they send with you. If they send one policeman with you, you say, 'This is pretty good.' We have had a situation where we have had two or three cars come with us for one person. We know then that we are in a pretty difficult situation and people are on edge about that.

CHAIR—You cannot take sick leave at that stage?

Mr Burns—It is a bit late and we hope it does not happen afterwards. In that particular case where a couple of police cars did turn up with our people, that man threatened to kill our people and he was charged for that. Whilst there was not much he could do about it, it did not fill the officers or anybody there—be it the police or our people—with great confidence, because he was a monstrous man. He was involved in the gym industry and all of that. He was very antagonistic toward us being there. The search and entry provisions of any legislation ought to protect officers and police and people assisting.

Mr Lonergan—We have also had occasion to be advised not to execute a warrant and not to go near the place until the police have cleared the way.

Senator MURRAY—The police advised you that?

Mr Lonergan—The police got a warrant and opened the doors for us.

Senator MURRAY—But who advised you not to?

Mr Lonergan—The police.

Mr Naylor—They rendered the scene safe before we got there.

Senator MURRAY—With this procedure of needing to coordinate with the police is there ever a risk that somehow a matter which needed to be kept secret would leak out? For example, if you rang somebody at the desk and the sergeant just spoke openly, it might become public knowledge. How does that work?

Mr Burns—Generally speaking, our regional investigation officers have a liaison officer in the state police operations area and they will talk to them first about what we are doing. So head office, if you like, in the state, knows that we are off to Wangaratta or somewhere.

Senator MURRAY—So it is not a generalised interaction; it is just specific?

Mr Burns—It is a specific case. There is an ongoing interaction between us and state police. But, specifically, on assisting us with warrants, that is very much case by case. We will put off and delay executing warrants if the police say they are not ready. If they tell us that they are doing something, and would we mind waiting a week while they finish their interest, we will also do that.

CHAIR—We might be interested in hearing more on the other matters we raised. Our secretariat will get in touch with you.

Mr Burns—We are at your disposal.

Senator CRANE—It might be useful to have some of the compliance people here as well, to go to the next step.

Mr Burns—We can do that. No trouble.

CHAIR—Thank you for that.

[3.10 p.m.]

ROXBEE, Mr Garry, Acting Director, Enforcement Section, Border Protection Branch, Border Control and Compliance Division, Department of Immigration and Multicultural Affairs

CHAIR—Mr Roxbee, do you have anything to say or do you want to go into discussion?

Mr Roxbee—I would prefer to go into discussion.

CHAIR—To get it going, it was suggested that the powers that the immigration department has for search and entry are wider than lots of others in the sense that you do not need a warrant in many cases. Is that so?

Mr Roxbee—It is not actually the case. They are wider in some ways, but much narrower in other ways. They are wider in the sense that an officer at the executive level or above can issue a warrant to a field officer who can then enter premises where he suspects that—

Senator CRANE—Who can give that warrant?

Mr Roxbee—The way it is administered, it is an officer at the executive 1 level or above. The act is broader than that. In fact, we administratively restrict that power to officers at the executive 1 level.

Senator CRANE—So you do not have to get a warrant from a magistrate?

Mr Roxbee—No, that is right. The officer who holds the warrant has the power to enter premises where he or she believes that there is an unlawful non-citizen. It also gives the power to enter premises—and this is an area where the power is perhaps a bit too wide—where there is a person who holds a visa to be temporarily in Australia and that visa is subject to conditions. I take it that power was aimed mainly at people working illegally or breaching their visa conditions in other ways.

CHAIR—This is into any sort of premises—houses?

Mr Roxbee—Any sort of premises.

Senator MURRAY—Sweatshops?

Mr Roxbee—Yes.

Senator MURRAY—You have the power of search and entry into illegal sweatshops.

Mr Roxbee—Yes. But our power to enter sweatshops is still regulated by a warrant, whereas many other departments have powers of entry under powers of inspection. We

actually have to have a warrant to enter a business premises, whereas many other departments have powers of inspection. One thing we are considering as a possibility to counter the problem of illegal work is a possible power of inspection to look at employment records and to look at identities of people in the workplace.

CHAIR—How often, over the last year, have there been entries into sweatshops, factories, offices, private homes and hotels?

Mr Roxbee—I cannot put an exact statistic on it, but I think the majority of addresses that we visit are private homes. We visit a large number of business premises. I suppose a very small number of those could be considered to be sweatshops. We do not actually use our warrant in many cases as a search warrant. It is a kind of hybrid warrant in that it enables us to enter premises to search for people. Under the Migration Act, section 189, we have the power to detain unlawful non-citizens. That is, I suppose, our equivalent of an arrest warrant.

In order to find them and detain them, we often need to visit addresses. Where we visit the address, although we may have a search warrant to visit that address, if we need to establish who is actually there at the address, we may simply knock on the door and talk to the people who are there. In many cases, we would prefer a low-key approach to the actual execution of a search warrant.

Senator CRANE—I am not sure whether I am confused or not. This is a terrible admission, is it not?

Senator MURRAY—Do you want me to tell you?

Senator CRANE—I know what your answer will be.

Senator MURRAY—My answer is maybe.

Senator CRANE—You said you have to get a search warrant signed by one of your own officers to visit a home, or something or other?

Mr Roxbee—That is right.

Senator CRANE—When Senator Murray asked you about a sweatshop, you said, 'We're unlike others; we have to have a warrant.'

Mr Roxbee—Yes.

Senator CRANE—Are you talking about that same warrant? Are you talking about a warrant you have to get?

Mr Roxbee—Yes, I am.

Senator CRANE—That clears that up. Is there any instance where, in fact, you use a magistrate's warrant?

Mr Roxbee—We use a magistrate's warrant for investigations of offences under the Crimes Act or under the Migration Act.

Senator CRANE—When an immigrant or somebody under a visa breaches the conditions of that visa, isn't that an illegal activity? Where do you differentiate between the two? This is where I am confused.

Mr Roxbee—They may or may not be committing an offence. It is not strictly an offence simply to overstay a visa.

Senator CRANE—What if they are working on a non-working visa?

Mr Roxbee—That is an offence.

Senator CRANE—So what sort of a warrant do you need in that instance?

Mr Roxbee—In that instance also, because of that second power under section 251, which gives us our search warrant powers to enter premises where we believe someone who holds a visa subject to conditions is, we can use our search warrant to enter those premises. Usually, those people are not prosecuted because, in most cases, there is no point to prosecuting them and the most effective remedy is simply to cancel their visa and get them out of the country.

Senator CRANE—If you go into one of those and somebody is working, you can actually arrest them yourselves—a sort of citizens arrest or something. Can you do that or do you have to call the police in to do that arresting? How does that operate?

Mr Roxbee—There is a procedure called questioning detention where we can detain someone who we believe is subject to visa cancellation for up to four hours, subject to various conditions which enable us to put to the person the reason why we think their visa might be subject to cancellation and then to receive their response. If we cancel their visa, they become unlawful and we can then detain them. Does that make sense?

Senator CRANE—Yes, but that is done by an officer from the department, not by a police officer?

Mr Roxbee—Yes, that is right. That is an administrative action by an officer of the department.

Senator CRANE—What happens if that person resists?

Mr Roxbee—If the person resists, the instructions we give to our officers generally are, if they are in any physical danger, they should withdraw from the situation. Given that they are only applying an administrative remedy, they are not armed. We do not want our officers to be at risk of injury or even of injuring the client in that circumstance. If we have reason to suspect that we are likely to need police assistance, or force in the execution of a search warrant, we can call for whatever assistance is reasonably necessary.

Senator CRANE—Would there be instances when you took the police there with you?

Mr Roxbee—Yes, Senator.

Senator CRANE—What about when you arrive and you confront one of these individuals: do you have any piece of paper or any sort of code that you give them which spells out their rights?

Mr Roxbee—We do give them a copy of the search warrant, I believe, which does not necessarily spell out their rights.

Senator CRANE—So the answer to my question is no?

Mr Roxbee—I believe so, yes.

Senator CRANE—Can you check that out?

Mr Roxbee—Yes, sure.

Senator CRANE—What about understanding their language?

Mr Roxbee—That is one of the reasons why it is difficult for us to give people a piece of paper that tells them about their rights. If people wish to ask us questions, or wish to discuss the issue of our entry with us, we use the telephone interpreter service to overcome language barriers. We also have translations of key departmental documents into about 10 community languages that we use in those circumstances as well.

Senator CRANE—The same would apply to the warrant then. If they cannot read their rights, the same would apply to their—

Mr Roxbee—That is correct. It is part of the difficult task of our officers in the field to ensure that communication is established with the people at the premises that they are visiting.

Senator CRANE—When you go on to one of these properties, are you actually looking for a particular person or is there an ad hoc or audit type of thing just to see—and let us use the sweatshop as an example—whether or not there could be people there who may have visas, who may be working illegally, or does it have to be specific?

Mr Roxbee—In all cases, we are responding to a specific allegation that there are people there who may be unlawful or working in breach of their visas, or whatever. We do not do any spot checks or audits in that sense. In about 80 per cent of cases, we are responding to a specific name and, in 20 per cent, we are responding to an allegation that a person whom we may not have full identification details of is there and is unlawful or breaching their visa conditions.

Senator CRANE—It would not have seemed to me to be too difficult, if you are responding to a specific name, to know what their nationality was if they had a visa and they had entered the country to actually have a document that was in their language, would it?

Mr Roxbee—Language and nationality are not always the same thing.

Senator CRANE—I understand that.

Mr Roxbee—Some countries have a large number of languages. In most circumstances, the people that we are dealing with do actually speak English. We would be receptive to the idea of ensuring that there was a document available in the language in all but the most difficult cases where we were not able to provide one in that language or where we were not sure what the language was. We actually do come across people in the field where we have difficulty identifying the language on rare occasions.

Senator CRANE—But that would not be the norm, would it?

Mr Roxbee—No.

Senator CRANE—In this process, do you have difficulty identifying the individual or do you rely on them to identify themselves? You go there and ask for Joe Bloggs in Vietnamese, for example—is that how they say it? Are you relying on them to identify themselves? How do you go about the process of identification?

Mr Roxbee—Usually we have a name, and, in those 80 per cent of cases where we have a name, there is likely to be some kind of application before a department as well that has been refused. But identification is a serious problem for us. I suppose our work in the compliance area in the department falls into two broad categories: one group is made up of people who, when they detect that their visa has expired, largely come to us to resolve their status. The other group is made up of people who will use every avenue and every means possible to remain in Australia to work illegally. Those people will often adopt false identities, develop ways of respelling their name or all kinds of other approaches. They will move house regularly. They do not have addresses that we can obtain, so our ability to identify them is definitely a problem. Normally we try to get people to identify themselves up-front. If they have difficulty doing that or giving us a satisfactory identity, then we would probably look at taking them into detention or at least asking them to provide us with further details until we can identify them as a person on the department's databases or until they can show that they are Australian residents or citizens.

Senator CRANE—At what stage would you move from a departmental warrant to a magistrate's warrant? What would be the circumstances that would lead you to make that decision?

Mr Roxbee—A magistrate's warrant is used where we would be expecting to charge people with offences and take them before a court. Offences in the Migration Act that we use magistrates' warrants for are things like people trafficking, aiding and abetting people trafficking, contrived marriage type offences where people have arranged or participated in contrived marriages for the purpose of enabling someone to get permanent residence, people

submitting false documents in support of applications and people escaping from custody illegally. There are also a cluster of offences around migration agents, particularly where people are practising as migration agents without being registered.

Senator CRANE—Would you have a defined list of those you could give the committee?

Mr Roxbee—Yes. There is some blurring of that boundary, particularly in that case of illegal work in that, in some cases, it does prove to be worth prosecuting people for illegal work. Usually with the participation of the AFP and the Director of Public Prosecutions, we will take people before magistrates and prosecute them if we think that it will serve a useful purpose in deterring other people from illegal work or those kinds of offences.

Senator CRANE—Is most of it instigated by some independent person coming forward and saying, 'We suspect we have got this'? I guess my question really is: how do you determine whether you should investigate somebody in terms of whether they are here illegally or incorrectly or whether they have overstayed their visa?

Mr Roxbee—Because of the visa system and the airports control system, we have records of people who have entered Australia, have overstayed their visas and have not left. In many cases those people will apply for another visa in Australia—sometimes successfully and at other times unsuccessfully. We also get information about them from that. We often get addresses, which are visited as part of the operation of trying to find the person if they overstay, in those processes.

CHAIR—How much knowledge do you get from people who inform you about these things, particularly about illegal workers? Who are they? Do you know?

Mr Roxbee—The majority comes from our own application processes onshore. But a significant number come from Australian residents or citizens who provide us with information about people they believe to be breaking an immigration law.

CHAIR—But what about on a business premises? How would you know where they are working?

Mr Roxbee—Again, often people will say that they believe people are working unlawfully at a business premises. In fact, often that kind of information comes from people who are either business competitors or competitors for the work in those business premises. Certainly, Australians take a great deal of interest in the question of whether people are working unlawfully here.

CHAIR—This was raised earlier. How do you do it? Does the business get disturbed when the authorities go into it to collect an illegal immigrant? Is there any protocol that you go through in respect of that?

Mr Roxbee—There are two types of approaches. If we believe that it is a better way to do it, we can approach the management of the enterprise and ask them to assist us in checking the status of the employees they have. In other circumstances, yes, the business

does get disturbed. We get a lot of criticism from, for instance, farmers and people in rural industries if we visit their places at harvest time, when they have large work forces on their properties.

Senator CRANE—Is that because you are disrupting harvest or because you are disrupting their work force?

Mr Roxbee—Because we are disrupting harvest.

CHAIR—Going back to another point, what level are the people who give you the warrant? You said they were 'senior executive'.

Mr Roxbee—It is executive level 1 or above.

CHAIR—Where does that fit into the scheme? Is it at the secretary or the deputy secretary level?

Mr Roxbee—Yes. Below that are first assistant secretaries and, then, branch heads and assistant secretaries. Then, there are directors, who are at executive level 2, and the first level below that is the executive level 1. So it is a very senior middle management.

CHAIR—Do you apply for a warrant or are you directed to go out? When I say 'you', I mean the people who actually do the fieldwork. Do they apply for the warrant or is a warrant given to them?

Mr Roxbee—They apply for a warrant. Under our instructions, they have to provide information about the properties they wish to visit and why they have a suspicion or a belief that that property is under suspicion.

CHAIR—Do they swear it out or do they just write it out?

Mr Roxbee—It is not sworn out; it is just written out. I suppose the process is subject to a fairly high level of accountability in that it is subject to accountability within the department and then also to parliamentary scrutiny. It is also subject to a great deal of public interest. Our managers who are issuing the warrants are certainly aware of the scrutiny they are likely to attract with the warrants, and they are extremely careful about how they issue them.

CHAIR—Do not answer this, but I would not mind you taking it back to the department. I am not too sure why we do not just have the police doing this because, as arose from Senator Crane's questions, if it is not a criminal act it is treated very much as if it is one. I have just got some curiosity as to why we have got the immigration department doing it. Would you just raise that?

Mr Roxbee—Yes. I think the police are very focused on serious crime, and it may be difficult to get them to give the amount of priority to immigration issues in individual cases that the government or the parliament might want.

Senator MURRAY—Mr Chairman, I have to go so I want to put a question on notice. Are you aware, Mr Roxbee, that there was an Ombudsman own motion investigation of the department in 1997 and the draft report since then?

Mr Roxbee—Yes, I am.

Senator MURRAY—In the submission we have received from the Commonwealth Ombudsman, at pages 6 and 7, items 10.3 to 10.8, the Ombudsman outlines a view that the department has been used as a Trojan Horse by the National Crime Authority, using your powers of access and entry, to find out matters which are of interest to them; in other words, matters which are not solely focused on your narrower requirements. Could you have a look at that for us, please, and perhaps give us something in writing in response to those remarks and how the department feels about interaction with other agencies—when it is proper, when it is not proper and any ways in which you believe it should be regulated?

Mr Roxbee—Yes. I believe that particular case happened several years ago and, since then, we have introduced a far greater degree of administrative scrutiny of the search warrant process. We would not expect that circumstance to happen under the existing regime.

Senator MURRAY—Yes, but perhaps you would have a detailed look at what he said and respond?

Mr Roxbee—Yes.

Senator MURRAY—Thank you. Mr Chairman, I am sorry, I must go.

CHAIR—Yes.

Senator CRANE—Does the administrative search power you have only give you the power to find out whether the individual is there or does it give you the power to take property?

Mr Roxbee—It gives us the power specifically to seize documents, books, papers, passports, documents of identity or tickets that relate to the entry, or proposed entry, into Australia of a person in circumstances in which that person has become an unlawful non-citizen, or whatever. So the kind of property that we can seize is very strictly delimited by that section of the act.

Senator CRANE—So if you went to a particular place looking for an individual and he was not there, and somebody happened to say to you, for example, ‘He’s not here, but his locker room is out the back,’ and he had some bags or something in there, could you get those bags or that material as evidence that he had in fact been there?

Mr Roxbee—I think we could. The act does not stipulate that the person has to be there when we are looking for the documents.

Senator CRANE—Could you give us a reply in writing as to how far that power extends?

Mr Roxbee—Yes.

Senator CRANE—Do you know if, in fact, there are areas where departments can write their own search warrants? We have not come across any yet have we?

CHAIR—What does the tax department do?

Senator CRANE—They have to get one. The National Registration Authority does. Is this something that is unique to Immigration?

Mr Roxbee—I am not sure about that. As I said before, many departments have a right of entry as a right of inspection. So they can go in and inspect records. For instance, agencies like the pipeline authorities can inspect equipment and take readings.

CHAIR—But under this warrant you could go to a factory or a farm and actually seize people. Is that right?

Mr Roxbee—'Detain' is the word we use for people.

CHAIR—I know that is what you use, but you seize them in the sense that the farmer or the owner of the factory could not get you to release them. You take them.

Mr Roxbee—That is right, yes.

CHAIR—You can take them off the property. When you say detain, you do not detain them on the property do you?

Mr Roxbee—'Detain' is just a word for the act of—

CHAIR—You remove from the—

Mr Roxbee—From the property.

Senator CRANE—The act of arresting.

Mr Roxbee—Yes.

CHAIR—Yes, that is what it is—the act of arresting. And that is done under this warrant, is it?

Mr Roxbee—No. The detention is done under another section of our act, section 189, which gives us the power to detain unlawful non-citizens.

CHAIR—Do you need a warrant for that?

Mr Roxbee—No.

Senator CRANE—Is it the same warrant?

CHAIR—Or is there no warrant needed at all?

Mr Roxbee—Out in the street, we can detain an unlawful non-citizen without a warrant simply because they—

CHAIR—Without any sort of warrant?

Mr Roxbee—That is right; simply because they have no visa and no right to remain in Australia.

Senator CRANE—Is that an authorised officer? Who can do that?

Mr Roxbee—That is an officer.

Senator CRANE—An officer or authorised officer?

Mr Roxbee—An officer. Section 189 is the—

Senator CRANE—Allows any officer with the immigration department to—

Mr Roxbee—Yes. In practice, that power is only used by compliance officers.

CHAIR—Is it a long section to read?

Mr Roxbee—It is really only part 1 that is relevant and that is only 2½ lines. Section 189, part 1:

If an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person.

CHAIR—Must detain?

Mr Roxbee—Yes. This provision was only introduced in the Migration Reform Act, which came into effect in September 1994.

CHAIR—So if somebody came onto a farm or into a retail store, he or she—depending on the gender of the officer—would have to take that person into custody even though the person was working?

Mr Roxbee—Under this wording of the act, yes. But, in fact, the power is used only by our compliance officers and used only—

CHAIR—But the power is there.

Mr Roxbee—The power is there.

Senator CRANE—It is an extraordinary power.

Mr Roxbee—Yes. I think immigration powers need to be compared with the powers that are available to immigration officers in other countries, because they reflect greatly on the sovereignty of Australia in the sense of controlling its borders.

CHAIR—It is a policy matter that you cannot answer. But this gives them the power to come into a private dwelling or onto a farm.

Mr Roxbee—No, that power is regulated by the search warrant.

CHAIR—But the powers that are within the department itself. The department of its own volition can go into residences and private dwellings and, I suppose, they could come into an electoral office, into a business or onto a farm—anywhere. Is that right? Within the terms of the—

Mr Roxbee—Within the terms of section 251 of the act which provides the power to issue the search warrant. We are very much aware that it is an extraordinary power and we use it extremely carefully because of that. Already there is a fairly precarious balance in place in terms of our ability to find people in the community and effect their departure from Australia. If our powers were more strictly limited, we may have a great deal of difficulty there.

CHAIR—The police looking for drug importers have to go through a lot more procedure than that.

Mr Roxbee—Yes. The difficulty for us is that we are a relatively small department. We have something like 150 compliance officers covering the whole of Australia, which involves every dwelling, every business premises, the borders and the coast. They range across wide areas, in that the same person might be working in Parramatta on one day and working in Dubbo the next day. It would actually be very difficult to operate that kind of regime efficiently with a more structured requirement for judicial warrants.

CHAIR—I think one of the concerns is that somebody might employ a person who is subject to the act and his or her business could be quite disturbed by the entrance. You just get the feeling that there ought to be some procedure outside the department that people ought to go through. Have a think about that. Are you in Canberra?

Mr Roxbee—Yes.

Senator CRANE—In one sense, I am thinking more about the safety of the arresting person. If there is access you must do it. It could be a relatively small person—say, five foot two inches, particularly if it was a small female—or it could be a 20-year-old strapping young bloke of six foot four inches.

Mr Roxbee—Absolutely. It does happen.

Senator CRANE—What training would that individual have in terms of speaking to somebody in that situation or apprehending them?

Mr Roxbee—A bit over a year ago, we gave training to all of our compliance officers on executing search warrants, conflict—

Senator CRANE—But I am talking beyond that.

Mr Roxbee—de-escalation and avoiding conflict.

Senator CRANE—According to what you read out to us, that applies to anybody who works for Immigration.

Mr Roxbee—That is right.

Senator CRANE—So do you turn a blind eye to the law when it is a little person who is not in a position to carry it out?

Mr Roxbee—In fact, we have to. It would be possible to restrict that power to authorised officers. We would need to think through the implications of that.

Senator CRANE—What happens if a citizen—and this has happened a few times with major criminals who have been arrested in Perth—has identified somebody who has been on *Australia's Most Wanted* and they or a friend have kept them within eyesight until such time as somebody could notify the police that there was actually a person under suspicion? What is the liability on that individual if, having gone up and been successful, they have made a wrong arrest?

Mr Roxbee—I think the Commonwealth accepts the liability in those circumstances; the liability would not be on the individual officer. Our officers go through extensive procedures before they do take someone into detention.

Senator CRANE—Yes, but I am not talking about compliance officers. You said there were 150 compliance officers. That is what you said, wasn't it?

Mr Roxbee—Yes, that is right.

Senator CRANE—How many employees are there in the department of immigration?

Mr Roxbee—About 3,000.

Senator CRANE—It is a really small percentage, isn't it?

Mr Roxbee—Yes.

Senator CRANE—Yet the onus is across the board?

Mr Roxbee—The way the act is written, the onus is across the board but, in fact, it is only placed on compliance officers.

Senator CRANE—So that in itself is another inconsistency.

CHAIR—And it is the department itself making the exception. The department is saying, 'We're not going to carry out the law.' The submission from the Australian Customs Service has been released.

Senator CRANE—In that context, I move that evidence automatically becomes public unless we have determined that it should not. Additionally—and I am not sure that we have this motion—that there be examination of any further submissions to satisfy the committee secretary that there is nothing in there that is of a confidential nature. If there is, then it should be referred to the chair to look at and to determine whether it be released. I do not think we need a motion every time we sit down; I have every faith in my executive officer and my chairman.

CHAIR—Thank you. We thank Mr Roxbee for coming. Are you able to come back again if we thought it a good idea?

Mr Roxbee—Yes, certainly.

CHAIR—Thank you, Hansard.

Committee adjourned at 3.52 p.m.