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SENATE

STANDING COMMITTEE ON SCRUTINY OF BILLS

Reference: Search and entry provisions in Commonwealth legislation

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SENATE
STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

Tuesday, 14 September 1999

Members: Senator Cooney (*Chair*), Senators Crane, Crossin, Ferris, Mason 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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[8.58 a.m.]

JENSEN, Mr Neil James, Deputy Director, Money Laundering Deterrence, Australian Transaction Reports and Analysis Centre

CHAIR—Welcome, Mr Jensen, to the meeting. We have been asked to look into the issue of entry and search and what seem to be the contending considerations between gathering information, which is very much what AUSTRAC is all about, and at the same time preserving those freedoms and rights of a citizen a decent society expects to have. We have looked at different organisations. I do not know whether you have followed what we have done.

Mr Jensen—Certainly.

CHAIR—We have looked at the tax office, the DPP and the NCA.

Senator MURRAY—I was wondering about the banks, what they think about all this.

CHAIR—As well as the Federal Police, all the people that you would expect. We have asked you to come along to give us your insight. Do you want to say something or do you want us to simply ask questions?

Mr Jensen—Perhaps if I can outline what the organisation is, what we do and what powers we have in place through the legislation. Stop me at any point, please, because I will keep going.

AUSTRAC has been set up under the Financial Transaction Reports Act 1988, which is a major component of the government's anti-money laundering program. We have been set up to receive, collect, retain, compile, analyse and disseminate financial transaction reports information; that is, reports of significant cash transactions over \$10,000, reports of suspicious transactions and reports of international funds transfer instructions which are international telegraphic transfers into and out of the country, all of which come from a group of organisations referred to as cash dealers. Those cash dealers also have another obligation and that is to ensure appropriate identification in terms of the legislation for people who are signatories to accounts and open accounts with those organisations.

There is another component of reporting which is a public requirement, if you like, and that is the carriage of currency of \$10,000 or more into or out of the country; leaving through the airports, coming through the airports, sea ports, mail or shipping.

The organisation itself, therefore, has a role to make sure that the information is coming into the organisation. That information is then made available to a limited group of law enforcement and revenue agencies which are specified in the FTR Act itself. They are the major Commonwealth law enforcement agencies, the tax office, Federal Police, National Crime Authority, Customs, Securities Commission and all state police forces and a small number of state organisations.

So we have a dual role in many respects. One is to make sure we are getting the information in and the other one is to make it available to law enforcement revenue agencies to counter money laundering, organised crime and large scale tax evasion.

In fact in many regards we have two roles. We have a regulatory compliance role and we have a role to assist law enforcement. Quite often we are looked at as being a part of the law enforcement community. In fact, we are seen as part of the law enforcement community, without having that law enforcement policing type role.

The cash dealers or the groups are also specified in the Financial Transaction Reports Act and they comprise the major financial services industry organisations, such as banks, building societies and credit unions, or authorised deposit taking institutions as they are now referred to, securities and futures traders, insurance companies and insurance agencies, right down to the level of bookmakers, TABs and casinos in the gambling type sector. So it is mainly the wider financial services sector and the gambling sector that provide reports to AUSTRAC. Reports only of significant cash transactions are required from solicitors. They do not have the account identification requirements or they do not have the suspicious transaction reporting requirements.

In terms of ensuring that we are getting the data that is required by the legislation and ensuring that the data is correct and is provided in accordance with the legislation, there are provisions in the act in section 27A through to section 27E which provide inspection powers for our regulatory compliance role. The provisions themselves require that the director approve authorised officers to undertake inspections, that those authorised officers must have identity cards issued by the director, that there are inspection powers in respect of cash dealers and solicitors and that we provide a notice or an instrument to those organisations when we are going to undertake inspections.

The inspections are there for the purpose of monitoring compliance with the legislation. In terms of monitoring compliance, we can review records relating to the obligations of the cash dealers or solicitors under the legislation, we can look at their systems for keeping records for preparing and providing reports to the director of AUSTRAC. There are penalty provisions in respect of not providing information or not assisting or not allowing the assistance when that is provided. In fact, we have included on the identity card that the inspectors use the authorisation of the director, so it is clearly on the front of the identity card as to what the purpose is and that these people are authorised.

In terms of our approach to audit inspection, if I can go back over the ten years that the organisation has now been in operation, we have adopted a cooperative relationship with cash dealers over that long period of time. That cooperation is in terms of making sure that they can comply with the act. We get together with a group we call our provider advisory group to ensure that the requirements of the legislation can be met by those cash dealers and having them assist us in all our processes of reporting requirements and the information that they can obtain.

Through that cooperative type of approach we have looked also at our audit compliance regulatory role. We have taken a three-pronged approach to that, I guess. The first approach is desk audits. Because we are getting data from the organisations, we can apply our

technology to the data that comes in and look at exceptions that are occurring through the data or, where there may be data quality issues, we can see that through the data itself by applying the technology to it.

The first stream of audit is desk audit. If we find something that does not look right in terms of the data that is coming in to us, we will pick up the phone, get in touch with the contact point—through our cooperative relationship we have got contact points in all the organisations—we will phone them and say something has happened. For example, if we have not had any reports this month from a particular branch of a major bank, they will say, ‘We do not know why that is. We will go away and check it.’ Or they may say, ‘That branch has closed down. You will not get any more reports from that organisation.’ So we take that initial approach over the telephone to try to find out what the problem is.

The second approach we take is a compliance audit. A compliance audit is where we go out and inspect. That inspection is generally what is understood to be an audit; that is, going out into the organisation, having a look at the records and the systems and evaluating those systems and records to make sure that they are complying with us.

Generally we will have approached an organisation in terms of a compliance audit through a number of background reasons, if you like. We may have looked at our compliance monitoring application and over a period of time that organisation has not reacted to our telephone calls, for example, and they are still not complying with the legislation, so we need to go out and have a look at their records or systems to see what the problem is. I say that in the sense that that is generally our approach; to go out and find out what the problem is and get it rectified, rather than immediately saying, this organisation has not complied so we will go through the courts and get compliance. Again, it is that cooperative type of approach.

Another background reason for perhaps undertaking a compliance audit could be that we have received information from law enforcement agencies that, during the course of an investigation into an organised criminal matter—money laundering or whatever—they have received information to indicate that reports should have come to us from that organisation and they have not, so we need to go and have a look at the systems and find out what the difficulties are.

The third type of compliance audit activity we have is a little bit novel, I guess, and that is what we refer to as joint studies. We arrange with an organisation—again I will use an example of a major bank—to go out to them with two of our people and maybe two of their people from an audit team or from their compliance section and review their processes and procedures. We actually work together with them to have a look at what the systems are and what their difficulties are. We will then agree with them, if we find some discrepancies, a timetable to rectify any of those problems. They will, over the period of that timetable, rectify those issues.

Our reason for doing that is that we believe that it is better to have compliance and have the information that the law enforcement and revenue agencies need, rather than taking a much stronger line of initiating court proceedings and doing it that way, which is generally a fairly elongated process which can take a number of years.

Senator CRANE—While you are talking about that, would you tell us what the trigger is that will make you go to that position, to go out and get them to do it? What is the actual trigger which would bring about the fact where you would go to a bank, get their two audit officers and go through this process?

Mr Jensen—The trigger is in fact looking at all of the cash dealers. What we are looking at is taking that approach across the range of cash dealers.

Our difficulty with that is the size of the team that we have available. The trigger for a joint study has been, since about 1996, to get the major cash dealers complying, to ensure that the major cash dealers are complying. So the program has been developed by, firstly, looking at the big four banks, the second tier banks, building societies and working down from the major reporters. For example, the major big four banks provide us with about 80 per cent of the data we receive, so if we can get their systems to a point where they are reporting as they should be and that reporting is accurate then 80 per cent of our data to the law enforcement agencies is accurate.

We then work down the line towards those organisations that provide fewer reports to us and perhaps those that are in a higher risk category, if you like, such as remittance dealers, people we refer to as underground bankers, those that are outside the normal wider financial services sector. The key to joint studies has always been to look at the majors first and work down in terms of volume of reporting.

Senator CRANE—What I am trying to get at is, why would you select one? Is it because you throw a dart at a board and it hits the National Bank or the Commonwealth Bank, or what is the actual trigger that makes you go to a particular financial institution and go through that process?

Mr Jensen—The trigger is the volume of reports that we receive from them. The big four banks are reasonably consistent in volume of reporting to us, so that trigger is to visit those banks and a number of their branches, which is a fairly big task—as you could imagine, they have a substantial number of branches—and evaluate their systems. It is a cooperative approach. We approach them and they agree to a joint study. Then, after a period of time, we put that into our program and we go and work with them in that joint study process. That has been accepted by all organisations that we have approached and we have undertaken joint studies with them in a very positive way.

The trigger has always been on volume and we are working down the level. It is a big task, there are still a lot of organisations to be approached to undertake that. Our theory is, as I said, to make sure that the volume of data we get that is coming in to us is accurate for its purposes.

Just on the high risk area, we have received funding in this year's appropriation to specifically consider high risk cash dealers and to have a closer look at those areas of underground banking, remittance dealers, bullion sellers and bureaux de change, where there has been some concern over a period of time by law enforcement revenue agencies that they may not be reporting. We need to approach that a little bit more stringently. We have been provided with funding which has allowed us to obtain four more auditors for the purpose of

looking into those specific high risk areas. Do you have any questions specifically that you would like to ask?

CHAIR—I am interested in the cooperative approach with the banks.

Senator CRANE—I wish the customers could get that.

CHAIR—How can you balance the need to get information for law enforcement against, if you like, showing proper respect for the people that have been approached; and what should we, as legislators, allow to happen?

I will give you an illustration of what the problem is. The Australian Taxation Office has powers to go and look at the books of all of us because the tax system now is based on self-assessment. In order to keep integrity in the system, they have to go out and have a look at our books and they have got the right to do that. The tax office can do this with quite a great deal of politeness, but nevertheless the law gives them the right, without going to get a warrant from a magistrate or anybody else, to come in and have a look at our books. We are concerned that this takes away the intention you should always have in the social structure so that the courts can put a restraint on the information gatherers. Nevertheless, the information gatherers have a right to get information from the people who are going to supply the information. We have to look at that balance.

You were talking about the cooperative approach with the banks. If you want to go into a bank, can you get a warrant or what do you do? What is the instrument that you get?

Mr Jensen—There is an instrument under section 27E that allows us to access or inspect the records of the organisation. We do not have a warrant ability as such.

If I can go back to how you started your question to me, our approach has always been that we seek an appointment; we do not just go and knock on the door and go into the organisation. The first desk audit is all done over the phone. It is a matter of phoning up and speaking to a specific officer, a compliance officer who has been nominated by the cash dealer themselves. We would deal through that person. With the desk audit we phone up and try and rectify the problem over the phone.

Both a compliance audit and a joint study will be initiated by a phone call, probably followed by a meeting. For a joint study there would be an initial meeting but with a compliance audit it might be a phone call asking for an appointment to be able to inspect the records. It will be then followed by a letter specifying the dates and times that we would like to come along and inspect the records and the authority under which we are seeking to do that. Then we would go on that day or days and inspect those records.

A joint study is a much longer process because we are asking the organisation to join with us in undertaking this audit activity, so we are seeking their assistance in it.

Senator CRANE—Who pays for that? Do you pay for the banks' auditors or do the banks pay for that?

Mr Jensen—No, they pay their own way in that. Generally speaking, if it is auditors that are involved it is part of their role, so we try to fit in with the auditors' role as well in reviewing their compliance with the legislation.

We would initially make a phone call to our contact officer. That contact officer would arrange for a meeting with the particular people involved in the organisation. It may cross a number of areas, particularly in the larger organisations. We would explain at that meeting what we are wanting to do in terms of a joint study and how a joint study activity takes place. We would then agree a time for that and we would send a letter confirming the time and date. That date is generally some months down the line because it is a fairly big exercise in terms of taking three or four days rather than just a matter of going in and having a quick look and coming back out. It involves their time, so we give them a lot of advance warning as well. So the program will be set.

For example, in one that I reviewed I think we approached a particular organisation in about 1996, saying, 'We are starting up this process of joint studies, would you like to be involved?' With our program we have now fitted them in to some time this year. It has taken a bit of time. They have been aware of what we are doing and they have been aware that our program has been taking some time and now they agree to us coming along and working with them to have a look at their systems.

The reason we get a positive response is that we are there trying to help them to make sure that their systems are doing what they are required to do under the legislation. So it is a mutual position, if you like. We are both working to the same end.

Senator MURRAY—Have you ever had to charge or penalise anyone for not supplying information?

Mr Jensen—We have not. We have found what I would call major difficulties but we have always agreed a rectification program. For example, under the legislation one of the systems for account identification requires customers to provide identification which totals 100 points. No doubt you have heard of that or come across it in the past ten years. The points system from time to time has not been fully adhered to, so we have had to go back to a bank, for example, and say to that organisation, 'We have identified the fact that you have not identified your customers to the full level of 100 points as required by the legislation. You need to do that. We can agree a program to get that in place so that you do identify them.' They will go away and do that. That has occurred with a substantial number of customers.

One of the major reasons that has occurred is because of change of financial products, where the financial product may not previously have been under the legislation, but the changing nature of the product—perhaps a debit card that you can now use in an ATM and take out currency with—would put that under the legislation. Where they originally identified that person or those customers to a particular level for their own risk or prudential reasons, it now is a requirement under the legislation because they have changed their product and the way they have marketed it to 100 points.

Senator MURRAY—Have your clients ever complained to your authority about an abuse of power?

Mr Jensen—Not that I am aware of, no.

Senator MURRAY—Would you describe your relationship as entirely non-adversarial, completely cooperative?

Mr Jensen—I would not say completely cooperative but cooperative. There may be organisations which would prefer that we do not come in and look at their records and inspect the processes, et cetera, but we have never, to the best of my knowledge, been rejected in an approach. Whether or not they are happy with that approach, I cannot gauge that.

Senator MURRAY—They do not complain?

Mr Jensen—We have not received a complaint that we should not be doing it, that I am aware of.

Senator MURRAY—Nor have the minister or Ombudsman, to your knowledge?

Mr Jensen—No, not to my knowledge.

CHAIR—We have got the Ombudsman coming in later this morning. Of course, the Federal Police are a classic target for complaints, but there have been no complaints as such?

Mr Jensen—No. I think the issue is that we have a regulatory or compliance role rather than a search warrant role or a seeking evidence role. Our role is to ensure compliance with the legislation. We are not out there seeking evidence in a criminal investigation.

Senator MURRAY—Do the police ever come to you and say, ‘We do not want to go through the problems of getting a warrant. Could you have a look at this for us?’

Mr Jensen—Not to my knowledge. They may come to us and say, for example, ‘We do not believe this organisation is complying with the legislation.’ As I mentioned earlier, that may be from information that they have received. We may then go and undertake compliance activity to check whether the reports are coming in. That will be done initially through looking at our system itself.

Senator MURRAY—Have the tax office or Social Security ever come to you and said, ‘You have got these powers. Would you mind telling us about somebody and what is happening?’

Mr Jensen—I cannot answer that. I do not know whether any approaches would have been made by the tax office but certainly there is no doubt they are aware of our powers. We do not have any relationship with Social Security at all. They are not an organisation that can access our—

Senator MURRAY—But is there a formal relationship with the tax office? Do they have a formal interaction with you to discuss your abilities and your powers in terms of their needs and their interests?

Mr Jensen—Yes, certainly we have a responsibility under the legislation to meet their needs. But I cannot answer the specific point.

Senator CRANE—Can you check that?

Mr Jensen—Yes.

Senator CRANE—Can you get that information for us to answer Senator Murray's questions?

Mr Jensen—Certainly.

Senator MURRAY—Could you explain to me what your formal relationship is with the tax office?

Mr Jensen—Our formal relationship with the tax office is to provide them with financial transaction information that we get. Our organisation receives information from the financial sector and gambling sector, collects that information in our central computer facility and then provides access to the tax office and those specified law enforcement agencies under the legislation—either direct access or by disseminating information to them. Their relationship with us is to obtain that information and we are to meet their needs as is agreed between the director and the Commissioner of Taxation.

Senator MURRAY—Their interest would be in identifying customer accounts with financial institutions that have large cash transactions which are not reflected in tax returns, is that right?

Mr Jensen—That would be one issue.

Senator MURRAY—What other interest could they have? They are in there to get the maximum amount of tax due to the government.

Mr Jensen—Certainly.

Senator MURRAY—Surely something they are looking for is a discrepancy between what is going on in an account and what has been declared to them in a return.

Mr Jensen—Certainly that would be one aspect of it but they have much wider requirements in terms of their overall activities. For example, we work with them when they look at industry and occupation activity for case selection purposes. Information comes in under the legislation which indicates occupation and industry categories, so we can provide them with information relating to that. We have systems that allow them to see aggregated data as well as individual data.

Senator MURRAY—You are able to pick out a particular industry, say, within the ABS or tax criteria?

Mr Jensen—Yes.

Senator MURRAY—And the tax office may make a judgment, as a result of seeing what is happening through those accounts, that it is a high cash industry which might be involved in the black economy. Is that their line of thinking?

Mr Jensen—Yes, they may do that. It is not only cash, though, because the greatest amount of reporting information we receive is international telegraphic transfers. International profit shifting, for example, is an issue that they would look at. It is the whole range of their actions.

Senator MURRAY—Does that relate to transfer pricing?

Mr Jensen—It could relate to transfer pricing, yes.

Senator MURRAY—Do the tax office ever accompany you on your compliance audits, joint studies or those sorts of things?

Mr Jensen—Never. In fact, the legislation provides that an authorised officer who is a member of the staff of AUSTRAC can conduct that audit. Section 40A allows us to employ, in the wider sense of the word, contractors to undertake work with us. The contractors we have are in respect of information technology. Our information technology is outsourced, so we have contractors working for us. To the best of my knowledge, we have never had an IT contractor, for example, go out on a compliance audit or a joint study.

Senator MURRAY—Have you ever had a policeman accompany you?

Mr Jensen—Never.

Senator MURRAY—Or a National Crime Authority person?

Mr Jensen—Never. The only other person at this point in time that we have as a consultant that may be needed in this sort of compliance audit activity is an ex-senior banker who has worked with us in a part-time capacity over the past ten years. He has assisted us to interpret the financial sector, et cetera, but to the best of my knowledge he has not been out on those joint studies or compliance audits.

The reason we may need those people is the technical nature of the products and the systems that we would be looking at but to this point in time I do not believe—in fact, I am certain—that either an IT person or our banking sector consultant have been out on audits. They have only been AUSTRAC personnel.

Senator CRANE—You said to Senator Murray that you have never had a policeman accompany you. Could you have a policeman accompany you?

Mr Jensen—The legislation specifically requires us to conduct the audit. In terms of a policeman's authority outside of that, they may, if they have that power, attend at the time that we are conducting the audit.

Senator CRANE—You do not have it explicitly within your act?

Mr Jensen—No, not within the act.

Senator CRANE—It would be just the normal process?

Mr Jensen—The only area would be that consultancy provision and they would not be considered as consultants to AUSTRAC in that provision.

Senator CRANE—Could I just follow on from Senator Murray's questions with some others. We have heard from AQIS, where the transaction can be illicit or illegal drugs or products moving in or out. Do you do any compliance work in that area for AQIS?

Mr Jensen—Not for AQIS because AQIS are not a specified organisation to whom we can provide information under the legislation.

Senator CRANE—Do you do compliance work for organisations similar to AQIS?

Mr Jensen—Customs is an organisation which can receive data. The only organisations in the Commonwealth sphere who can receive information from us are the tax office, Federal Police, National Crime Authority, Australian Securities and Investments Commission and the tax office. I think I have covered all of them.

Senator CRANE—If you have not got all of those, come back to us on the list, if you want to check it. You told us that your search and entry powers come from section 27E of the Financial Transaction Reports Act. Is that the only legislation that gives you a head of power? Is that all contained in that or are there provisions, say, in the Corporations Act or the tax act?

Mr Jensen—Not for AUSTRAC to undertake any compliance audits or any work.

Senator CRANE—We have found enormous discrepancies between the selection process and the training process of an authorised officer to go on to property. Could you take us through how you go about selecting an authorised officer to go on to property? Can they come from the outside? What is the training process? What qualifications do they have to actually carry out that process?

Mr Jensen—Bearing in mind that over a long period of time our audit area has comprised, at a maximum, three people, those persons generally are, although they may not always have been, qualified accountants to start off with. One was a long-time public servant, both state and federal government public servant; another one had been a public servant for some number of years; and the third one, I think, had come to AUSTRAC with some limited external experience. I do not think that person was a public servant before they

started with AUSTRAC but I am not certain. We have selected people who we believe have appropriate skills and abilities to be able to undertake that role for us.

Most of the training for those people up until this point in time has been in-house training in terms of the requirements of the legislation and an approach to auditing that we have established over a period of time. It is an issue that we have identified as requiring more attention in terms of training and selecting of appropriate people. In fact, through the funding that we have received this year we have selected four people—we have just had a rejection, we have only got three now—to undertake this role in addition to those that we already had there.

We have sought outside assistance from a consultancy to advise us on our high risk areas and what we need to consider in terms of our audit approach or our compliance approach. We are also looking to provide better training in terms of audit activities. Even though we have been around for ten years, we have only undertaken audits really over the last four or five years to any degree. There has still been a fairly limited approach to it and we are really finding our way as we are moving along, but we have identified the need for better training and certainly that is the case.

To go back to your point, trying to get staff has been a very difficult exercise. We have specifically advertised for auditors both within the Commonwealth Public Service and externally. To give you an example, one of the people who has been appointed was an internal auditor, as I understand it, with the Australian National Audit Office and has done some audit work with other government organisations, I think including the tax office, over a long period of time. So we are building up some history, if you like, in the audit process to help us train the new people coming on.

On the other side of it, we have another person who has been an auditor for a period of time in Australia Post; I do not know how long that period of time has been. But again we are bringing in the skills to the organisation from people who have had audit backgrounds. The third person could have come from the private sector, I am not certain. I would need to check that person's background.

Senator CRANE—Do you contract out to private audit companies to do work for you?

Mr Jensen—No, not in terms of this compliance audit. Just to give you an example, for internal audits we actually use an internal auditor from the National Crime Authority to assist us in that process because we did not specifically have the skills available within the small organisation that we have. We are only a small organisation. I did not mention that at the outset. We have a staffing at this present stage of around about 45 people plus our IT contractors, so we are a very small organisation in that sense.

Senator CRANE—Only four of those are authorised officers?

Mr Jensen—There will be eight authorised officers when those new four come on board in the next few weeks. The head of that section is also an auditor and the senior manager is also an authorised officer.

Senator CRANE—As I understood from an earlier question, you said you do not operate and you do not have the power to get a warrant to do a search, it is only through this letter process. What happens if the particular company or operation says no?

Mr Jensen—It is something that we have not had to deal with, I guess. It is not a question that has arisen at this point in time.

Senator CRANE—Do you have any power to deal with it if it does?

Mr Jensen—Generally speaking, I would suggest, no, other than them being required under section 28 to provide us with the information. There is a penalty provision for not providing us with the information. I would have to go back to the act but I assume at this point in time that it covers access to the premises as well.

Senator CRANE—When you write to whichever institution it might be, how precise do you have to be in terms of the information you seek? Do you have to be fairly precise about it or is it a broad process where you can be going there on some suspicion on what somebody said? What is required to activate it and what do you have to include in that letter when you write to somebody? It has obviously worked in terms of getting in there every time.

Mr Jensen—I think it is not so much the letter, it is the cooperative way we have gone about it. We are working with them. That is, in many respects, hard to understand, but that is the way we operate. We work with them over a long period of time. We have tried to rectify the situation, for example, over the telephone over a period of time. If it has not come, we then go and do the compliance audit.

Senator CRANE—The letter is the first contact, is it?

Mr Jensen—No, the telephone call is the first contact in all cases, so we are talking to them. Then we send the letter out to them confirming what we are talking about. The letter contains generally—

Senator CRANE—Do you say, ‘We have spoken to you, now we are coming to get you’?

Mr Jensen—No, we do not say that at all. To take an example of a worst case scenario, where we have had an issue with them over a period of time, we would say to them, ‘You have not rectified the problems that we have asked you to rectify over the telephone. We would now like to come out and have a look at your systems to see why that information has not been provided to us. You have an obligation under the legislation. We, under section 27E, are able to come out and inspect your premises and we would like to do that.’

Senator CRANE—Do you explain precisely why you are coming out?

Mr Jensen—Yes. That is written in the letter as well. We superimpose, if you like, in the letter the wording from the section itself.

Senator CRANE—When you arrive at the institution, what information do you give them which spells out what their rights are in terms of what can be done and what cannot be done?

Mr Jensen—We provide them with a copy of the instrument, under section 27E, authorising the officer to inspect the records and the systems.

Senator CRANE—Does that tell them that they can have their auditor there or their financial controller?

Mr Jensen—No, it does not.

Senator CRANE—Why not?

Mr Jensen—Why not? Good question. I guess we have never considered it necessary because we have spoken to them on the phone and advised them of what we are doing.

Senator CRANE—Would the officers in AUSTRAC be aware of what the rights are of the organisation they are dealing with?

Mr Jensen—Generally speaking, yes, particularly in the larger organisations. They generally have a compliance officer who not only looks at the FTR Act requirements but a whole range of requirements within the organisation. We are dealing with a lot of them, maybe not on a daily basis but on a regular basis, so they are fully aware of their obligations under the legislation and what they need to do. Again, we have worked over a long period of time with most of these organisations to ensure compliance. We have had issues arise over a long period of time and, in fact, many of the larger organisations and the representative industry groups we have had dealings with over a long period of time. We send information out to them regularly and we send newsletters out to them regularly so they know what the requirements are. When we come to them and approach them and say that we would like to undertake a compliance audit or a joint study, they generally know what we are coming to have a look at. That is reasonably limited. It is the systems and processes that are in place for suspect transaction reporting, significant cash transaction reporting, the reporting of international funds transfer instructions and account signatory identification procedures. **Senator CRANE**—How do you determine the list of organisations that the newsletter should go to?

Mr Jensen—We generally send out to all cash dealer organisations at least one copy, if not multiple copies, of the newsletter. It is also available on our web site so people can access it. We refer to it in our publications and in our talks. Over a long period of time we have gone out and spoken to industry groups and organisations. It is freely available when someone phones up for information; it may be a member of the public, it does not have to be a cash dealer. We distribute that as widely as we possibly can.

The reason for that—and it is an interesting situation—is that our information has been extremely valuable in a lot of major organised criminal investigations, drug related investigations and tax evasion matters, yet you rarely see us referred to in the media activity relating to those investigations because, if the system works, publicity needs to be

minimised. On the other hand, we need to make sure that the people who are providing us with the information know that it is working. So our newsletter is a way of getting some generalised information out. Our annual report is extremely comprehensive in terms of the information we are trying to provide back to the public and to the cash dealers, so that we are putting that information out as widely as we possibly can.

Senator CRANE—In terms of answering a question to Senator Murray you said your operations were non-adversarial. That is fairly unique in terms of what we have been looking at. Having said that, what would your reaction be if this committee were to recommend that all organisations, including yourselves, that are carrying out this role—in your case by conversations and a letter; in other cases using pretty sophisticated search warrants—when they hit the doorstep or the office or what have you, would be required to hand over a summary sheet of what your responsibilities are and what the rights are of the people who are being dealt with, so they have it there in black and white?

Mr Jensen—I have no problem with that. That would not be an issue for us if we were to be required to do that. I have no problem with it whatsoever. We need to get it in context: we are not a law enforcement agency.

Senator CRANE—I understand that. Nonetheless, you have got power to search and enter.

Mr Jensen—Yes. Again, as I say, we would have no problem with that whatsoever.

Senator MURRAY—Do you have the power of seizure?

Mr Jensen—We can take copies or extracts. We do not have the power of seizure as such.

Senator MURRAY—Does a copy mean a written copy or a photocopy?

Mr Jensen—I believe that we can take a photocopy.

Senator CRANE—What confidentiality surrounds any of the information you collect?

Mr Jensen—We have secrecy provisions in section 25 of the act. Bearing in mind that we provide information to those specified law enforcement and revenue agencies and it is limited to those, we can provide them with information but we cannot provide it to other than those specified within the legislation. So, yes, there is strong secrecy and confidentiality. In fact, our corporate plan and our outputs in terms of our outcome for the organisation specifically have one output relating to security and privacy issues, so we take high regard in terms of that.

Senator CRANE—When you are dealing with one of the institutions that comes under your jurisdiction, who do you deal with there? Is it the finance manager of the company or is it the company's auditors? They fulfil very different functions.

Mr Jensen—Yes.

Senator CRANE—Is it a combination of a number of them?

Mr Jensen—It is a combination of a number. What we have established, again over a period of time, is a compliance contact, if you like, and we deal through that compliance contact. The reason for that is very simple. That person knows us. They understand what we are trying to do and they understand what their organisation needs to do. Then they can go away and make the contacts within their own organisation. Generally, it would be that person that we would deal with and they would be at a reasonably senior level within their organisation, not an executive level generally, but a reasonably senior person within the organisation. We would either deal directly with them or they would arrange for us to deal with other appropriate people.

It may be that we deal with their risk management people. Bearing in mind that looking at financial transactions and ensuring that they are complying with the legislation is a risk issue for them as well, quite often we are dealing with risk related people within the organisations. It could be the audit area or it may be a security area within the organisation. It differs in each organisation, but more often than not it is a specific person that we deal with on a day-to-day, week-to-week or month-to-month basis. There may be two or three people within the organisation that we deal with, but generally in most organisations it comes down to one person and maybe two.

Senator CRANE—The auditors of a company—and I have sat on the boards of a number of companies—when they get the external audit, one of their jobs is to advise the directors, ‘We ain’t got it quite right’, if I can put it that way. In virtually every annual auditor’s report and the half-yearly report they will point out things to you that you can do better; not necessarily things that are totally wrong, but where mistakes do occur and that sort of thing. In fact, you are overseeing, in a sense, what is their responsibility. In dealing with that situation, do you run into a problem where they do not want to be exposed as not having done their job?

Mr Jensen—No. It is interesting, actually. I think it is the reverse. We are certainly not overseeing their work. We are ensuring compliance.

Senator CRANE—Do you understand the point I am making?

Mr Jensen—I understand what you are saying. We are ensuring their compliance with the FTR Act, and that is as far as we go in that. If they are joining us in a joint study, they may pick up on things that they need to advise their board on. I would suggest that, as a member of a board, if my organisation is not complying with legislation I would be wanting to know that fact. That is where I get back to the risk side of organisations as well. It is an interesting approach to look at it. The internal auditors have no difficulty generally with us being there and with us working in with their programs in terms of what they are looking at, because they are looking at it for basically the same purpose or the same reasons as we are. We are trying to ensure they are complying with the legislation and they are trying to ensure that they are complying. If they find something untoward, I would expect them to advise their board in whatever way they do advise their board that there is an issue there.

Senator CRANE—If the auditors were not carrying out their responsibilities in an appropriate manner or doing their job properly and the directors or the senior executive staff—I do not like using the word ‘misled’—were almost being misled in terms of what is reported, would you report that? You are in their hands. What would happen in an instance like that where you found an auditor was not carrying out their functions properly? Would you report that to the board or how would you deal with that?

Mr Jensen—No. What we do in terms of follow-up, once we have been on to the audit, is to write a letter back with our findings if there are issues that need to be resolved. We will agree with the people on a timetable to ensure that those issues are rectified. If we do not get rectification then, yes, we will go to the chief executive of the organisation and advise the chief executive that we have done this work; we spell out what we have done over a period of time and that we still do not have compliance in this area. I know of at least one instance where the rectification was not as quick as what we had agreed to so we wrote to the chief executive advising of the situation. It is the cash dealer that reports to us, not individuals within the organisation.

Senator CRANE—Thank you, Mr Jensen.

CHAIR—There is one other issue I would like to raise with you which has arisen and that is legal professional privilege. I think the society of accountants would like the same sort of privilege. Have you got any thoughts about whether or not legal professional privilege ought to cover this area? I know it is an issue that is not new in this area. Do you have any thoughts about that?

Mr Jensen—To be truthful, no, I cannot really answer that.

CHAIR—Thank you very much for that, Mr Jensen. Thank you for coming along.

Mr Jensen—Thank you for inviting me.

[9.55 a.m.]

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

CHAIR—I thank Ms Felicity Hampel from Liberty Victoria for coming back to give us some more insights. Did you want to say anything?

Ms Hampel—I must say I was a little uncertain as to the exact point at which we had left off and whether it was really for me to continue asking questions or to make submissions afresh. I am very much in your hands.

CHAIR—I will tell you the sorts of things that seem to have happened, and Senator Murray and Senator Crane might help here. There is the classic issue of how to serve the public interest by getting the information needed to get a storage of intelligence and also to get evidence for either a civil case or prosecution and at the same time serve the public interest of making sure that we can all go about our lives and our businesses as free and civilised people. Where does the balance occur?

It is clear to say that the Federal Police have got to get a warrant and the evidence is that warrant can take some time to get and all the information that goes into that is gathered in a very conscientious way. Then we have the tax office that says, 'Look, if we are going to take an issue forward as a prosecution, we will do as the police do, but most of our work is checking to see whether people who put in their tax returns have done it accurately. When we look at that we are not suggesting that they do it dishonestly or surreptitiously but we need to know to keep the integrity of the system going. We need to know that they are doing that well.'

There has been some evidence from the society of accountants that accountants ought to have the safeguards of legal professional privilege. They acknowledge, of course, that is the client's privilege, that the order extends to them. They say that there are guidelines which the tax office has agreed upon with them which are nevertheless not quite satisfactory because they are not in legislation, so they cannot be enforced by the tax office if they should go forward.

The tax office says that there is sufficient protection of people because if they start acting outside the purposes of the tax act then people can go to court. The issue always comes down to, it seems to me, how you find the proper balance. The tax office say—I think just as an estimate, they were not saying this was a firm figure—that they would do 280,000 inspections a year and to expect them to get warrants for all of those would just be ridiculous.

So you have got this mixture of how do you run a policing system, in the very broad sense of that word, and at the same time preserve the sort of society that we all want. Would you comment further on what our position is, what sort of things we have had raised?

Senator MURRAY—I was just occupying myself with what was a very enlightening question and answer session between the three of us when we met last time. I think where we have got to in this inquiry is almost a state of confusion, a state of split personality, because we recognise the efficacy of having in society enforcement mechanisms and rules which prevent drug dealers from hiding their cash or tax avoiders not contributing to the common good or farmers not poisoning us by not following the proper approach to drugs on the land or weevils in their bread or whatever else.

Senator CRANE—I am listening carefully.

Senator MURRAY—But on the other side of it there is an acceptance by parliament and by the people of an erosion of the individual's liberty and rights. The committee has almost come in its deliberations so far to the view that if you accept those two things, at the least what you must do is to ensure that proper processes follow; properly authorised people, properly trained, informing people of their rights, making sure the entire interaction is at an appropriate level of obligation and of response.

But that approach so far from the committee does not deal with the core issue as to whether you should have search, entry and seizure provisions of that nature in the first place at all and that we have not been able to master. We have not had people on the other side of the table from us saying, 'The tax office just should not have those rights at all,' or AUSTRAC or any other authority with strong rights.

I suppose I can speak for my colleagues when I say that we judge that to be because society as a whole has accepted the framework I have just outlined to you. What they are really wanting is tinkering, with a little more consistency, a little bit more consideration, a little bit more consultancy, a little bit less aggravation and, by the way, a lot more effectiveness; let us get more money for the tax people, let us catch more crooks or lock up a few more farmers, or whatever it is.

When I glance back over the interaction we had last time, right at the very beginning we said we should start with an understanding of what our civil liberties and rights should be, at least at the most basic level, which implies a charter or bill of rights or some kind of statement of principles which is a guidance for parliament, and then measure everything else against that. I think the fundamental thing this committee needs from people like yourself is to assist us with setting the philosophical starting point against which we measure everything else, against which we determine whether search and entry and seizure provisions are appropriate and in what circumstances they are and how they need to be constrained.

There is a last point to make before I give it back to you and that is that once parliaments have let loose the dogs of search and entry you cannot recover it and those powers, once given, are taken. It is very, very difficult to wind back the powers and bureaucracy of an executive government which have been given to them. Is that helpful, Mr Chair?

CHAIR—Yes. Thank you very much.

Senator CRANE—I guess if I could just quickly add that very early in the hearing last time I said to you: ‘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.’ I do not know whether you have had the opportunity yet to look at the transcripts, but you nominated the Federal Police as being the model. We have been through this situation from operations that are in a very adversarial role in terms of questioning people and what they are doing in their powers with the last witness from AUSTRAC who gave us the indication their role was not adversarial at all and all that was required was a telephone call and a letter and what have you and they fell in love forever, if I can put it that way.

Of course, having gone through this process now, I have certainly in my mind come to the conclusion that the organisation that has the tightest and most informative method of search and entry is AQIS, without a doubt. They have a very, very adversarial role. That may have grown out of the fact that they are, in terms of inspection, usually raiding a container or going into some premises where there may be the pressure of a disease risk or pressure of the community wanting to bring their horses in for the Olympics and nobody knows about it. They live in a very tense world in terms of community pressures. Maybe that has grown out of the fact that because they are in that role they have had to become very precise in how they select their people, how they train them, how they deal with their customers or clients, or whatever you want to call them.

Have you had an opportunity to do any overview at this particular time? If you have, I will be interested in your comments now or later on when you can do it.

Ms Hampel—I have had the opportunity of doing some overview. I have reviewed the transcript of our discussions last time and I have been provided with a transcript of the hearings of 3 August and the balance of the hearing on 4 August, which was the day I addressed you. I have looked over all of them, although I have not done a careful analysis of all the submissions. I had, before my last appearance, been provided with the transcript of the appearance before you of the representatives of the Attorney-General’s Department and I also had been given their first written submission together with the written submission of the AFP and the tax office. Since then I have also been given the supplementary submission of the Attorney-General’s Department and the submissions of the Commonwealth DPP and Australian Customs Service.

I have not had all of them but I have certainly had, I think, a fair smattering of the submissions, and the matters that have been raised by all of you clearly come out from those particular submissions. So I can give a general overview but may not be able to give you the specific detail in relation to particular bits of search and entry.

In some of the submissions, particularly the Attorney-General’s ones, they have done a fantastic job, I think, of gathering together all the various legislative provisions and trying to do some degree of measuring against the benchmarks or the guidelines that they use when they are asked to draft legislation that give powers of search or entry or seizure.

Senator CRANE—That is an interesting comment because the Attorney himself was very keen for us to do this inquiry.

Ms Hampel—I think it is really very interesting because what they said in that first submission—and it is borne out again, I think, in their second—is that there is an almost fundamental conflict or tension between the guidelines that they have and the will of any particular minister or department to give themselves additional powers and of course the acceptance that, notwithstanding the existence of the guidelines which provide a benchmark, it is the will of parliament ultimately in any particular case that is going to determine whether the powers are greater or less than those in the guidelines. So the Attorney-General's Department in its role of drafting legislation may be in conflict with the Attorney-General's Department in its role of providing advice as to whether it complies with national criminal law policy as it is currently drafted or parliamentary will as it currently is, which may change from day to day depending on the balance of power or change of government.

Senator CRANE—So the consistent thing is the inconsistency?

Ms Hampel—That is right. But what they have done is analysed that there is inconsistency. They have done well, I think, in formulating principles as a benchmark, but they themselves have encapsulated the problem. They are, in a sense, powerless to enforce consistency.

So I come back to where I started when I spoke to you last time; that is, as a matter of principle you have got to look, first of all, at the rights of the individual. They spring from either your inherent rights or from international covenants such as the ICCPR that citizens should not be subjected to unwarranted intrusion into their right of free existence and freedom of movement. That is a lovely general principle but that should actually be the guiding and informing principle. The word that determines that is 'unwarranted'. What is warranted in particular circumstances is, I think, the nub of the issue, because if you say in general terms 'should not be subjected to unwarranted intrusion', people would agree with that.

Where I think the difficulty arises is that if we look at particular cases there are always circumstances where somebody is going to argue that their need is so great and the risk to the public is so great that they should have terrific or enormous powers. I think that is the wrong way to approach it. We must have that principle of benchmark first and there must be a set of accepted policy principles and there has got to be a justification for deviation from it, rather than getting too bogged down in saying, 'We do not want drug dealers to be able to secrete their assets' or, 'We do not want this risk to international trade by weevils in the flour,' to override the application of that to the principle. So we have got to have the principle and then we have got to have each power of incursion into the individual's rights measured against that principle and against the guidelines or benchmarks.

The next step in that is there should be no deviation from those unless the person seeking the additional power can justify a greater power than everybody else who has been given such powers. That means we come back to saying, first of all, there is an acceptance that there are circumstances in which the state is justified in intruding into that right of privacy and integrity of the individual but those circumstances must be capable of clear definition and must be consistent with clearly stated principle so that no interference can occur unless there is a conformity, not just with specific evil we want to get rid of, but conformity with a

statement of broad principle and its application and practice across a variety of areas of incursion.

That brings me back to the point about consistency. I agree with what is in the Attorney-General's submissions that there should be consistency and there clearly is not at the moment. I said last time that one of the reasons the inconsistency occurred seemed to be historical anomaly rather than application of principle and nothing I have read since then has dissuaded me from that view. I do not think historical anomaly—what was acceptable in the 1910s or 1920s that is not acceptable in today's terms—should be the determinant for whether the power should exist or continue to exist.

One of the reasons, I suspect, why AQIS has not only carefully defined powers but an acceptance in principle of the training of people who exercise those powers is that it has had a relatively recent review, as has had customs, and I think the more recent the review the more likely it is that outsiders are going to look at it in terms of application to the privacy principles described by the Law Reform Commission as set out in the Privacy Commission submission to you and see whether the powers conform with that.

There is a much greater acceptance now of the prominence of the right of the individual than there was at the time that the first powers of entry were given to the tax officers back shortly after the turn of the century and that clearly informs the powers given to AQIS and the customs service. So we are seeing the later legislation reflecting, if you like, the different values that we as a society now give to the rights of individuals compared to that paternalism or, 'This is for the greater good and therefore you must just accept any incursion we have into your privacy' that informed the early powers given to the tax office and which have then been the sole justification, it appears to me, for continuing to give them powers that are over and above the powers given to any other agency or authority.

That is a sort of fairly general answer, I think, to the matters that have been raised, but it just seems to me that we must come back to a clear statement of principle. We come back to the ICCPR and the statement of the right to privacy and integrity and then come to an application of the principles. The principles that were set out by the Law Reform Commission in its report which are extracted in the submission to the privacy commissioner I think are as valid today as they were when the report was written.

Senator MURRAY—Can I interrupt you briefly?

Ms Hampel—Yes.

Senator MURRAY—One of the things which will exercise our minds when we produce our report is its practical effect. It is pointless as parliamentarians being idealistic if our report has no effect because people will not respond to it. One of the options, I think, which we may have before us is to set out a benchmark set of standards, a charter, a set of principles, however we choose to describe it, and make the assumption that the executive government from whichever political party is unlikely to change things much. They might improve matters of consistency and process, but they are unlikely to withdraw powers and ask that in future the law requires or the government requires or parliament requires agencies which deviate from that standard to report annually on that deviation, so that it is continually

in the public eye. That is commonly done incidentally in environmental standards, industrial standards, and all sorts of things. There is the benchmark and people report against their shortfall to it.

Do you think that is an appropriate way to deal with this issue or do you think that is a cop out and a compromise and the committee should really be driving very hard at trying to get the executive government to reduce the level of intrusiveness in our society?

Ms Hampel—I think there should be a reduction of the level of intrusiveness because I see no basis, no philosophical justification, for the tax office having greater powers of entry and search than the Australian Federal Police. So I start by saying that we must have a consistency of power unless there is a justification and I do not think protecting the revenue is a greater justification than protecting people from commission of offences. That, to me, is a fundamental, philosophical point.

My second point is, much as I would like to trust the executive and much as I would like to trust governments of the day, I think we need a protection enshrined in legislation as to the principles to be applied to the grant of any power that impinges upon the right of privacy and freedom of existence of the individual.

The guidelines that the Attorney-General's Department have are generally good and they generally follow the privacy guidelines from the OECD picked up by the Law Reform Commission and set out in the Privacy Act, but they are guidelines only and they are policy only. They are subject to change and they are subject to change without there being the need to legislate. I would like to see these guideline principles enshrined in legislation so that there must be proper parliamentary debate and voting on changing the principles in order to introduce legislation that intrudes on a person's rights to a greater extent than these principles.

The sorts of principles I think we should have are those that are set out on page 2 of the Privacy Commissioner's submission, that power of intrusion should not be granted as a matter of course but only where there is a reasonable cause for suspicion that an offence has been committed or there is a monitoring need in the way that is set out; that it has got to be conferred expressly, not by implication; that it must be done by statute, not by subordinate legislation; that the grounds on which the power of intrusion are exercised must be clearly stated; and that the authority should, except in emergency circumstances, be conferred by a person exercising some form of judicial authority, be it a magistrate or a registrar.

They are pretty simple and clear and can find their way into one section of an act. The material then collated by the Law Reform Commission in relation to the application of those powers to search and entry and which have been picked up essentially by the Attorney-General's Department as their guidelines I think should be enshrined as legislative principles. They should be trying to say, 'No agency or authority should have power greater than these except in exceptional circumstances.' And the exceptional circumstances have to be defined and parliament has to actually acknowledge that there is a granting of a greater power than already exists or than is in the general principles so you cannot slip anything through in the rush of a busy legislative program.

Senator MURRAY—I cannot recall whether I asked you the question before, but do you distinguish between the rights and liberties which attach to an individual as opposed to a legal persona? In other words, taking the example of AUSTRAC, my impression from the evidence we were given and from what I know is that their principal interaction is in fact with legal persona, with companies, whereas the tax office goes right through the whole spectrum and so does the police force, although the police force is probably most of all concerned with individuals rather than with legal entities. Do you distinguish at all in spelling out these principles and processes between those categories?

Ms Hampel—Not really, because much of what AUSTRAC does in relation to looking at companies is indeed looking at areas where a corporate entity has been interposed between an individual or a group of individuals and the transaction. So it may be sophistry to say, ‘We’ll look at individuals’ or ‘We’ll stop at individuals and not companies,’ because if one is looking essentially at the activities of an individual or a group of individuals through a company it does not matter that there is an interposed entity.

Senator MURRAY—I ask you this question because yesterday I said to the tax office that the government distinguishes in terms of tax policy, in the legislation, between classes of taxpayer. You pay different levels of tax according to your income, you have different tax concessions according to the way you structure it and so on. We know there is in law the opportunity to distinguish between classes of individual; for instance, children or guardians of the court have a different legal status from other individuals.

I asked them did they think that their powers should vary, meaning they should be less, for individuals as opposed to corporate entities. Because when they approach a large organisation they know they are approaching people with amazingly sophisticated systems, superb accountants, top-notch lawyers, et cetera, and their ability to interact is vastly different to where they approach an individual, even a well-educated and reasonably worldly-wise individual on their own. Their answer was yes, they would consider a differentiation of power. At the moment their powers are sweeping; they apply regardless of who you are. Institutions like that are prepared to differentiate between their powers, so the question that lies behind my earlier question to you is whether the liberties or the rights that attach to individuals should be greater than those attaching to entities.

Ms Hampel—One of the difficulties is that corporations in Australia are involved in such a broad range of activity. They can go from BHP, which really has a large shareholder base, to the small, one person corporation.

Senator MURRAY—You can establish classes in that, too, and legislation really does. Small business is dealt with differently in terms of trust law.

Ms Hampel—I am just not sure that corporation in itself is the easy determinant because it covers such a broad range of activity from, in effect, a sole practitioner or sole trader through to a BHP sort of organisation.

Senator MURRAY—Right at the heart of it is the question whether BHP should have the same rights and protections as a corporate body or more rights and protections or less rights and protections than does Felicity Hampel QC in her individual capacity.

Ms Hampel—I think it should, because if you are talking about the criminal law, corporations can commit criminal offences and individuals within corporations can, so they should have the same rights and protections as either the individual or the corporate will. If you are talking about revenue regulation then, again, you are ultimately speaking about something that may be described as corporate will or may be the activities of individuals within the corporation.

Senator MURRAY—Given the chairman's remarks yesterday, how can you equate a search and entry provision into someone's home, sometimes when it is their place of business, with a search and entry provision into a giant corporation? You just cannot equate the two, surely, in terms of the impact, the intrusiveness, the damage to sense of self which lies behind the whole doctrine of individual liberty.

Ms Hampel—I suppose, again, it is covering the vast range of sins that troubles me. Whether the large corporation is essentially a family corporation, a News Ltd or a Grocon at one end of the scale or it is a BHP with its broader shareholder base at the other end, you still are often speaking of individuals behind it and the impact on a very wealthy individual who is the company or who is the guiding light or the public persona of the company of these types of powers of search and entry can be proportionately as devastating on them and on their commercial interests as it can be on the private individual who is subjected to the 6 o'clock raid.

Senator MURRAY—What I am concerned about is the potential for governments and people like yourselves to be approaching us from two different directions and therefore the language not being easily meshed. I understand you to be principally using the language and the philosophical opinions which come from a history of the study of individual liberties and rights and requirements, whereas governments very frequently view things from a point of view of organisation and corporate in the bigger sense of the word. Activities with respect to this term of inquiry of search and entry provisions very commonly relate to organisational activity of whatever kind rather than individual activity.

Ms Hampel—I suppose what really concerns me is that I see the big company pitting its might against something like the tax office as a diversion of attention from the real point. The reality is that, whether it is a plumber who has managed to incorporate herself so she is a company, whether it is a Grocon or a BHP, whether it is me as somebody who must practise as an individual or whether it is a wage and salary earner does not matter. There is going to be an intrusion that ultimately affects individuals within it.

I do not see that it should matter that individuals can incorporate to get an advantage of a lesser intrusive regime, or a greater intrusion regime, for that matter, than those who are individuals, because when you are looking at criminal activity it is ultimately going to turn on people rather than the company, even though companies can be liable. When you are looking at revenue or other regulatory activity it still depends on individuals as much as the corporate entity, because although we have got this legal person or the fiction of the company, they are driven by people and there is an individual will as well as a corporate will. The corporate will still has to be seen by reference to who as individuals within the corporation exercised the power. I just see that has got the potential for creating a greater confusion and difficulty in clarity of application than—

Senator MURRAY—But throughout centuries—for thousands of years—law has recognised special dispensation for the weak and disadvantaged. Typically children are an obvious example. The other side of that principle must always be, I assume, that those who are fully adult and fully resourced can attract the law on a far less disadvantaged basis.

Ms Hampel—I think you start from a benchmark of what is the acceptable level in the general run of things and then there may be ameliorating provisions for those in positions of disadvantage, but I do not think it has to be harder because somebody is in a position of greater advantage. That is my concern. I think it is the tax office bogeyman mentality of saying, ‘We need to have greater powers to deal with these well-resourced and well-protected corporate entities.’

Senator MURRAY—It is not just the tax office bogeyman, though, you see. The community itself will say to the parliament, ‘Hunt down the drug dealers, hunt down the corporate tax avoiders.’ That is the mentality.

Ms Hampel—Regarding hunting down the drug dealers, they are individuals, so you do not need to concern yourself about corporations in that. So far as hunting down the corporate tax avoiders, that to me seems to be much more an issue of the complexity of our existing tax system and the building up over 100 years of a very convoluted tax system that has enabled uncertainty to bedevil the ways in which people organise their affairs. Again, I see that as a product of the tax regime rather than something that in itself justifies the need for greater investigative powers or coercive powers against corporations.

That is why I say I think it is approaching it from the wrong end. If we start from the principle that you should not be subjected to unwarranted intrusion into your privacy then you have got to work out what is unwarranted intrusion. If you start from the principle of ‘entitlement to privacy unless’, then you can define the ‘unless’ much more easily than if you start by saying that there is a great evil out here which is corporate monsters who rort the tax system, therefore we have got to do something to fix it.

That, to me, is problem solving but not necessarily doing it by reference to principles. We must, I think, start from the principle of the right to privacy and then see whether problem solving can be dealt with by reference to those privacy principles or how much incursion into the privacy principles there has to be in order to solve the problem. It is a fundamental philosophical difference. It is like saying there are lots of kids using drugs on the street so therefore we should take them off the street or we should ban drugs rather than looking at the issue that we are trying to protect them from in the first place.

Senator MURRAY—I understand the point you are making but I am not persuaded in certain respects. Let me give you an example of public health. The community, over hundreds of years, has accepted that for public health purposes it is appropriate to have greater rights of intrusion or regulation of public eating facilities than eating facilities in somebody’s private home. We accept the rights of the state in the interests of public health to send inspectors into restaurants or large eating establishments to ensure they are appropriately run and clean, but we would not dream for a minute that they should come into your kitchen at home and exercise those same powers and authorities, even though you are

just as capable of poisoning four people at home as you are of poisoning 100 people in a restaurant.

If we differentiate in terms of intrusiveness in the larger public interest on a matter like public health, why would not we do that in tax policy or in crime policy? Why would we set a very high standard for individuals but a lower standard for other kinds of situations—and I agree with you they have to be carefully determined—where the public interest is clearly established, that a slightly lower level of liberty or right should attach? Why would we not protect individuals and the home more than we would protect large organisations and something major in the community?

Ms Hampel—I think with something like public health and food regulation there might be a fairly simple answer and that is that there is a licensing regime for dealing with the public at large rather than the individual aspect.

Senator MURRAY—But that is a fundamental issue of search and entry provisions.

Ms Hampel—Yes.

Senator MURRAY—If you have ever run one of those establishments, there is absolutely nothing more authoritarian than somebody coming in and saying to you, ‘You have got to do this with your floors, you have got to introduce stainless steel into your kitchen fridges and you have got to separate out meats and fishes and dairy products and introduce new pantries.’ It has a real cost and a real effect on the business concerned. I think it is justifiable, frankly, in the interests of public health, but you would never accept that in somebody’s private home.

Ms Hampel—Unless there were cause.

Senator MURRAY—If you have those intrusive powers in the interests of public health, why would not you have it for tax or for some other reason?

Ms Hampel—Again, I would like to come back to where we start looking at it. If there is reason to suspect a criminal offence has been committed I think there is a justification for one sort of power of search and entry. If we are not talking about criminal offences but about regulating the way either the individuals react to the state or obligations that individuals have towards other people within the community, then we are talking about, in a sense, a regulatory enforcement regime rather than a criminal law regime.

As far as individuals with the state are concerned, say our obligation to pay tax, then I would define it by reference to that relationship, so that it is what I owe the state—that is, the obligation to pay my tax—in return for what the state owes me—namely, provision of all sorts of services to me and other people in the community. It is the nature of that relationship that I think gives the appropriate springboard or justification for a power of incursion into my privacy.

As far as public health is concerned, it is my interaction with other people within my community that gives a regulatory power. Whether it is a farmer who has got weevils or

rabbits or whether it is a restaurateur who is feeding lots of people, their conduct is something that may run the risk of harming other people and therefore the state has traditionally given to itself the power to regulate the way we transact these things if they are likely to impact on other people.

The first is the individual and the criminal law; the second is the individual, including the corporation, in its relationship to the state; and the third is the relationship of individuals to each other and how much the state can regulate that in a non-criminal way. I think if you analyse it in that way it is much easier.

Senator MURRAY—That is very helpful.

Ms Hampel—Thank you. I think that is much easier than to try to fit it into categories of where you have that incursion. That is what I meant before about the wrong end of the stick by looking at the problem. If we try and bring it back to see what the relationship is and therefore how we should regulate it, it makes it much easier.

Senator CRANE—Could I just follow up on a couple of points in terms of you using the benchmark of the AFP as the bottom line. In their instance, as far as I understand, they require a search entry warrant to do everything.

Ms Hampel—Unless it is an emergency.

Senator CRANE—Yes. Fundamentally that is the position.

Ms Hampel—Yes.

Senator CRANE—Whereas in the case of the Taxation Office they primarily use self-assessment, which is something that the public wants, it is what the taxpayer wants, because it saves a lot of money on both sides and they use that as an audit or a checking system. Where do you draw the line in terms of what is search and entry? I am not talking about corporate tax or getting into the more complicated arrangements in trusts or even in partnerships—not that partnerships are very complicated—but about the ordinary PAYE tax. If you are going to have more freedom on this side, you have got to have an audit system on the other side. That is the general perception.

Ms Hampel—Yes.

Senator CRANE—Would you classify that as coming into the search and entry provisions? I am just asking where do you draw the line in terms of what is part of the public process allowing freedom on one side and a checking system on the other side?

Ms Hampel—So far as anything criminal or regulatory—that is, exposing somebody to some sort of criminal or statutory sanction—I think that the powers of entry and search have to be either by consent or under a form of compulsion like a warrant. So far as monitoring is concerned, where you have, say, a self-regulation regime, I think there is a proper basis for saying there are circumstances where, absent consent, it still may be appropriate to have a power of entry without warrant. But that would have to be the sort of power of entry for

audit purposes, to check the books to see whether you are complying with the statutory regime and, if it is not by consent, I would say it would have to be on reasonable notice and the refusal to consent or the refusal to allow entry on reasonable notice would then be a springboard perhaps for an application for a warrant, so that there was a compulsory and authorised form of entry notwithstanding absence of consent.

You gave some examples last time, Senator, about the weevil inspections and I have been thinking about that. In terms of public good there is, as you pointed out last time, a need to ensure that weevils are not allowed to exist in areas where they are likely to cause a public health or an industry risk. One of the things you said last time was that they do not need to come in without announcement, because the weevils are not going to go away—they will be here tomorrow. That, it seemed to me, with respect, was actually a good way of defining where notice should be required before entry was able to be effected without notice or consent or under some form of compulsory regime.

Where you are looking not at the criminal law but at weevil inspections or tax inspections for audit purposes there should not be an unfettered right of entry without notice and for a general purpose. There has got to be an identified purpose. Either I am authorised to carry out audits to see that you are weevil free or to see that you have put everything in your tax return that you should have or I have a reasonable basis for believing you are not complying and therefore I want to enter. They are the two bases, really, for entry for those audit purposes; either suspicion of breach or legitimate audit under self-regulation. With both of those it seems to me that it would be appropriate to say that entry can be during business hours with consent or on reasonable notice, and what is reasonable will obviously vary depending on the sorts of circumstances of the case. If we say to BHP, 'We want to look at all of your transactions relating to your smelter somewhere and we want to do it tomorrow and we expect you to have everything set up for us,' that may well be unreasonable given the amount of information we are asking for and the short time to comply. But if we say, 'We want to come next week and we would like all of that,' that may well be reasonable in the circumstances.

With the weevils, we might say, 'We would like to come tomorrow,' and it may be, depending on the gestation period of weevils or the time limit in which you think they are likely to be spread, a day might be a much more reasonable time, even if the farmer says, 'Well, I was going to go out and cattle duff tomorrow' or something. So either it can be by consent at any time within ordinary operating hours or upon reasonable notice, the reasonableness depending on circumstances or emergency powers. If you think you have got to get in straightaway because there is a shipment of wheat just about to go out and you are worried it is weevil infected or if a person unreasonably withholds consent then that may be the basis for the obtaining of a warrant.

Senator CRANE—You draw the line, if you like, between whether the information could be removed or got rid of very quickly, then you go straight to a warrant, but if it was something like an employee's tax return there is very little you can remove from that or take away.

Ms Hampel—That is right.

Senator CRANE—So that could be done by consent. If they then refuse, then you would get the warrant situation.

Ms Hampel—Yes, that is right.

Senator CRANE—That is at the bottom end of the scale.

Ms Hampel—Exactly. What you have done is seen, first, whether you can achieve something that balances both the need to preserve what it is you are trying to look for with the right not to be walked in on at any time or to be intruded upon unnecessarily or unfairly. That seems to me to make sure the powers of those who have to inspect and whose power of inspection should be for the greater good are not unnecessarily hampered nor are they unduly restricting the rights of the individual.

Senator CRANE—In the case of AUSTRAC, whom we heard from before you—and I think you heard most of that—we were informed that, in fact, it was done by communication and then a letter but they did not have the power of a warrant. Do you think that organisations such as that, if you are going to be consistent with AFP standards, should go to the situation where they have a warrant, or do you have a series of things underneath that general principle where things can be set out?

Ms Hampel—I think the AUSTRAC example is interesting because it is one that shows a great process of education that has gone on amongst those charged with the power of investigating and those within the corporations who are compelled to provide the information. I certainly would not like to give anyone more warrant power than already exists.

Senator CRANE—So we meet the benchmark, do we?

Ms Hampel—I suspect that the reason we do not need warrants with AUSTRAC is that there are other remedies available if somebody refuses to cooperate. That is the other point. The reason you might need a warrant with your weevils is that if somebody refuses to cooperate, and there is no other remedy, there still may be a greater good need to go in there, but if somebody refuses to cooperate with AUSTRAC that may in itself be a proper basis for a referral to, say, the AFP or the tax office or whoever, where those powers, if appropriate, can be exercised.

Senator CRANE—On the other end of the scale we had Immigration telling us that, in fact, they can write their own warrants. What is your reaction?

Ms Hampel—That offends against the principle in the same way as a senior tax officer authorising a search or entry into premises. I think it is essential, again in conformity with the principles that the Attorney-General's Department have as their standards, that it must be somebody independent of the department or organisation wishing to assert the power of entry and search who provides the authorisation to do it. Otherwise there is no appearance of, and perhaps no reality of, independent scrutiny to ensure that there is indeed a proper justification for the entry.

Tax should not be able to do it and Immigration should not be able to do it—the very people who need to do it without independent scrutiny are the ones whose evidence about its reasons should be scrutinised most carefully. If the AFP can go to a court and get a warrant, I cannot understand why Immigration cannot.

Senator CRANE—I am not quite as pessimistic as Senator Murray. I am not sure whether we will quite get to your position either but I think we will get some of the way down the track.

Ms Hampel—I suspect there will be a lot of resistance from tax, who have got more power than anyone else. If we were true to principle, we would rein them back to what everybody else has.

Senator MURRAY—I thank my colleagues for letting me use so much time. We have spoken about—and I raised it with you last time around—interaction between government instrumentalities of some sort even when they are independent statutory authorities interacting with citizens and corporate entities, but there is the question of unions having the right of entry into businesses.

Ms Hampel—Yes.

Senator MURRAY—We discussed it last time. Primarily it is the question of examining wage records and all that sort of thing. Recruiting and that side of it does not worry me because that is just an interactive exercise. But regarding the right to go to a business and examine wage records and anything else of that nature, do you believe that if that right were to be retained it should be given to an independent body? In other words, the union would say to the Industrial Relations Commission in a state or in a federal jurisdiction that they should go and examine those records or that the IRC should give the union in a particular circumstance the right to go to examine the records. How do you deal with a situation where private bodies, private individuals, essentially have a right to a search and entry? Where does it fit in your principles?

Ms Hampel—It is not citizen-state, it is citizen-citizen in circumstances where there is generally a power imbalance. Unions are the representatives of the individual or the group within the work force, so as the representatives of the individual they have got a right to inspect those records that relate to the individual or the group they represent in the same way the individual worker could say, 'I want to have a look at my wage records.' It is really just a delegated right or power. That is something I did not articulate last time but has occurred to me since.

Apart from the historical basis for the existence of unions in Australia, the principal reason is that they are acting as the representative of the individual workers so they are really exercising the power that the individual would be able to exercise. In that sense, I see no great difficulty with it. It fits very comfortably with me saying to my employer, 'I would like to go and inspect my wage records please, but I would rather have somebody who is better qualified to ask the questions who knows what they can and cannot look at and to deal from a position of greater equality with you, big employer, than I, humble employee, can

do.' It is a bit the same as having a lawyer represent you at court or an accountant represent you when the tax office comes along to talk to you.

That is, I think, the first part of it: that they are the representative of the individual or the group of workers. The second part is that there is no justification in principle for a union having any greater power than these other regulatory bodies, the self-audit ones. Again you would be looking at entry by consent or upon reasonable notice, and only if consent is withheld or reasonable entry is refused after reasonable notice has been given should there be power of entry without consent. It can measure against those same principles and it fits once you look at the union as the representative of the employee.

Senator CRANE—In terms of getting consistency in search and entry and the rights of the individual—and going back to the union question which Senator Murray asked—15 years ago, which is not really that long in time, we had the Hancock report which the chairman just reminded me of. Who would have thought today you would actually have a legal right to negotiate directly with your employees in terms of employment? Who would have thought that, in fact, you would have union and non-union employees working alongside each other in many workplaces in Australia, when you looked at the closed shop situation?

I think we are in an evolving situation in terms of freedom of association and freedom of rights and what individuals can do. I certainly look at this in a positive light, and I am sure my colleagues do as well, that we can get some consistency into what is happening with search and entry and we can get benchmarks above which you do not go and below which you do not fall, and I think that with the attitude of the current Attorney, Daryl Williams, now is the time to strike.

CHAIR—Can I thank you for coming to Canberra, first of all, which is a very generous effort for a busy practitioner from Melbourne, and for coming down again this morning.

Ms Hampel—Thank you. It has been a pleasure speaking to you. I hope I have been of some assistance.

CHAIR—You have. It is very good for somebody who has a very busy practice, so thank you very much.

Senator MURRAY—You have been of great assistance.

Ms Hampel—Thank you.

Proceedings suspended from 10.55 a.m. to 11.05 a.m.

HASSELL, Mr Peter, Senior Investigation Officer, Commonwealth Ombudsman

TAYLOR, Mr John Richmond, Senior Assistant Ombudsman, Commonwealth Ombudsman

CHAIR—Welcome, Mr Taylor and Mr Hassell. The committee is struggling—that might be the word at this stage, although it will change later—with the concept of entry and search powers given under Commonwealth legislation. We are trying to work out the proper balance between the public interest in law enforcement agents and other agents as well getting information, intelligence and evidence so that the integrity of society can be preserved and the public interest in allowing people to go about their lives as we think they ought to in a civilised community. We are trying to get to the principles of when powers of search and entry ought to be given. That is one aspect of it.

The other aspect, which I suppose in a sense is one that you have more to do with, is that, given that people have those powers, how should they be used and how can we as a committee suggest ways in which people with very intrusive powers use them properly? I was wondering whether you can help us with any of those matters.

Mr Taylor—Just to finish off something we addressed when we appeared before you with the Ombudsman in Canberra, we progressed a little with the department of immigration in respect of our own review of the Immigration powers to enter, search and seize. Immigration have now responded in writing saying that they found our report very useful, that they have already adopted a number of the recommendations and recognise that to implement fully our recommendations there would need to be changes to the Migration Act. They are currently briefing the minister with a view to progressing that further, so I think that is very encouraging.

You will see from our report that we were concerned that the power to enter and search premises was being exercised by comparatively junior public servants and that warrants were being issued by public servants with limited experience in the criminal justice system and with no judicial oversight. That, in our view, put Immigration out of step with the rest of the Commonwealth law enforcement arena and in fact with their statutory counterparts in law enforcement as well. That is the background to why we wrote the report.

I think there is a threshold question that I would ask if I were looking at this from your perspective. It is: does the agency need the power to enter and search and seize, because there are criminal sanctions involved? I think this is picking up a little on your last witness. If there are criminal sanctions likely to flow from the entry then it is our view that a judicial warrant should be issued rather than an administrative warrant, as, for example, some state government and local government agencies can use and, particularly from a Commonwealth perspective, the department of immigration.

If the necessity to search after an entry is for administrative functions, such as protecting the revenue of the Commonwealth, as the Taxation Office does, and to a lesser extent the Customs Service does, then administrative powers would seem to us all that is necessary. Where we distinguish in our report is that where Immigration know the existence of a named

non-citizen and an unlawful person in Australia then we do not see any difference between an officer of Immigration issuing a warrant for that person's detention and the state police issuing a warrant for a fine defaulter who is known. It is an administrative function. With the state they are simply endeavouring to recover the revenue; with Immigration they are simply seeking to take someone into custody and remove them from Australia because they are, in common parlance, illegal. But where Immigration wish to enter premises, as they frequently do, on information about possible unlawful non-citizens whom they do not know or they are seeking evidence in relation to people whose identity they do not know at the time of the search, then we believe it should be a judicial warrant with the safeguards that it implies. That is, there has to be a proper procedure for preparing a warrant, there have to be internal checks, as the AFP has to do, that there is a warrant adjudicator and it is approved by a more senior person and it then goes before a magistrate or judge to be sworn.

It has been argued by Immigration informally with us that if it has to go before a judge, it would be a Federal Court judge and that might create a potential conflict of interest because the person being detained—if someone is detained—may well have a right of review by the Federal Court or, equally, if it were a member of the Administrative Appeals Tribunal, which issues telecommunications interception warrants, then that might also create a conflict of interest.

Of course, an alternative strategy for that is that the warrant be issued by a state magistrate exercising federal powers. That is very common. State magistrates frequently issue warrants under the Commonwealth Crimes Act and there is no risk of conflict of interest.

Senator CRANE—In terms of a Federal Court judge issuing a warrant in relation to a person who might reappear before another judge in the Federal Court, how serious is that conflict of interest? Is it a perceived one or is it real?

Mr Taylor—I do not think it is a real one at all, because one judge may issue a warrant and another judge may hear the matter, or judges may well wish to disqualify themselves if they recognise the name. It is not uncommon for judges to relist matters. I think it is not a real prospect myself.

Senator CRANE—So it is a perception rather than a reality?

Mr Taylor—A perception we do not share but one that has been raised informally with us.

Senator CRANE—In terms of the Administrative Appeals Tribunal, would you apply the same reasoning?

Mr Taylor—Yes, I would. In my dealings with the Administrative Appeals Tribunal, in terms of telecommunications interception warrants, there has been no suggestion of bias or conflict of interest.

Senator CRANE—Thank you.

Mr Taylor—The other area I raised briefly with Senator Cooney as we were talking informally was that the Commonwealth is moving towards a common criminal code. It seems to me that if you are going to have consistency in Commonwealth legislation then the issue of warrants and the powers of entry, search and seizure should also be like. That again brings us back to Immigration and puts Immigration out of step with the other law enforcement agencies.

CHAIR—You have given an example of that in your submission, but one of the most common things in this area, not only of entry and search but also interrogation or questioning at police stations and other places, is the issue of how the person who actually carries out the power conducts himself or herself. It is often said that you could have the most perfect system but if you have got the wrong people running it, it is not going to be very good, and you can have a fairly ordinary system but if you have got top-class people running it, things will be done well. Have you got any thoughts in that area, in terms of the sorts of people that ought to be carrying out these functions and their qualifications and training and the supervision that should be given to them?

Mr Taylor—Senator, it strikes a familiar chord with me because one of the own motion investigations the Ombudsman's office conducted in our police jurisdiction about three years ago was the AFP's use of power to search individuals—pat searches, strip searches, searches in custody and so on. The consistent theme that came out through that own motion investigation, which involved interviewing police officers, supervisors, reviewing complaints, interviewing complainants and community groups, was a lack of understanding of police powers. In other words, individual officers simply did not understand where to draw the line in terms of their powers to search and how far to go and that there were in fact threshold issues which they have to step through before they can go right to the extreme example of a strip search. It is rather hard to be critical of individual officers when they do not understand what their powers are and their training has been limited. As a result of that investigation and report, which was a public report, there was some substantial improvement in police training in the ACT, which is the area with community policing that tends to utilise those powers the most, and some significant drop-off in complaints. So training is critical.

Taking Immigration as an example, where officers have generally no law enforcement background training—they have not gone through a process of intensive legal training in terms of powers and responsibilities—there is no reason why those officers cannot be effective if they are properly trained. Training is crucial.

CHAIR—Who should do the training? In a certain sense, the ideal combination might be a group consisting of a couple of very senior police officers. A couple of retired judges and perhaps the odd retired Ombudsman or some sort of group like that. This is just what goes through my head. But have you got any thoughts of the sorts of people who ought to do the training?

The reason I ask that, just to explain it to you, is that you have got some people who have been through the system and know what the issues are and have no doubt discussed it with confreres over the years. It is a bit hard for people who are going to train others to do so if they have not had that personal experience. Do you have any thoughts as to the sorts of people who should be doing the training?

Mr Taylor—Very much so. There are two answers. Firstly, we as an organisation have had a lot of experience with that. We contribute to many police training programs and assist the Federal Police in running an internal integrity program for their internal investigators which we contribute to in a substantial way. We also give guidance to a variety of agencies, both ACT government, as the Ombudsman is the Ombudsman for the ACT, and Commonwealth government.

In terms of who might give that training, as an organisation we espouse that agencies should be responsible for their own conduct. It is too easy to say it is someone else's responsibility. I think it is very important from our point of view to encourage agencies to maintain their own professionalism and therefore be responsible for their own training. In terms of who they might draw on for that training, that is really a matter for the agency. As you said, there are all sorts of people around with the relevant background and experience to contribute to the development and also to participate in training. We certainly offer ourselves as an agency to any Commonwealth or ACT agency that would be interested in our advice, expertise or contribution. But I emphasise that it really is the agency's responsibility.

Mr Hassell—Perhaps, Senator, if I could give you an example. Following our review of the Migration Act, the department of immigration introduced intensive training for all their officers in conjunction with the AFP. They developed a course that met their needs and gave their people an awareness of the law that they needed.

Mr Taylor—These days, tertiary or advanced training is accredited through universities. There are a number of universities that specialise in providing law enforcement type training packages; Charles Sturt University, for example. In fact we utilise trainers from Charles Sturt University to train our advanced investigators. So there are outside sources readily available.

CHAIR—I had not realised that.

Mr Taylor—There is a big move in the law enforcement or quasi-law enforcement arena for accreditation. It means that agencies can have their own staff trained as trainers and gain tertiary accreditation for their courses. In fact, staff these days, if they do accredited courses, can earn points towards diplomas, graduate diplomas and degrees.

CHAIR—Is Charles Sturt the only one that does it?

Mr Hassell—There might be La Trobe.

Mr Taylor—Yes, La Trobe also have a strong interest in that sort of training.

Mr Hassell—Charles Sturt diplomas and degrees are predicated upon the competencies developed by the Commonwealth Law Enforcement Board, so it articulates back into the Commonwealth and what standards have been set within agencies. Many investigators and Commonwealth agencies, in particular fraud investigators, nowadays undertake that training, as indeed many AFP officers do.

Senator CRANE—In our previous hearings with Ms Hampel she made the comment that she thought the provisions for the review of the exercise of entry powers and remedies for

their abuse were not adequate at the moment. One suggestion is that the Ombudsman's office provides one source of review for these particular things. First of all, do you agree with the general comment she made? Secondly, would your organisation be an appropriate organisation to do a review?

Mr Taylor—Firstly, as you know, the Ombudsman does have the responsibility for dealing with complaints about public administration, in other words, complaints about the conduct of any Commonwealth agency. That is in our jurisdiction. An exception, for example, at the present time, is the National Crime Authority which is not in our jurisdiction currently.

Senator CRANE—Because it is in your jurisdiction does not necessarily mean you are the appropriate organisation to do it. I am asking you to go one step further.

Mr Taylor—I am certainly happy to take that step. I think we are the appropriate body because I think we have got a proven track record. Our police area has given us a wealth of experience in the day-to-day practical problems that organisations experience when they are exercising their powers to enter and search premises. I must say, the bulk of those sorts of complaints we deal with are in the police jurisdiction. That would stand to reason because it is generally police that are exercising those fairly extreme powers of being able to force entry and search and seize. Equally, from our involvement with the department of immigration, the report simply illustrates the problems that we have identified with that agency. To a lesser extent, we have had experience with the Customs Service, although I must say the Customs Service have a good track record in relation to complaints about their powers to enter and search. We do not get very many complaints.

Where we do get complaints, they tend to be more joint task force operations where the Customs Service and the Federal Police, for example, get involved. We get few complaints about the Taxation Office and its power of entry and search. The bulk of our complaints tend to relate to forced entry by police. We have investigated those sorts of complaints and we have used our formal powers on a number of occasions. You have two examples before you of the Motio and Awit complaints and we have publicised those results. We have invariably found that when we have looked behind what has taken place there have been a range of administrative problems in terms of the police exercising their powers.

I might preface what I am going to say next by saying that we do not suggest that the police should not have the powers to enter and search. In fact, it is obviously a legitimate law enforcement tool when exercised properly. But when we have looked behind what has taken place, we have invariably found poor procedures, lack of supervision and, going back to my earlier comment, a lack of training and understanding of their powers. I must say the AFP is very responsive to our reports and there has been a gradual but consistent improvement in the way they perform. Nevertheless, each time we have looked at this—and in the past four or five years we have looked at this perhaps half a dozen times in a formal sense using our formal powers to compel people to answer questions—we have found problems. That says to me that our role is very important to ensure consistent conduct and to ensure that agencies, particularly agencies using such important powers, recognise that if they make a mistake and there is a complaint, the Ombudsman may well investigate and investigate thoroughly and people will be called to account on oath.

Taking another step further, I would draw your attention to one of those very problematic areas when it comes to search or entry and search, where agencies act on anonymous tip-offs. In these times we have hotlines for all sorts of things, paedophilia, drug related offences and general complaints. There is nothing wrong with law enforcement agencies, particularly police forces, acting on anonymous information. But our concern is how it is used and what the checks and balances are to make sure that it is legitimate anonymous information and not either spurious, vindictive or, in examples that we have investigated in the past, it has been coloured.

CHAIR—A couple of federal politicians might agree with what you are saying.

Senator MURRAY—It has been what?

Mr Taylor—Coloured—added to, shall I say, or a particular spin put on it, Senator. Senator Crane knew what I was talking about. That is the value of having a body like the Ombudsman with the power to investigate those sorts of complaints thoroughly.

Senator MURRAY—And the experience.

Mr Taylor—Indeed. And experience comes at a cost, too, I might add. At the moment you are looking at probably the two most experienced investigators in the Ombudsman's office. It is very hard to attract people with the right background and experience and the determination to follow through when you are investigating police officers, for example—a very difficult environment.

Senator CRANE—Had you finished that?

Mr Taylor—Yes, thank you.

Senator CRANE—That leads to another question I want to ask you. In terms of the anonymous complaint, as far as the individual the anonymous complaint has been lodged against, what is your view on their rights in terms of knowing precisely what the complaint is, rather than a generalised statement that 'We are going to investigate X'? What right do they have to know what the actual complaint is?

Mr Taylor—I suppose there are two answers there. In terms of the responsibility of the police to answer questions about the search, I think it is reasonable that police officers tell the occupant of the premises why they are there, in general terms. Police officers are loath to tell too much. They might be concerned it would give away the anonymous source.

Senator CRANE—Then comes in the word 'vindictive'.

Mr Taylor—Indeed. But there are also other oversighting principles involved. There is freedom of information. It would be quite appropriate, in my view, for a complainant to be given a copy of whatever police reports relate to the complaint that led the police to act, providing it did not identify any possible source. That is an issue, because of our FOI involvement, that we quite often encounter.

CHAIR—The eternal problem is that when the police give evidence they say, ‘Information received’ and a new and fresh-faced advocate might say, ‘Where did you get that from?’ The magistrate will say, ‘It is under public policy.’ That has been there for a long while.

There is a difficulty. Winston Churchill—a person who lived before you were born, Mr Taylor, but I can remember well—used to talk about the informer in Nazi Germany; that there are information givers and then there are informers and the difference between the two is at times very narrow. A person can be put through tremendous anxiety and difficulty and expense dealing with information given anonymously where, from his or her point of view, were he or she to know what it was, it would make it perhaps cheaper and enable that person to answer the question because he or she knows where it is coming from and what it is all about, what the context is. I suppose there is not much we can do about that because it seems to be embedded deep in the law, as you know. But if there were ways we could get around that, it would help a bit.

Mr Taylor—It is a question of balance, isn’t it? It is balancing the public interest and the need for law enforcement agencies to pursue their legitimate inquiries. I do not think it is unreasonable for the person who is on the receiving end of a search which originated because of anonymous information, or any sort of information, to be told in general terms the basis for the search. I do think there is a public interest in terms of protecting the identity or the likelihood of identity being exposed. I think that is an important issue that the courts have upheld.

CHAIR—Because then you would get no information or insufficient information.

Mr Taylor—Yes. Going back to my earlier comment, again, I think the important role we play in this process is that the AFP, for example, well know on past examples that if we receive a complaint and we have any concerns about the appropriateness or the legitimacy of the anonymous information, we will investigate it, and we have done so.

Senator MURRAY—Can I follow up on the same line of questioning quickly. One of the things we have not covered in this inquiry so far, I do not think, is the bases on which magistrates will give warrants. Senator Cooney has outlined the informer possibility and sometimes an informer will be anonymous because they are afraid. You do not exactly want to tell the world what you have told somebody else about someone who is a drug dealer because the drug dealer might come and get you, so that would be a legitimate informer. But you get the fabricator, perhaps vindictively, who might invent something.

Let us assume a scenario where a policeman is rung and told that a certain person has got a buried body in their backyard. I would have thought that is the kind of thing that would alarm any police person and they would feel obliged to go along and get a search warrant and go and investigate it, but perhaps they would not. Do you think there should be any guidelines developed, and perhaps expressed in our report, as to a precautionary principle, if you like, for magistrates when issuing warrants? If a policeman arrives and says, ‘We have got information,’ unless that is explored, if the information is simply a malicious phone call, then the magistrate has probably got no right to give a warrant but if the information is as a result of proper detective work then you would have.

I am not experienced as to how much testing goes on between the two and whether that is an area which we should concern ourselves with, that warrants might sometimes be given injudiciously, if you like.

Mr Taylor—To answer your question, it is quite a low threshold test that magistrates will apply. Section 3E of the Commonwealth Crimes Act says that an issuing officer, that is a magistrate, may issue a warrant to search premises if the officer is satisfied by information on oath that there are reasonable grounds for suspecting. It is quite a low threshold. In fact, the onus is on the informant, the person swearing that the contents of their affidavit are true, to establish that there are reasonable grounds. I think that onus should stay with the informant; in other words, with the police officer or the public servant who is seeking the warrant.

I think the guidance and the guidelines should be with the agencies involved, because the magistrate or judge invariably is not going to look behind the information because it is taken at face value, again because it is on oath and therefore can be expected to be true. It is then a question of whether there is sufficient evidence to support what is being sought on reasonable grounds, basically lower than on the balance of probabilities.

In my view the responsibility and the guidelines should be with the law enforcement agency. We have taken up this very issue with the AFP to strengthen their guidelines in terms of issuing warrants, so that the procedures are well and truly embedded in the process, there are checks and balances internally and, by the time it gets to the magistrate, hopefully it is a fairly foolproof system. But human beings being what they are, we know from our experience and our investigations that it does fall down from time to time, and that is where, again, we become involved.

Senator MURRAY—You have actually audited a warrant process and established that at times the magistrates, in your opinion, probably have given a warrant which was not justified on the basis of the police case for that warrant.

Mr Taylor—In at least one case where we used our formal powers—and that case was not a public report but I can give it to you in broad terms—we established that the information on which the warrant was issued was false in four material particulars. The particulars were either wrong or coloured. One example in that was the informant was relying on anonymous information from a reliable source. Our investigation established that the source either did not exist or did not make the call for the tip-off. A magistrate would never test the informant to that extent because that is not their role. Their role is simply to establish on reasonable grounds that there is sufficient information to issue a warrant.

CHAIR—I suppose the judicial officer is in a very difficult position. There is no way he or she can check the information when the applying officer comes in with the affidavit. What can you do?

Mr Taylor—Exactly. So all they are doing is that simple threshold test: does the warrant relate to a crime; therefore, are the powers being sought relating to a specific crime of a search warrant being issued; is the evidence provided sufficient to support that? Very few warrants are rejected. I can say the statistics in terms of telecommunications interception

warrants are very low in terms of rejection. Broadly, in the broader criminal arena, I would expect from my own experience that there would be very few. I think the onus should always remain with the agency seeking the warrant, not with the magistrate or judge.

Senator CRANE—If I could follow on, Ms Hampel once again suggested having a set of legislative sanctions, guidelines or a charter covering search and entry powers. Do you have a comment on that proposal?

Mr Taylor—I think there are already sanctions that exist; that is, if an agency gets it wrong, they leave themselves open to civil action. In a number of cases that we have looked at, where search warrants have been executed on the wrong premises, for example, the recipients of the problem, the people whose door has been smashed in—and that is a common occurrence, or common enough, anyway—have sought compensation. We have recommended compensation in a number of cases and it has been in some cases quite substantial, in the tens of thousands of dollars. The AFP has accepted those recommendations. That is the extreme end.

In terms of what other sanctions might be imposed, I think there is also a range of sanctions that are already available against both the agency and the individual officers. Whether they are a public servant or a police officer, they can face disciplinary action or other action, criminal action, for example, if it was an extreme case of perverting the course of justice. There are other sanctions available. I do not see the need from our point of view to actually enshrine that in law. It exists already.

Senator CRANE—You would say that there is no requirement for a charter covering the overall principles of search and entry?

Mr Taylor—In terms of principles, I think there is some merit in looking at principles that would apply uniformly across the Commonwealth. This is going back to my comment on a uniform criminal code. There would be some usefulness in having principles that say: these are the issues that should be considered. The AFP already has that and those guidelines are used by other agencies within the Commonwealth. From that point of view, I do not think sanctions are necessary but principles, yes, I would agree.

Senator CRANE—We heard from AUSTRAC today that Immigration can scribble out their own warrants, as against AUSTRAC who do not have access to warrants. It seems to me, at least preliminarily, that there needs to be an upper line and a bottom line. Were you here when we were talking about the taxation office and employees' self-assessment and what have you?

Mr Taylor—Yes.

Senator CRANE—That fits into a different category altogether. If you have freedom on one side, you must have audit processes on the other side.

Mr Taylor—Yes. I think that goes back to my earlier comment, Senator, that in my view the threshold question should be: are there criminal sanctions which will flow from this? If so, a judicial warrant. If there are not, and we are talking about administrative

sanctions such as recovery of unpaid tax or penalties involving tax or penalties involving diesel fuel rebate or those sorts of broader revenue issues, they are administrative and would not need a warrant because there is not going to be any likelihood of arrest, detention and, generally speaking, seizure of papers.

Senator CRANE—The next question relates to the execution of warrants, which generally do not become public, but from time to time, as we all know, they are leaked into the public arena. If somebody wants to challenge a warrant which they believe has been wrongly executed or goes beyond what has been seized or the material there, it becomes a very public matter immediately because the only real recourse is the Federal Court. Do you think there is a necessity for these things to be kept private until such time as that dispute as to what has been taken goes beyond the warrant or whether it is a wrongly executed warrant? How would you handle that?

Mr Taylor—There are two answers. One is from our point of view, of course, a person can complain to us at any time during the process. We do occasionally get complaints from people whose premises are being searched as we speak.

Senator CRANE—That is public then, isn't it?

Mr Taylor—It is only public in terms of the provisions of the Police Complaints Act, which has very strict secrecy provisions. In other words, a person can complain to us at any stage and say, 'The AFP, customs or whoever have seized our documents and they have taken everything and we want those bits that they do not need back.' That is not an uncommon source of complaint to us. There will be times when we simply say, because it is so complex, it may involve a complex company fraud, that it is a matter best left to the courts to decide. I am not sure if I have answered your question.

CHAIR—Yesterday we had some evidence from the Australian Securities and Investment Commission which said that their policy was to ensure that if a warrant was being executed it was not made public. Even though a lot of people know about it, they made sure insofar as they could that it was not made public.

Senator CRANE—I guess that is the point we are following up because, whether we like it or not, a number of these things do become public. One of the recent ones that was particularly infamous was in the case of Ian Cameron, the former member for Stirling, when the television cameras were there when the police arrived to execute the search warrant. When you follow that situation through, obviously he did not know about it, so you can make a pretty accurate guess where the leak came from. Are the penalties in terms of leaking that sort of information against an individual sufficient, or the remedies?

Mr Taylor—In the past I would answer no, they are not. But for example—again, this is an issue close to my heart—we did an own motion into the police improper release of information, some seven years ago, I think it was now, which led to the AFP Complaints Act being amended to make it a specific offence to release information and to improperly access information. Some examples were people looking up computer records and then releasing it externally. There was no difference between that and knowing that there is going to be a raid and telephoning a journalist, there is no difference at all. That is a dismissable offence in the

Federal Police and certainly the public service regulations would make it a serious disciplinary offence within the wider public service.

Senator CRANE—But how many get dismissed?

Mr Taylor—Not many, Senator, I regret to say. But certainly in matters that we have looked at there have been cases where police officers have been removed because of improperly accessing information.

We have also looked at the broader problem of information being passed to the media. I can say in one particular example we established that the media are also very clever at obtaining information by using radio scanners and sources other than just police officers or those directly involved in a search, so it is not always black and white.

Senator CRANE—I had one of those in estimates a while back. I seized a camera and then got told I was not allowed to do it. But I ended up with the film, I know that much.

Senator MURRAY—You might have been trained by the AFP.

Senator CRANE—I was infuriated by it. One of the journalists with a camera came around and started taking photographs while I was in front of the people at the table. I forget which department it was now.

Have you given any feedback to the tax office about the exercise of its access and entry powers? In general what detail of operations do you have with the tax office and how do you operate under their particular powers for search and entry and obtaining information?

Mr Taylor—Under the Ombudsman Act there is a specific position called Taxation Ombudsman now. We have specific funding from government to focus on tax complaints. It is a growing area within our complaints handling. We have a special tax adviser who works directly to the Ombudsman with a small team of officers.

To answer your question broadly, we are providing Tax with regular feedback on complaint processes and complaint handling and complaint issues. I have not specifically looked at the details of complaints about tax search. From my experience, I think there would be very few complaints. It is certainly not an issue that I am aware of, and I think I would be if it was a problem. But I cannot give you anything more specific than that.

Senator CRANE—Could you check that out?

Mr Taylor—Yes, certainly.

Senator CRANE—I asked a question earlier on about the need for harmonising search and entry provisions so we get a consistent jurisdiction between the states and the Commonwealth. Could you identify those areas where you think there should be differences or a lesser standard, using the AFP as the benchmark of what it should be and working back from there?

Mr Taylor—I think the AFP is a good benchmark because, firstly, we are familiar with it and we know that they have up-to-date guidelines and procedures for obtaining and executing warrants. Working back from there, I would go back to my earlier comment that where there is the likelihood of criminal sanctions—that is, criminal prosecution with the prospect of penalties or imprisonment or both—then I think it should be a judicial warrant.

Where the agency is seeking to exercise powers to enter and search involving administrative sanctions—your comments earlier, Senator, about searching for weevils or weeds or rabbits is, generally speaking, an administrative function; and recovering revenue for the Commonwealth, taxation, customs and so on, again is generally administrative—where there are, generally speaking, no criminal sanctions to follow, then I think those types of entry should have guidelines and standards but not to the same threshold test as warrants being issued by a magistrate or judge. In other words, they are administrative functions.

Senator CRANE—If I could try to summarise that, you are saying that in the administrative field it should be done wherever possible by consent and they should not move to a warrant situation unless the consent was refused?

Mr Taylor—Picking up on your last witness, consent generally is what would apply. Although you would know from your own experience that a wide range of state public servants have the power to enter premises. Inspecting for weevils is an example, or pasture protection board rangers checking on rabbits. That is a power which, if it has to be exercised by force, in my view should involve law enforcement officers. There have been some spectacular examples in the media where officers exercising that sort of power have ended up being shot. There was one in Victoria not long ago involving an RSPCA officer exercising a lawful power to enter premises but without the recognition of having a law enforcement role. He was challenged and shot.

CHAIR—What the law enforcement role does, if there has been proper training, is approach the situation as it should be approached. Many years ago, I remember—again before anybody here was born—talking to an old Deputy Commissioner of Police, who said that the scariest times were when he went out with a new group of young constables who were keen and ready to grab hold of anybody off the street. He used to say to them, ‘Listen, just go about this in the right way.’ I always remember that because what he was saying was that policing is not an easy business and you need to have particular skills and particular experience.

Mr Taylor—Of course, the police are there, too, to ensure there is not a breach of the peace—in other words, that there is not an overreaction to what is otherwise a lawful inspection.

Senator CRANE—There have certainly been some nasty instances where farms or property on farms has been seized on the instructions of financial institutions by a bailiff. There have been a few people shot over the years in those situations.

Mr Taylor—Yes, indeed.

CHAIR—The department that does a lot of inspection is the tax department. This will be no doubt in the annual report, but does the Ombudsman get many complaints about the way the tax department goes about its business?

Mr Taylor—Not very many. We do get occasional complaints about desk-top audits and how they are conducted, but I am not aware that we have had any complaints about the exercise of their search power to examine and seize documents. Again, I will check on that and get back to you if we have any detail to add.

Senator MURRAY—I have a couple of brief questions. You might like to come back to us, Mr Taylor, but it seems to me—and it was crystallised today in our discussion with Ms Felicity Hampel—that we need to hang this report off a set of principles, a philosophy, if you like, which attaches to the views as to what are the appropriate rights which should be preserved or protected where search and entry provisions are considered. Ms Hampel believed you should make the distinction, which you do, between criminal and non-criminal matters, administrative as you describe them. She almost went to the third step, and I think she did make it go the third step, and that is dividing non-criminal between those which are definitely concerned with public interest—matters of public health, for example—and those which relate to the citizen's relationship with the state, such as a tax payment, which I guess you could describe broadly as public interest. It is a bit difficult to see it in the same category as public health, for instance. That was a division.

She resisted the division upwards or downwards between classes or types of entities within those divisions. She resisted the idea that corporations or legal persona, for instance, would be accessible of greater power on behalf of authorities than an individual.

I have given you this description again at some length for this reason: what I would like to ask you on notice, perhaps you could give some thought—I do not think we need to have you back, Mr Taylor, but as a supplementary submission—to that whole area of against what principles, against what theory should we set a view as to how search and entry and seizure provisions should be considered. As an assistance to you in that matter is the Attorney-General's two submissions which were very helpful and thoughtful in that area. I will put that on notice and leave that aside in the way I have outlined it to you.

Mr Taylor—Yes.

Senator MURRAY—The other one is I would really like some guidance in the area I spelled out to you earlier—and you might again prefer to come back on notice—which we have not really explored, and that is how far the magistrates, particularly the less experienced and less competent magistrates, rather than the more experienced and more competent magistrates, may be giving warrants which should not have been justified on the case sworn before them, and whether in the swearing of that case the guidelines need to be specific so that the magistrate is aware as to how strong or how flimsy the evidence is.

I give you the example, if somebody says on oath, 'We have reasonable information to believe,' if they disclose that the reasonable information was an anonymous telephone call, the magistrate might want to inquire a little more. If they said it was the result of detailed investigative work, he or she might accept it out of hand. So whether there is a set of

principles in terms of the way in which matters are sworn that we should be expressing in our report, perhaps developing further the ones that you have referred to in the AFP, which I think have been sent to the secretary.

Secretary—No.

Senator MURRAY—Perhaps you could send us a copy of those guidelines you referred to.

Mr Taylor—We will provide you with a copy of the AFP's current guidelines on the issue of warrants. Would you also be interested in seeing a copy of their guidelines in terms of executing warrants?

Senator MURRAY—Yes.

Mr Taylor—We will also endeavour to put down our thoughts on the principles.

Senator MURRAY—Any weaknesses.

Mr Taylor—Yes. In terms of the conduct of magistrates, of course we are not aware of what training or guidance magistrates are currently given in terms of issuing warrants. I suspect probably not very much as they are independent once they are appointed. But I would be happy to make some suggestions in terms of some of the principles that we would consider relevant when considering whether a warrant should be issued or not. I think that would be perhaps as far as I would go in terms of intruding on a magistrate's right to issue a warrant.

CHAIR—Just on that, I think they do have a meeting, they go away for the weekend and that sort of thing, so I was wondering whether the appropriate thing would be if you got an invitation from the chief magistrate to come down and talk about it.

Mr Taylor—We are always happy to contribute to any venue in terms of espousing what we think is important, particularly in a law enforcement context. I would be happy to put down our views on the issues we think should be considered.

Senator MURRAY—I am less interested in telling a magistrate what to do than in telling the police officer what they must provide to the magistrate.

Mr Taylor—I agree with that approach. The responsibility always lies with the informant, the person who is swearing the information.

Senator MURRAY—That is right. In the old days they used to finger old women as witches and in a dictatorship they finger people as enemies of the state. In our society we have people fingering other people for vindictive purposes and it is most commonly via the anonymous phone call. I think a magistrate should know that. Maybe they do. I do not know. Maybe the police tell them, but if they do not, maybe that is the sort of thing we should be requiring them to ensure. It is that kind of thinking which is in my mind. If you could come back and assist us, it would be helpful.

Mr Taylor—Certainly.

Senator CRANE—If I could ask one more question which I asked the people from the Attorney-General's and also the Federal Police: how precise should a warrant be? One of the things that used to happen at Senate inquiries, there used to be a clause (d), as it was commonly called, which said 'any other matters'. It has now been knocked out. You cannot have any other matters. You have to have terms of reference which relate to what you are inquiring into.

Mr Taylor—The Commonwealth Crimes Act, under section 3E, specifies the details that are required to be in a warrant. It talks about the kinds of evidentiary material that is being searched for, the premises, the description of the premises, the persons named and so on. So the act already specifies quite specifically what detail is required by law. In terms of recognising, however, that once police officers are on premises and they see something else that relates to another crime, I think you discussed last time we appeared before you that of course police officers have got a responsibility to pursue other crimes. I do not think you can make a search warrant so precise that police officers are unable to exercise their proper powers to seize other things that might relate to other offences.

Senator CRANE—That was not really my question. My question was related to what was put before the magistrate at that particular time. Can they add a clause on there which says 'any other matters' or that general meaning?

Mr Taylor—I think the answer to that is any other matters that relate to the offences they are investigating, yes, but it has got to relate to what they are investigating.

Mr Hassell—I think there is a good body of case law on this which has been established by the courts over time. The general principle on affidavits is that relevant information ought to be included. In other words, it would be quite inappropriate for a police officer swearing an affidavit before a magistrate to exclude information which may well be exculpatory to the very information that he is laying before the magistrate. Relevant information ought to be included and certainly that is the training proposition for Federal Police officers. As I said, there is quite a body of case law established by the courts over time on that particular issue.

Senator CRANE—So the key word is 'relevant'?

Mr Hassell—That is one of the key words. I do not profess to know them all off the top of my head, but certainly relevant material ought to be in. There are degrees of relevance, too. It may not be necessary to put every single piece of information but if it is relevant to the facts being disclosed in that affidavit and it might sway a decision maker the other way then it ought to be there.

Senator CRANE—Relevance to the facts is pretty precise.

CHAIR—Could you give us those references so that we do not have to go searching for them, at your leisure, or could the secretary give Mr Hassell a ring at some stage about them?

Mr Hassell—Yes. Could I suggest also, Senator, that the Attorney-General's Department might be able to provide useful material in that regard.

Senator CRANE—Thank you.

CHAIR—Thank you, Mr Taylor and Mr Hassell, and I thank the Ombudsman's office, both here and in Canberra. That has been very lucid. Thank you very much.

[12.05 pm]

ROZENES, Mr Michael, QC (Private capacity)

CHAIR—For the purposes of Hansard, could you tell us the capacity in which you are appearing before the committee today?

Mr Rozenes—I am a barrister. I am not here in my capacity as Chairman of the Criminal Bar Association.

CHAIR—You are not?

Mr Rozenes—Only because the association did not get around to reviewing any of these issues. So I really speak on my own behalf, if that is permissible.

CHAIR—I have been intoning the issues, which you know more about than I do, on trying to establish the balance between the need to gather information and evidence, both for the suppression of criminal activities and also generally, as with the tax office, through an auditing process, and the need for the public interest in keeping us good, free citizens, where we can go about our lives, as we hope all decent people are able to go about their lives.

What is the balance between the issues? What are the principles behind entry and search? Given those principles, how should the activities be carried out? Do you want to say something to start off with?

Mr Rozenes—I would briefly say this: what you need is scrutiny at both ends of the chain. I do not think you can leave it up to police and/or any other law enforcement agency to simply have a go when they feel like it. It has to be supervised, it has to be accountable and there have to be limits on it. There has to be also a degree of efficiency. We have got to be able to make sure that people who do commit criminal offences are capable of being convicted on legally admissible evidence.

Senator MURRAY—That is it, then. Let us go to lunch.

CHAIR—It seems to me you need proper people carrying out the activities, because you can have a pretty good system but if you have not got the right sort of people making that system function you are in trouble, and you can have a pretty ordinary system which, if you have the right people in charge, works pretty well. I suppose we have to look at how selections are made and how training is carried out.

Mr Rozenes—I think that is probably beyond any recommendations this committee could make. That all depends upon what sort of people get recruited into police forces, how much money is put aside to train them properly and what priority is given to these sorts of issues.

Senator MURRAY—That was a very succinct answer you gave earlier. Our difficulty has been that the community standard is such that it implies, and in fact has allowed, an

erosion of individual liberty and this area of search, entry and seizure is one of those. For instance, the desire to ensure that drug dealers are caught and big tax evaders are caught and so on has resulted in some fairly expansive and intrusive powers.

Mr Rozenes—Of which, I might say, the search warrant is probably the least intrusive.

Senator MURRAY—It is actually the non-search warrant powers which are far higher, we agree with you, having studied this now in some depth for a few months. The problem facing us was either to accept that and simply recommend proper accountability and process and training and those kinds of issues, or in fact to go the route of Ms Hampel QC, who said: look, essentially you start with a clean sheet of paper, you establish the essential principles and rights you wish to preserve and those things in the public interest you wish to pursue and then you test every act and every instance of the search and entry procedures against those principles. You would have heard me summarise at the end for the previous witnesses some of the matrix that she was outlining.

Mr Rozenes—Yes.

Senator MURRAY—I would find it helpful if, with your experience and background and of course your legal training, you could indicate to us some of the starting points that you think should be considered from the civil liberties side of things.

Mr Rozenes—I do not think I would be in favour of reinventing the wheel. I suspect that the entry and search provisions that we have probably work tolerably well. The test, I suppose, for them is to see how they are challenged and how often they are challenged. For example, in the Commonwealth arena there was a period of time back in the mid- to late 1980s where many of the search warrants that were executed in respect of tax fraud and bottom-of-the-harbour schemes and the like were challenged, firstly, in the Supreme Court and then, when the Federal Court obtained the requisite jurisdiction, in the Federal Court.

My feeling about those challenges was that they were motivated by a desperate need to find out what the investigator had and knew, rather than any real concern about the way in which they had been executed. What was being sought was the information that lay behind the warrant to see just how far the investigator had got in the process, what information had been found and how much at risk, if you like, various defendants were. After that, and with the introduction of what was called the three condition warrant, again I now suspect that much of the litigation about warrants is not so much their execution or their width and breadth but rather whether legal professional privilege lies or does not lie with respect to any group of documents.

The other issue is whether or not this all could have been obtained cooperatively rather than by coercive process. It would be an interesting exercise, I think, for this committee to have a look at the last five or six years of challenges to warrants at the Commonwealth level to see just what the real concern about the issue of warrants is.

I am fairly comfortable about the search warrant situation. I must be frank about that. Much of the coercive powers that we deal with at the criminal lawyers' end are the coercive powers that are exercised by organisations like the tax office, ASIC, customs and everybody

else who can effectively compel your attendance, compel you to swear on oath, compel you to answer questions, notwithstanding that the answers to those questions may tend to incriminate you. In other words, there has been the abrogation of the privilege against self-incrimination. In some jurisdictions there has been abrogation of legal professional privilege and there are secrecy provisions that are imposed. These are far more important and intrusive interferences with civil liberties than to search one for physical evidence.

Senator MURRAY—I am certain our report will reflect an emphasis on the non-search warrant area because by and large the evidence to us is that in the search warrant area training is attended to and guidelines are attended to and you have got the independent check, with the exception of the immigration department, of the magistrate and so on; whereas the rights to search and enter farms, homes and businesses in a regulatory sense is very intrusive. It is in that area that Ms Hampel's response and our own questions lie as to how far that should be wound back from where it is at present, what principles should guide that.

Mr Rozenes—I think it is difficult to legitimately draw a distinction between the search of a citizen's house and a search of corporate headquarters, but the courts have identified distinguishing features. I cannot think of the case, it might have been Yuill's case, I am not sure, but I know that the courts have drawn a distinction between the rights of a citizen compared to the rights of a corporation. They have held that corporations have no privilege against self-incrimination. There are other issues about legal professional privilege and corporations as opposed to individuals.

I suppose there is a recognition that corporations are more difficult to prosecute, if you like, because they do not speak, they have no persona. They have public interests in the sense of public shareholdings, so the decision as to whether to speak or not to speak should not be made by a mere selection of people like directors but rather the interests of the public may demand that a corporation surrender documents or speak to investigative agencies, whereas a private individual is in the position of making that choice for himself or herself. So they may be the differences why government and the courts have seen and applied different principles to corporate vehicles than they do to individuals.

Senator MURRAY—One of the tests Ms Hampel suggested the committee look at is to recommend that no authority have powers which exceed those of the AFP.

Mr Rozenes—That will require a massive winding back—massive. At the moment the AFP's powers are wide, in the sense that they apply to physical matters. They cannot compel you to answer questions. They can take documents, they can take body samples, they can eavesdrop conversations, both over the telephone and in a room, but they cannot compel you to answer questions. In almost every other area, and going back for a very long period of time, the various authorities under the Commonwealth have been able to compel answers to questions. It is a massive difference.

Senator MURRAY—What is your view of that? Do you think it is appropriate that the right should have been lost?

Mr Rozenes—Again, I think the difference might be that most organisations—take the NCA out of it for a moment; I will come back to them—tend to deal with corporations, I suppose. The tax office does not; it deals with individuals. The logic behind giving those authorities the ability to compel answers to questions, albeit that the answers could not be used to incriminate the person, as I say, is a very longstanding principle that nobody seems to have been too fussed about for a very long period of time.

Senator MURRAY—Are you fussed about it?

Mr Rozenes—I am fussed about it in the context of the comparison made between that and an organisation like the NCA. This is the organisation that it is said has Draconian powers, yet it cannot compel the answer to a question. The only way it can compel the answer to a question is to give the person being questioned an indemnity. The indemnity is not just an indemnity against the use of the answer, it is a use and derivative use indemnity. So whatever the person divulges under the compulsion, that cannot give rise to the finding of material that can then be used in evidence. No other organisation that I know of has that protection, yet we have never complained about that, never. The tax office powers go back, I think, many years; customs is the same.

CHAIR—They can compel you, tax and customs.

Mr Rozenes—Absolutely. They can compel you to produce documents, compel you to answer questions and give you in return only a use indemnity. The answer you give cannot be used against you but everything or anything that is discovered as a result of your answer, any hard evidence, is capable of being used against you. As I say, that is a power that no-one has actually thought about criticising for many years.

CHAIR—I suppose you are more likely to make a mistake or, to put it the other way around, evidence given orally in a situation where there is an inquiry being made is more likely to be inaccurate, because of nervousness and because you are a bit worried, you might adjust it more than the real evidence you get from entry and search.

Mr Rozenes—Absolutely. I am doing a couple of cases at the moment for the tax office. They are tax frauds, where a client has been compelled to attend and answer questions. All those questions are admissible against him at the trial; no caution, no protection whatsoever.

CHAIR—The tax office told us yesterday that if that situation was going to arise they would always use warrants and get advice.

Mr Rozenes—I am doing two cases now where that is not so. The client came along in response to a request by the commissioner to attend and answer questions, and does so with a view to trying to sort out a tax problem. It is all recorded and taped and statements end up in the police brief. The matter settles, the tax is paid, penalties are paid and then the whole matter goes across to the AFP and charges are laid. We are in court and the evidence against the client is his answers to the tax commissioner.

CHAIR—You are involved in two cases where that has happened now?

Mr Rozenes—Yes. I do not know whether those were section 216 or whatever their compulsive powers are. I do not know whether they were compulsive questions or whether they were voluntary, but they were in the form of a record of interview, if you like.

Senator MURRAY—But if you are not cautioned, if you are not given advice on what the circumstances are, you may well think it is compulsion but also think you are protected by privacy and confidentiality.

Mr Rozenes—You might, but they say they are not police, there is no prosecution they know of at that stage, they are not obliged to give you any caution and they do not give you any caution.

Senator MURRAY—Something runs on from this. You have referred in your responses to legal professional privilege. The accounting organisation saw us yesterday—three of them representing 100,000 accountants, a very powerful body of people—and they are campaigning for qualified limited professional privilege. What is your opinion of that?

Mr Rozenes—I would be cautious about extending the privilege. There were very special historic reasons for legal professional privilege which were recently restated in *Carter v. The Managing Partner*. I think it is difficult to extend that privilege. I know Victoria has recently created a new privilege extending to complainants giving evidence or giving history to doctors in sexual abuse cases. The amendments to the Victorian Evidence Act now I think exclude those sorts of complaints from scrutiny in the criminal trial process. That is the newest privilege that I have seen in many years. The accountants probably argue that they do no different work to what lawyers do and why should they not have the same protection as lawyers.

Senator MURRAY—At its heart that is the argument.

Mr Rozenes—At its heart legal professional privilege is founded upon the public policy that says that citizens would be reluctant or loath to bare their souls to their lawyers if they think the lawyers are not compelled to protect that communication. I suppose accountants might argue the same.

Senator MURRAY—They do. They think they have got a better case.

Senator CRANE—I guess I have something that is half comment and half question. In the example you just gave—I was not in Canberra yesterday so I did not hear what the Taxation Office said—the chairman just told me that they never do it unless they have gone through a proper warrant. That leads to the next question, that is, an individual in circumstances like that in fact would be better off in your two cases if they refused to talk and got prosecuted for refusing to talk.

Mr Rozenes—Absolutely. Sometimes that is the advice lawyers give to their clients, because whatever penalty you get for not complying will be the lesser of two evils. If you do comply it is used against you.

CHAIR—As I understood what the tax officers were saying yesterday, their usual task is to audit our self-assessment and to question people to try to help them and to question them about their documents and their financial records. But if they thought at any stage that there might be some criminal element in all this, they would then adhere strictly to the powers that the Federal Police would have, in effect. I do not know whether they used those words, but that was the thrust of it, that they would take care to protect the person involved, to protect his or her rights.

Mr Rozenes—Is that what they said?

CHAIR—That is the thrust of what they were saying.

Mr Rozenes—That is what they say but I do not think that is what they do.

Senator MURRAY—Nor do I, having listened to you.

Senator CRANE—They are not the only ones who do differently to what they say.

Mr Rozenes—They may not even know, that is the other thing. Tax may decide to do an industry wide audit on, for argument's sake, abalone divers. I have been involved in several cases where abalone divers have been prosecuted for understating their income. All of them started off with interviews with the tax office. The tax office might say, 'We did not realise this was all criminal conduct until later,' and in fact that might be right. They say, 'At the time we were just seeking to recover revenue, that is our job. We are not obliged at that stage to contemplate possibly, maybe, perhaps, criminal charges might arise from this. We are looking after revenue.' That might be right. Many instances, though, turn out to be criminal cases, and in the meantime the evidence that has been given in an effort to settle a tax problem becomes evidence in a criminal trial.

CHAIR—There is no derivative use immunity?

Mr Rozenes—No.

CHAIR—Can I also ask your views as to the exercise of a judge's discretion to exclude evidence as a penalty for it being obtained not in accordance with the proper procedures. Have you got any thoughts on that?

Mr Rozenes—I was involved in that celebrated case of Ridgeway where the police, in effect, participated in the importation of heroin to Australia and then prosecuted Ridgeway, who was receiving it. I think it was the first time that the court recognised a discretion as wide as the one that they recognised to exclude evidence in the way they did. How often that happens now, I am not sure.

The courts have said time and time again that there is nothing unfair about the police obtaining real evidence by trick, whether it be a sting operation or whatever; that the protection is in the fact that the evidence they uncover is physically real. It is not an admission or confession or something like that, which is the product of the individual's

conduct. Rather, it is the location of real, hard evidence. So I just do not know how far the courts will take that.

Ridgeway was pretty special and the court pointed out that the police, by importing the substance, had in fact committed an act which was one of the elements of the crime with which Ridgeway was charged. At the same time the High Court said they did nothing wrong with charging him with the state crime of possession because there the importation was an element of the crime. That shows you how narrow that discretion is. I do not know that it is a problem.

CHAIR—If the judge does not exclude the evidence that is obtained in breach of the law, what other penalties could there be?

Mr Rozenes—That is a fairly substantial penalty, to exclude the evidence. They do it in the listening device cases and in the search warrant cases. If there is a break and entry without warrant to obtain evidence, it is sometimes excluded.

CHAIR—If they do not exclude those, there is no real penalty on the person who is breaking the rules?

Mr Rozenes—No. The courts say that. They often couch the process of exclusion on the basis that this has become prevalent or to ensure that it does not become prevalent. Police sometimes have to pay the ultimate price. There should be no reason for police not being able to get proper warrants. I would be in favour of facilitating the warrant process by electronic means, telephone means, provided proper information is made available to a properly instructed judicial officer whose conduct is accountable and in circumstances where the product of the search is properly identified and in my view supervised thereafter. I have always wondered why it was at the Commonwealth end of things that the return of the warrant is not to the court.

CHAIR—But it is not anywhere, is it?

Mr Rozenes—In Victoria it is. The statute says it is. Effectively, I think it does not get there until much later down the track, but it would be nice to have a mechanism where the person who issued the warrant is accountable for the execution of it. At the moment, the issuer of the warrant signs a piece of paper and to all intents and purposes that is the end of it. There is no check, if you like, to see if the warrant has been properly executed. If the person whose house is being searched is present and understands the warrant and the warrant is specific enough for that person to be able to make an informed judgment as to what is covered by the warrant, that is fine. But if the person is not there, if it is a covert execution, who supervises what the police take?

CHAIR—There is a move to give police the ability to get a covert warrant so they can go into somebody's house or business premises and do a search and then go without that person knowing.

Senator MURRAY—Or their computer.

CHAIR—Or their computer. Have you got any thoughts on that?

Mr Rozenes—I have no doubt that in modern law enforcement the execution of a warrant covertly is probably an important part of the law enforcement process. It just needs to be supervised. I do not mean supervised by some independent police officer, that is not supervision in which the community will have any confidence at all. The judicial office holder who issues the warrant and permits a covert execution of it in terms ought to be responsible for what is done there. Whether that means that you take the magistrate on the bust or the raid, I do not know. There has to be some accountability for what is done covertly, as there is, is there not, some provision in the Commonwealth listening device law that brings the product back to the court in some way?

CHAIR—They have got to report. I know there has got to be a report as to the number.

Mr Rozenes—I think there is some recognition of what is done covertly. I suppose listening device legislation is quite different.

Senator MURRAY—Mostly a reporting mechanism.

CHAIR—That would be the type of thing you would have.

Mr Rozenes—The same logic would apply, in my view. The reason why it is there in the listening device legislation is that people who are being eavesdropped on do not know that they are being eavesdropped on and if they have rights, they do not know that they can exercise them.

Senator MURRAY—There is a device of third party warrants which are effectively covert; namely, warrants are procured to go to a financial institution to examine the records without the individual or company knowing. Although AUSTRAC does not use warrants, they are effectively doing that. They are doing covert surveillance and then passing that surveillance to law enforcement agencies and administrative authorities such as the tax office. But the mechanics of having that supervised by a resource-stressed magistracy or judiciary is difficult.

Mr Rozenes—Yes. Ultimately, if I can give you a colloquial example, the real issue arises mostly in drug cases, where the allegation invariably is that whatever was found in the house was planted by the police for all sorts of reasons. Whether a magistrate is present or not, I imagine the allegation will still be made that the magistrate was looking this way and the police planted it over here.

Senator MURRAY—A common allegation is that they get done for an ounce and there were actually 15 ounces and the police ended up with 14.

Mr Rozenes—Yes, that is another one.

Senator MURRAY—Given your statement, is one option to require sample audits to be undertaken, so that the supervision of covert warrants would be on a random and occasional basis by a magistrate, just to ensure that things are going along as they should? It is a

random test, rather than every single one, because it just might not be physically possible to do every single one.

Mr Rozenes—No, I think if the principle is good it should have universal application.

Senator MURRAY—It does apply in Victoria?

Mr Rozenes—I think the Victorian Crimes Act provides for the product of a search warrant to be returned to the court.

Senator MURRAY—What does that actually mean?

Mr Rozenes—Probably nothing. I am sure that they do not bring them back to court. Eventually these matters do come back to court because they come back as part of evidence in the case.

Senator MURRAY—If a case arises. But if a case does not, they could be improperly served, they could have been served on the wrong premises—all those sorts of things.

Mr Rozenes—Yes, all those things. I notice one of the things that was raised both by the AFP and by the Commonwealth DPP, which I have no difficulty in supporting, is this question of allowing the officers to hand over material to state agencies. I do not think there is any argument about that. That is quite clearly obvious. I have always had great difficulty in this division that we have between Commonwealth and state law enforcement.

CHAIR—A police officer from the Australian Federal Police Association said yesterday that if they get a warrant in relation to an alleged breach of the Commonwealth civil law, when they go on to premises, they could find a number of cannabis plants growing.

Mr Rozenes—Or they find a bloodstained knife. What are they going to do, leave it there? It is one thing turning over material that ostensibly looks like it falls within the Commonwealth basket, like drugs, and handing that across to state authorities, but what if you find the bloodstained knife? The Commonwealth have no charter to investigate crimes against the person at all, yet they surely cannot just leave it there.

I suppose there are two categories. There is the stuff that gets taken ostensibly as part of the Commonwealth search but really discloses state offences, like in drugs where ultimately there is no evidence that there has been an importation but rather it is clear that this is a state trafficking; there is no difficulty about that. But what if the substance is right outside the Commonwealth basket altogether? I have got no trouble with that either.

CHAIR—Some of the things you said this morning are inconsistent with what we have heard from other authorities—I am not going to name them—and I think it arises because people at a senior level perhaps do not quite realise what happens at a lower level. Have you ever thought about that?

Mr Rozenes—By way of example? Give me an example.

Senator MURRAY—I think the tax office have 14,000 employees and we might be speaking to somebody of commissioner or near commissioner rank, who might have no idea that in fact at the operational end something different is happening.

Mr Rozenes—I have two cases I will tell you about. One has concluded, so I have no difficulty in mentioning it; the other one will go to trial in November of this year. The one that has concluded was in Western Australia; it was a massive tax fraud. In my opinion, it was clear from the very beginning that it would be a fraud trial. A task force was set up to deal with it and lots of interviews were held; not a caution administered anywhere. All of the interviews were led at the trial. Someone might stand up and say, ‘At the time I had no idea this would turn into a police investigation.’ If that is what they say, it is very hard to attack that.

Senator MURRAY—The alternative is that even when it is not going to go to trial they give a caution automatically so that people are aware of the potential dangers they face.

Mr Rozenes—I imagine if that was the case then the tax office would say, ‘Look, we will never get to the bottom of half the stuff that we want to, or 90 per cent of what we want.’ Their argument will be, ‘We are not here to worry about police and prosecutions, our charter is to collect revenue and we need to do these things to do that.’

Senator MURRAY—They cannot have it both ways.

Mr Rozenes—But in a way they must have it both ways because if in the process of doing what they are meant to do they come across a massive tax fraud, they want to be able to refer it for prosecution.

Senator MURRAY—But they have specifically said to us in evidence that they make the distinction and then move to a different framework and a different approach. If at the leadership level they have accepted that, then the inference is that when it is not up to that stage they should be either advising people of potential dangers or giving them indemnities; the caution and indemnity approach. My understanding of the evidence they have given to us is that they have accepted that you have to have a different approach for the two functions.

Mr Rozenes—I agree with that. All I am telling you is that I have two cases where the very opposite happened, where the very material that the taxpayer gave them voluntarily without caution ended up in the trial.

Senator MURRAY—In which case my answer would be that in all cases they must provide a caution or an indemnity until they move on to the next stage.

Mr Rozenes—I hear what you say about that. It is not what their law says they have to do.

Senator MURRAY—The reason I put that proposition to you is to see whether or not you react favourably to it.

CHAIR—We have to make some sort of recommendation. If we were to say that the tax office as a matter of policy should give cautions or give some warning or send a letter or do some such thing, when we put that to them, they say, ‘It is not that simple. The vast majority of our stuff is simply out there trying to help people get their tax returns in so they can pay the proper tax. Now and again somebody forgets about the interest that he or she received and has to pay tax on it and we just write a letter and fix it all up, so generally it is all done in a very amiable way.’

Mr Rozenes—I am sure that is right.

CHAIR—But then you hear them say, ‘Well, there are cases where it gets out of hand,’ so we have got to work out what to recommend.

Mr Rozenes—You might say, for example, that I suppose the two solutions would be that you either impose upon the tax office the same requirements that, for example, ASIC has, where in order to compel your compliance they have to give you a section 19 examination in which you have the right to claim privilege before every answer and anything you do say cannot be used in evidence against you. Alternatively, you work that retrospectively, that whatever has been said, if there is a prosecution, cannot be used against you.

CHAIR—In relation to the immigration department, I do not know whether you have had any experience at all in that area.

Mr Rozenes—No, none at all.

CHAIR—They seem to have, as far as I can see, no checking on their activity. When you were the Commonwealth DPP did you ever have a prosecution under the Migration Act?

Mr Rozenes—No. Of course, most of the drug cases and quarantine cases relied upon as part of their evidentiary process the statements that are made upon entry and at the customs barrier, none of which are the subject of any caution, all of which are admissible in evidence against you and some of which form the very basis of the charge, the making of a false statement, the making of false entry. Yet the idea that at the desk every time you come through someone will say, ‘Before I ask any questions I must advise you that anything you say may be used in evidence against you. Have you had a good trip and who are you coming to visit?’ is an absurdity. I do not know how big a problem that is. I suspect it is not a big one. The real issues for us are tax and customs.

Senator MURRAY—Your retrospective idea is a good one.

Mr Rozenes—That might be one way.

CHAIR—Tell us a bit about any problems in customs, because we have not heard much about that. They have got wide powers of inquiry.

Mr Rozenes—They have got I think probably the widest powers of entry, search and seizure of any of the agencies and the longest standing of those powers. Their powers, which go back I think to the turn of the century, are very substantial powers.

Senator MURRAY—They were particularly related to the excise and sales tax provisions which have shifted across with the same powers to the tax office.

Mr Rozenes—Yes, very substantial powers.

CHAIR—We did not look at that.

Senator MURRAY—We did discuss it with them and they kept saying to us, ‘Just remember, we no longer deal with that area.’

Mr Rozenes—But their capacity to enter and seize goods is very wide.

Senator CRANE—They gave us the answer but said, ‘We do not deal with it.’

CHAIR—Can I thank you very much for giving up your time and coming and guiding us through what is a difficult path.

Mr Rozenes—It is a pleasure. It is nice to see you.

CHAIR—As I said to Ms Felicity Hampel, people who give up their time in a busy practice are people that we much appreciate.

Mr Rozenes—I am only sorry that we did not get a chance, through no fault of the committee but rather our own, to put together an association view, if you like.

Senator CRANE—You have still got time.

Mr Rozenes—It is still a question of getting the same people who looked at it last time to have another go.

CHAIR—How much trouble is there in doing that? I do not mean a final submission, just a few notes.

Mr Rozenes—We farm it out to volunteers, Senator, and volunteers are good at volunteering and not so good at delivering the goods, but we will try again.

Senator MURRAY—I am very interested in the principles which should guide us, because we have had lots of evidence about practice but not that much about principles.

Mr Rozenes—I think the principles are difficult because they are longstanding. That does not mean that you cannot look at them. But there is the old saying, ‘If it is not broke, don’t fix it.’ I do not know where the complaints generally are.

CHAIR—We have a problem—and an advantage, as I see it in a way—where we have not got any set principles, as most other places do, either by a bill of rights or European directives and things like that, so we have to work our way through it as a community. I am just interested in the principles.

Mr Rozenes—The other problem, if I may say so, is that you operate in a state environment but the fact is that the Commonwealth effort is never more than about 10 per cent of any state's criminal justice horizon. So you really have to look at what gets done on a state by state level to see if the Commonwealth system is going to be compatible and not markedly different.

Senator MURRAY—That is why I am interested in the principles, because I suspect that this kind of review will not go on in the states and has not gone on before. This might in fact provide, not a model, but some kind of shape around which people can fit themselves and their views of their state.

Mr Rozenes—Interestingly enough, the point you make is a very valid one, because if you look at the search warrant system in Victoria, it is very simple. A scheduled search warrant is provided in the back of the Crimes Act for almost every offence—I think drugs has got a separate one. It is never challenged, you never see the search warrant the subject of administrative review or judicial review anywhere—very rarely are they queried in courts. That may be because the nature of the people who get picked up on state offences is a little bit different to the Commonwealth lot. But it is a very interesting comparison to be made.

Of course, the states do not have the great AD(JR) power that the parliament and the Commonwealth have for challenging these things and we have a very compliant Federal Court. I do not mean that with any disrespect. They do look at cases from time to time, whereas in the state courts if you try to raise a warrant issue, you will get shown the door very smartly. So there are interesting and different cultures.

I wish you well in your search for some uniform principle view for dealing with this difficult topic.

CHAIR—Thank you.

Committee adjourned at 12.55 p.m.

