



COMMONWEALTH OF AUSTRALIA

# Proof Committee Hansard

## SENATE

STANDING COMMITTEE FOR THE SCRUTINY OF  
BILLS

**Reference: Search and entry provisions in Commonwealth legislation**

MONDAY, 13 SEPTEMBER 1999

CANBERRA

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**SENATE**  
**STANDING COMMITTEE FOR THE SCRUTINY OF BILLS**  
**Monday, 13 September 1999**

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

**Senators in attendance:** Senators Cooney, Mason and Murray

**Terms of reference for the inquiry:**

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

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**Committee met at 9.11 a.m.**

**FIRMSTONE, Mr Adrian John, Chairman, National Indirect Tax Committee, Institute of Chartered Accountants in Australia**

**SHEPPARD, Mr Brian, Taxation Manager, Institute of Chartered Accountants in Australia**

**CHAIR**—I welcome the witnesses from the Institute of Chartered Accountants in Australia.

**Mr Firmstone**—As you will note from our submission, we are here speaking not only for the Institute of Chartered Accountants but also for the Taxation Institute of Australia and for the Australian Society of Certified Public Accountants.

**Senator MURRAY**—Representing how many altogether?

**Mr Firmstone**—We would think in excess of 100,000, amongst the three bodies.

**CHAIR**—We have been asked as a committee to look at the issue of entry and search right across the board by the National Crime Authority or the police. The next lot of people coming along are from the Health Insurance Commission and, this afternoon, the Taxation Office, whom we have already heard from. The problem is, I suppose, how do you balance off the public interest of leaving people with their dignity and the sense that they are citizens against the public interest of getting people, say, to pay their tax or to obey the law generally. The Taxation Office said that they have a lot of internal processes by which they try to balance that off. Some difficulty in that is that you always see your own processes as good ones, which is reasonable enough. We think the Senate is well run.

So I would be interested to hear what you have to say about all that because, clearly, you are the clients and I suppose you see them as more than just units of production; you know they are also people that you have no doubt had contact with over the years so you can see the problems they have as well as appreciating the problems of the Taxation Office. So could you give us your thoughts in that context?

**Mr Firmstone**—You will note from our submission that we have an interest in a particular area of this. But we agree wholeheartedly with the sentiment that what needs to be done here is a very difficult balancing act. Yes, government officials need appropriate access to the information they need to do their job and to meet their obligations under the legislation they administer—but, on the other hand, you have the rights of individuals. It is a question of how one balances the two things. The institute, for one, is very mindful of the fact that access is important—and we support it—but we think there need to be boundaries within which that access needs to be exercised.

In the context of tax, which is where we come from in the main, there are boundaries. There is a legal boundary, which is the one created by legal professional privilege, which puts a box around just what it is the commissioner can access in the context of those documents which lawyers produce in the course of providing legal services to their clients.

There is a version of that in so far as accountants are concerned. They are non-legislative. They are in the form of a protocol, which appears in the commissioner's access guidelines, where the commissioner and the accounting profession, the bodies which are speaking today, got together in the 1980s and tried to put a box around those circumstances where we thought it was fine for the commissioner to seek access; they tried to define what was desirable in principle so far as accountants and their interaction with their clients are concerned. It was an agreement between the commissioner and the three bodies which are speaking, and there are some guidelines which extend quasi privilege to accountants' documents where they are in the form of audit working papers for a statutory audit, or they are in the form of advice given on accounting or tax matters.

Those guidelines are administrative, and they are part of an Access manual where the commissioner has put other restrictions on the way in which he will exercise his right of access. For example, in the context of audit, there is a protocol there as to the way in which the commissioner will approach it. He will usually give notice unless there is a reason not to. He will seek to sit down with the person being audited and explain fully what is going on in a non-confrontationist way. There is a code of behaviour that is also part of these guidelines which we very much support. I guess that is where our interest is because the commissioner is making it clear these days that those guidelines are there and he stands by them, but he also is testing the boundaries of them in a significant way.

We are becoming concerned. When we approached the government back in the 1980s to formalise in legislation, or codify in legislation, the kind of accountants' privilege which we were talking to the commissioner about and which lawyers enjoy in their dealings with their clients, we ultimately accepted a voluntary code on the part of the commissioner on the grounds that we had full confidence that it would be pursued and operated in accordance with its terms and its spirit. Generally, that has been the case, we have got to say, although in more recent times, however, we are becoming concerned that the commissioner is starting to eat away at the edges of that.

Our submission talks of a couple of examples which have been made known to us—one where the commissioner in an action involving Deloitte's in the Federal Court sought to argue that he was not really bound by those guidelines; they are simply administrative benchmarks which really ought not be applied and interpreted critically or narrowly.

We have also seen, in another court case recently before the Federal Court, where the commissioner is arguing that he can move outside the boundaries of the restrictions in those guidelines and seek access to documents where he has a suspicion that tax avoidance might be at work. His submissions were that it does not even matter if the submission is well founded as long there is a suspicion, and that suspicion might not be evident from the face of the transaction as he sees it. But, if for other reasons he suspects it might be at work, then he is entitled to pursue the documents and information in question.

The problem with that one is that the guidelines do not permit the privilege to be set aside in circumstances where there is a simple suspicion of avoidance. They may be set aside only in circumstances where there is a reasonable suspicion of fraud, evasion or other illegal activity.

We are getting a bit concerned, because we are starting to see things happening in the courts and in the community which are giving us the impression that the commissioner is operating at the boundary of these things in a way which is trying to push it out and, in the case of suspicion of avoidance, actually steps over it. The institute is not for one minute condoning avoidance. It is again just a question of balance as to where one draws the line between, on the one hand, the rights of individuals to be candid with their advisers and to seek advice on their affairs and, on the other hand, the rights of the community and the commissioner to ensure that taxes are properly paid.

We have guidelines, and we are seeing that some of them are starting to be stepped over. We are seeing it also in some other areas—not just involving the privilege question. We are seeing it in the context of field intelligence, where the commissioner is now calling on people in a way which is different to what the guidelines suggest. He is calling on people unannounced. He is calling on them under the guise of conducting general inquiries when it is plain that what he is really doing is seeking information for the purpose of commencing an audit. We are getting a bit concerned that some of that behaviour is also pushing out the boundaries as to what his own guidelines say is really beyond what his people should be doing.

For us, it is a question that, while lawyers are able to speak candidly with their clients and give advice, and the information which they have in their possession is protected as a consequence, accountants have something similar but it is not legally enforceable. If the commissioner wants to test the boundaries of legal professional privilege, he can do that, but an adjudicator comes into play. The courts can adjudicate and decide whether or not he is acting appropriately and whether or not what the commissioner is trying to do is within or outside the boundaries.

The problem with our voluntary code is that there is no adjudicator. There is no-one, other than the commissioner, to say whether or not he is acting within or outside the boundaries. Where we come from is that we see this one discrete element in the whole range of considerations we confront with access—this element of privilege for communication between professionals and their clients and the protection of the confidentiality of what is communicated in the relationship—as something which can be codified. It already is in the context of legal professional privilege and, in fact, in our submissions in the eighties, we put forward some draft legislation for that purpose.

We think it can be codified; we think it should be codified. We think it should not be left to the commissioner to decide when he is or when he is not acting within the boundaries of the guidelines. If people in the community are not happy with that, they ought to be able to seek the intervention of an adjudicator on that point and codifying—what I will call loosely—the accountant's privilege or the other professional's privilege is a good way of achieving that.

So, as a general proposition, we think the commissioner is doing a good job of drafting guidelines—I guess 'guidelines' is a good word—as to how his people should balance the interests of people regarding their rights to confidentiality and privacy on the one hand and his rights to access of information on the other hand. But we think there are circumstances where those boundaries are being crossed, or at least being pushed out, and there is no-one

looking and there is no-one who is able to rule on it other than the commissioner himself. It is very much voluntary.

As a group of professional organisations, we are not satisfied that that ought to be the case—that the commissioner ought to be the one who determines whether or not he is acting in accordance with his guidelines. We think there should be an independent adjudicator and we think that should be the courts, and the way to get there is codification of the process. We think that, in recent times, the commissioner has been pushing out the boundaries of the guidelines. The difficulty in our case is that there is really no way of controlling that—it is very much voluntary.

**Mr Sheppard**—In fact, the commissioner said at the National Tax Liaison Group last Wednesday, when we raised this issue, that he would resist legislation to codify these principles. He made the statement that he was prepared to continually test the boundaries of the access guidelines. So, when you have the commissioner saying that, you wonder what sort of message is flowing down to his field officers. They tend sometimes to misinterpret the spirit of the access guidelines, and that can come across as quite an aggressive approach when they speak to tax practitioners.

That is the sort of feedback the institute is getting from their members: that tax auditors are turning up—sometimes unannounced, which is in contravention of the Access guidelines—on the excuse of a PR visit or an educational visit to explain a new law or whatever. Once their foot is in the door, they have a specific list of clients, as they call it, that they would like to talk about. Quite often, to use the words in one letter, ‘The practitioner feels that he has been ambushed.’ So what Adrian has been talking about is really more checks and balances in the system to ensure that that sort of behaviour does not go on unchecked and that we have some right of redress.

**Senator MURRAY**—I have a whole series of questions. The first one is in regard to these statements you have been making about tax commissioner interaction with the 100,000-odd professionals that you jointly represent. How do you know what the extent of the problem is? Is it from surveys, research or feedback at meetings? How can you quantify this analysis?

**Mr Firmstone**—It is very much anecdotal. We are simply responding to examples which have been taken up with us by our members. We have not done any surveys. We cannot, and do not, say that there is evidence which is sustainable of a widespread abuse of these guidelines. What we have is anecdotal evidence or examples of circumstances, such as the ones which both Brian and I have reported. The two that I raised earlier—and they are in my submission—are self-evident because they are submissions which the commissioner’s counsel put to the court, so it is not really a question there of understanding the extent.

We are not really talking about abuse of the guidelines because we have no evidence that they are being widely abused. We have a lot of evidence, though, that the commissioner is developing an attitude regarding the boundaries of the guidelines, and he is trying to push them out. That is evident from the two points we made about the two federal court cases, and it is also evident from statements he is making to the National Tax Liaison Group.

**Senator MURRAY**—Is this a national problem or is it stronger in some regions than others?

**Mr Sheppard**—It is national.

**Senator MURRAY**—On this matter of confidentiality and privacy versus privilege, my instinctive judgment would be that most clients, including some very senior business clients, would be under the mistaken apprehension that dealings with their accountants were, in fact, subject to privilege, and most would be taken by surprise if they discovered they were not.

**Mr Firmstone**—That would be my intuitive reaction, too, but I do not know that that is right. We have not really tested that proposition.

**Senator MURRAY**—You have both been in practice. Would that be your experience?

**Mr Firmstone**—Sure. It would be our experience.

**Mr Sheppard**—I have been in this job for only two months. I came from the big end of town where I think tax auditors tend to be a bit more careful in those situations because the professionals they are dealing with tend to know their rights, but sometimes small practitioners are not as au fait with their rights in terms of the access guidelines and, as I say, can feel a bit ambushed and put upon by the tax office.

**CHAIR**—They probably feel they have no clout.

**Senator MURRAY**—In a strange way, if you want to increase accountability, you almost need to ensure that this matter is resolved and cleaned up because, if clients were generally aware that that privilege did not apply, they might close off their openness to accountants.

**Mr Firmstone**—Exactly. It would threaten our businesses.

**Senator MURRAY**—This would mean the ability of accountants to fulfil their obligations under Corporations Law in terms of the ASX reporting schedules, requirements and so on would be affected. Is that a correct judgment?

**Mr Firmstone**—I think so. It really depends on how nervous and concerned people are. So far as the law in general is concerned, our clients can have every confidence in the confidentiality of their information because we have a contractual and a professional duty to preserve it. The difficulty here—just in this area—is when a Commonwealth official seeks to use an access power in Commonwealth legislation that overrides the contractual and professional obligation of confidentiality as a matter of strict law.

I think most people believe when they speak to professionals—be they accountants, doctors, lawyers or whatever they are—that what they communicate is confidential information. For most purposes it is; it is just in this case it is not. If the commissioner has a general right of access, then that will override. The only case where it will not is in the case

of legal professional privilege, which the courts have held as sacrosanct and there is no policy in the access provisions of the law to override that right.

**Senator MURRAY**—And therefore this lack of privilege would also affect the ability of other agencies to access those records—police, for instance?

**Mr Firmstone**—Police do not have a general access power anyway; they tend to require warrants. They have to confront a magistrate and explain the basis on which they want access and convince a magistrate that there is a reasonable basis for going into a place.

**Senator MURRAY**—But, as you know, even with a warrant, legal professional privilege will protect—

**Mr Firmstone**—It still will protect, correct.

**Senator MURRAY**—a number of documents, whereas in your case, it does not.

**Mr Firmstone**—It does not. We do not have any protection really. The commissioner has a very broad access power. He is not subject to the same constraints as the normal police authorities of having to first convince a magistrate that taking access is appropriate. He makes that judgment himself and everything therefore depends upon whether or not he is reasonably exercising that power on a case-by-case basis. It does override all other laws; it overrides contract. The only one it does not override is legal professional privilege. So our confidential information and our contractual communications with our clients can be simply overridden without there being an effective means of monitoring whether that is being done properly.

**Senator MURRAY**—Let us talk about unfair competition. As far as I am aware, the proposed changes to the New South Wales legal profession are going to allow them to incorporate and operate as companies, plus there is an emerging trend, I think throughout Australia, whereby accounting and legal practices are conjoint. I would assume that this would mean that it is possible for the legal half of the firm to throw a blanket of legal privilege over the entire firm. So accountants who are joined with lawyers in an operating entity would enjoy the benefits of legal professional privilege, whilst those without would not. This could, therefore, encourage clients to start going in a particular direction because of greater protection. Is that a worthwhile judgment, or is that not so?

**Mr Sheppard**—I think it is. Certainly we used to do that in the public company sector: if you were negotiating with an external consultant, you knew that you had additional protection if it was a tax lawyer as opposed to a tax accountant.

**Mr Firmstone**—The notion of multidisciplinary practices like that is very new and, yes, it will happen. I think at the moment there is only a small handful of them, in fact, operating in Australia. Yes, ultimately, legal practices and accounting practices will operate together under one roof and maybe under the same entity. A lot of them do not operate under the same entity. Arthur Andersen is a good example. Andersen Legal and Arthur Andersen, the accounting firm, are two separate legal entities, although they operate together and they are under one umbrella organisation. To attract privilege in circumstances where an accounting

entity and a legal entity are together but separate is very difficult. It only works in circumstances where the accounting and legal entity are one and the advice has the character essentially of legal advice, not accounting advice. It still will not protect accountants' working papers or accounting advice or the conclusions they draw and the opinions they give which flow from their statutory audit function, because that will not fall under the category of legal advice, I would not think.

**Senator MURRAY**—I am flanked by two lawyers and I am quite sure they could find a means to test your proposition and, in fact, enlarge on it.

My last set of questions before I give up my spell will be to look at it from the ATO's point of view. Accountancy, like any other occupation, has the same percentage of miscreants and crooks as the rest of society. It is a truism that successful criminals—white-collar or otherwise—will generally have good legal and accounting advice—'good' being a professional term, not a moral term. There is also immense community pressure for tax cheats to be caught. The press is full of it, and the community as such often demands the giving up of civil liberties in that respect. We see it at every level now in legislation: the drive for mandatory sentencing, three strikes and you are in and so on. There is constant community attack demonstrating these sorts of values.

How do we deal with the problem that some accountants are complicit in tax avoidance and are assisting criminals—as are lawyers, who enjoy professional privilege? Do we increase the penalties—in other words, give them privilege but make the penalty really draconian if you are found to have broken it? I have often thought that lawyers who breach professional privilege should never be allowed to have it again. As a result, they would not attract any clients at all. How do you deal with the community concern, and legitimate ATO concern, that they need to go off to the accountants to get the truth and that there is always going to be a proportion of your body that is not ethical?

**Mr Firmstone**—We support the notion that—and it is part of the guidelines and part of our agreement with the commissioner—where the commissioner has a reasonable suspicion of fraud, evasion or illegal activity, then that is a respectable or reasonable basis to set the guidelines aside and to seek access.

**Senator MURRAY**—But how do you define reasonable suspicion? State of mind is one of the most difficult legal areas to prove.

**Mr Firmstone**—Yes, that ends up being the difficulty. The police confront it every day when they have to confront a magistrate and seek a warrant. They have a constraint which is about convincing somebody who is independent—and maybe that is the process—that they have a reasonable basis for getting the warrant or whatever it is they want to seek access to. I am not suggesting that that would impede tax investigation processes. I do not think we should reach the stage of getting them to get warrants. But what I would like to see is a codification such that, if the target of an initiative by the tax office has grounds to suspect that the commissioner does not have a reasonable basis or pleads that the commissioner does not have a reasonable basis, that person will, as in the case of legal professional privilege, be able to simply claim privilege and let the court sort out whether or not access is appropriate in the circumstances.

**Mr Sheppard**—We are talking about checks and balances rather than about having some tax officers wade in, take a shotgun approach to this and ask for a client list for particular transactions, et cetera. Those legislative checks and balances are there so that they will stop and think and go about it in a more orderly fashion, which is what the access guidelines indicated would be the practice.

**Senator MURRAY**—If I were the tax officer sitting opposite you, I would argue, ‘My life is difficult enough as it is, so how am I going to ensure that taxes are appropriately paid? It will just shut off one more avenue.’

**Mr Sheppard**—They still have the access guidelines. We are not arguing about the total access guidelines, we are just arguing about one little ring-fenced area of the access guidelines which we consider should be under more careful consideration before the tax office comes in.

**Senator MURRAY**—What about the penalty side? If the government—because it would be them who would initiate the legislation—and the parliament were to agree to give qualified, limited or some form of privilege, they might demand in return some sort of really major penalty for breach of that.

**Mr Sheppard**—I think you would have to accept that. That is my personal view.

**Senator MURRAY**—What form would that penalty take?

**Mr Firmstone**—There are two categories of cases. The first category is those circumstances where the accountant is complicit in arrangements which are illegal. In that sense, the penalties are the same as they are for any criminals, because that would be a criminal act, I would expect. I would think aiding and abetting criminal activity would itself be a criminal act. At least it would be conspiracy. So the penalties under the law for criminal acts would be more than enough to bring to bear for people who can be shown to be complicit in illegal activities.

It gets a bit more difficult—I agree with you, Senator—in circumstances where what is happening falls short of that, and tax avoidance is an example of that. I do not think the institute would be against a regime which saw penalties in circumstances where avoidance is at work and that is established, and then the penalties would be higher than they otherwise would be for other forms of underpayment of taxes. In effect, it already is that way in a sense, certainly. My expertise is more in indirect taxes than income tax, but I think it is the same. Correct me if I am wrong.

The penalties that are normally imposed for underpayments of tax are relatively modest. They can be up to 200 per cent, but they are not imposed at that level, in my experience. They are more commonly imposed at around 25 per cent to 50 per cent. In the context of avoidance, penalties are also up to 200 per cent in sales tax, in GST and in income tax as well. There is a disposition on the commissioner to bring to bear high levels of penalties for those who are complicit in those arrangements. In my experience, the sorts of penalties which I see levied on people who are assessed under the avoidance provisions is 100 per cent or more of the tax sought to be avoided.

**Senator MURRAY**—But the penalties normally apply to the client, don't they, not to the professional?

**Mr Firmstone**—Not to the professional? Okay.

**Senator MURRAY**—Yes. You see, that is where you need the penalty to apply. Frankly, I would expect from your submission that you would concede that only a minority of accountants would ever be at risk. Essentially, allowing some form of privilege quarantines the profession in a way that has not happened before. Generally speaking, there would need to be a quid pro quo.

**Mr Firmstone**—Are you suggesting that there would be a level of penalties for accountants being complicit in avoidance, for example—

**Senator MURRAY**—On the civil side.

**Mr Firmstone**—which would not apply in circumstances where lawyers were complicit in avoidance?

**Senator MURRAY**—No.

**Mr Firmstone**—Are you talking about a penalty regime which might strap on every way, every adviser or counsellor who—

**Senator MURRAY**—I am one of those who do not hold with the way in which some lawyers conduct—

**Mr Firmstone**—I think there is tax avoidance—

**Mr Sheppard**—On that basis, we would not. There is tax avoidance and tax avoidance. Some of the part 4A cases that have gone to court have involved very detailed legal scrutiny and analysis of the steps to come up with the conclusion that, yes, that particular provision did apply. Some of them are much more blatant and, in fact, that is one of the three criteria—blatant, artificial and contrived—in terms of tax avoidance schemes. My general comment is that I guess it would be dangerous to apply a penalty regime to all situations where part 4A had applied. It would have to be a discretionary situation.

**Mr Firmstone**—It would be a maximum penalty.

**Senator MURRAY**—I take a cross-disciplinary view because I also sit on the Corporations and Securities committee and have a considerable interest in Corporations Law. As you know, the reporting requirements are absolutely fundamental to the integrity of the market. Yet very frequently in the past, particularly in the 1980s, professional advice and professional services actually allowed companies to conceal their true status and nature. I do not believe the kind of bright people who do those things did not know that, frankly, and those who are valuers or lawyers or accountants to the Bond Corporation would have known its problems. So I have an interest in enforcing professional standards whilst protecting the

privilege and the confidentiality and privacy which a society has the right to expect in these circumstances. That is why I am interested in the contra—

**Mr Firmstone**—Why does it need to be as a trade-off for privilege?

**Senator MURRAY**—Because some people would abuse privilege. That is the problem.

**Mr Firmstone**—Yes, but if it is the community's will that certain activities are undesirable, antisocial or whatever, then I guess that gives rise to the basis for some penalties for people who are participants in those sorts of arrangements. There are penalties on the actual taxpayers themselves under the various taxation laws for being complicit in avoidance. If they are extended to their advisers on that basis, I think that is respectable, and that is an appropriate foundation for such an initiative. I do not think it is necessarily appropriate, though, to look at it as a trade-off for privilege. Lawyers have privilege. It is really just a question of levelling that situation. It seems to us that there is no difference in principle between lawyers and accountants inasmuch as their duty of confidentiality to their clients is concerned, and, from a client's point of view, they need to be able to consult their advisers candidly and to receive advice, confident that their affairs will be kept private.

**Senator MASON**—You mentioned that the commissioner was nibbling away at the edges of this protocol. Why is he doing that now, do you think? The protocol has been working quite well in the past.

**Mr Sheppard**—He is not happy with the concept of access guidelines. He agreed to them very begrudgingly.

**Mr Firmstone**—I think it is happening with the legal professional privilege side as well. I do not think he is only nibbling away at the access guidelines inasmuch as they relate to lawyers. There is a lot of activity in the courts now where the commissioner is challenging claims for privilege, and that is quite legitimate. But in the end, we will have the courts adjudicating on whether or not the commissioner's attempts to change the boundaries are appropriate or inappropriate. The difference in our case is that we do not have that. We do not have anyone adjudicating on the point. The commissioner makes the rules. Our point is that if a commissioner wants to change the boundaries, that is fine, as long as there is somebody else involved in the process who is able to bring to bear an independent line and who is able to safeguard the balance between the community's right to make sure everyone pays their proper tax and individuals' rights. That is our point.

**Mr Sheppard**—But stepping back to 1989, the professional bodies wanted legislation at that stage. The government and the Commissioner of Taxation were both of the view that it was not necessary, so access guidelines were drafted over some years to cover the situations. The commissioner is saying that he wants to test the edges of the access guidelines, so that is of concern to the professional bodies. Therefore, we feel it is appropriate to raise again this question of codifying certain areas of the access guidelines.

**Mr Firmstone**—What would be manifestly unfair, I guess, on our profession is if the commissioner's will to change the boundaries in legal professional privilege was not favoured by the courts because the adjudicator says that the balance is fine where it is and

ought not change, whereas, on the other hand, the commissioner changes our rules and all of a sudden we are substantially out of kilter again.

**Senator MASON**—We are balancing principles and politics and, as Senator Murray said, the commissioner does believe he is having a hard enough time anyway procuring the appropriate amount of tax, and that is a political problem.

The problem in principle, as Senator Murray said, is that people can abuse privilege. People can—I think you mentioned—be ‘complicit in avoidance’. But that is all in the eye of the beholder, because, in this sense, lawyers with their clients, particularly if it is a criminal matter, can, in a sense, be complicit in procuring a not guilty verdict. It is a matter of evidence; it is not a matter of truth. We are dealing with such very difficult principles. I am just wondering if you can actually translate the principles of legal professional privilege, which are ancient common law principles, with accountants in terms of tax.

**Mr Firmstone**—Only an element of them, because privilege in the legal context is not limited to criminal matters. That is fact. That is where the problem is.

**Senator MASON**—I know. But that is because it was originally founded for that—

**Mr Firmstone**—It might have been founded for that but it has extended to all legal advice, or all litigation. So it is all legal advice given in contemplation of litigation and whatever.

It is not limited to criminal, even though that might have been the foundation of it. So once you extend legal beyond criminal, you then start to introduce the need for parity with other professionals who do play a very similar role in society in safeguarding and assisting people to comply with their legal obligations.

**Senator MASON**—Except that you want, in a sense, privilege, so that people can be frank with their advisers.

**Mr Firmstone**—Sure.

**Senator MASON**—So that if they are committing an offence they can do so knowing they will be covered by privilege. Is that right?

**Mr Firmstone**—No. It is not the offence that is covered by privilege, it is the communication.

**Senator MASON**—Not an offence, but the communication.

**Mr Firmstone**—How is it different from going to the confessional and confessing to the priest? It is the communication that has to be privileged. That does not go about sanctioning the action or anything like that; it is really a question of whether it is appropriate to compel delivery of the communication to a public official.

**Mr Sheppard**—But those sorts of blatant situations would stand out, I would think. The commissioner will have reasonable grounds to say that there is illegal activity here and he will demand access to those papers that might demonstrate that. But all we are talking about are some additional checks and balances before he goes to those lengths.

**Mr Firmstone**—In fact, the kind of privilege accountants do have under the guidelines is not as wide anyway as lawyers have. Lawyers do not have the restriction of their privilege as accountants do. Accountants' privilege does not apply in circumstances where the commissioner has a reasonable suspicion of fraud, evasion or illegal activity. That is not superimposed on legal professional privilege. So we are not even asking for the full scope of legal professional privilege; we are satisfied with the principles as they are now encapsulated in the guidelines. If the commissioner wants to change the boundaries of them—as he is suggesting he does—then there ought to be somebody else who is bringing to bear an independent mind as to whether or not the commissioner in doing so is appropriately balancing his needs against the rights of individuals.

**Senator MASON**—Not just him, judge and jury.

**Mr Firmstone**—Not just him.

**Senator MASON**—Who would be that somebody else?

**Mr Firmstone**—If it is codified, as we request, that someone else would be a court because, if a commissioner sought to extend the boundaries of the code, then he would need to go to the court, if challenged, to convince his honour, or their honours, that that is an appropriate outcome.

**CHAIR**—I believe that legal professional privilege operates within the context of an ethical profession. I am not for one minute suggesting that accountancy is not an ethical profession, but there are certain structures and what have you. Can you give us an idea of how the profession treats its own and, if you get a rogue accountant, what can happen? There would obviously be peer pressure upon him or her. What else can happen?

**Mr Firmstone**—In the institute's case we have a royal charter. Running off that are some by-laws and ethical requirements that all members are required to adhere to. Any breach of those by-laws or ethical requirements will result in an investigation and, if the person is found guilty, then there is disciplinary action which ranges from fines to suspension of rights to practice and loss of membership.

**CHAIR**—I am going to ask a self-serving question which I think is quite an appropriate one. What do you think is the culture in the accountancy profession? What I am trying to get to there is the culture where the young accountant says, 'I'm going to get away with what I can.' Is that acceptable, or is it one where people say, 'We're here to do a job to advise people and that is what we are about'?

**Mr Firmstone**—That is hard to say. You are talking about 100,000 individuals and, as a general proposition, we are confident that our members comply with our ethical requirements. We have a statement out on tax avoidance and behaviour and tax practice

which members are expected to comply with. It requires members to not be complicit in artificial or contrived or blatant arrangements. If someone ends up in court for that pursuant to a kind of penalty regime which Senator Murray has suggested, that person would similarly be dealt with by the institute and would lose their right to practise.

**Mr Sheppard**—I think there are probably still a few cowboys out there, but the climate has certainly changed over the last 15 years in terms of what is acceptable in tax planning. You know that if you put something which is over the top into place that it is eventually going to have such a profile it will be attacked by the ATO and you will lose face in front of your clients if you involve them in those sorts of activities. Certainly in the big end of town and at the institute's membership level they would be foolish to be involved in schemes which are too over the top. The climate has changed.

**CHAIR**—You have answered this already, but I want to put it in this particular context. I understand what you are saying is that you feel as professionals that you cannot give full, free and adequate advice if there is perhaps a good chance that the communications that you get from your client are going to be made public.

**Mr Firmstone**—Or open to scrutiny.

**CHAIR**—Or made available to the tax office.

**Mr Sheppard**—There is a lot of ebb and flow that goes on before you come to a view as to how particular commercial transactions should be structured. The concern is that the ATO will come in with the benefit of hindsight, pick on a particular phrase in an email or some correspondence and argue that that indicates tax avoidance intention. We feel that that sort of ebb and flow of discussion should be privileged.

**Senator MURRAY**—In terms of your self-worth as accountants, you should be careful on the privilege issue because lawyers have privilege and so do parliamentarians, here and in the chamber, but we both rank lower in communities' attitudes than accountants.

**Senator MASON**—If we do nothing with respect to this, if the situation remains as it is, what sorts of strategies can you see accountants undertaking to overcome this problem? You mentioned one before, Senator Murray, and that was, in a sense, hide behind legal firms.

**Mr Sheppard**—If I continue to get letters like this from members and the commissioner continues to push the boundaries, I guess we have to react via media releases or whatever, continue to negotiate with the commissioner and tell him that we feel that he is overstepping the mark, continually remind him of the principles of the access guidelines and, if that is not working, try some embarrassment with media releases. That is the sort of thing eventually I think it would come to and we do not want to come to that sort of level of—

**Senator MURRAY**—He is not easily embarrassed.

**CHAIR**—What happens is that there is a battle for good public opinion between you and the tax office, and that tends to distract from the exercise that you should both be about, which is getting people to pay their fair share of the tax, no more and no less.

**Mr Sheppard**—Yes. We have complex legislation and it requires a lot of discussion sometimes to determine what is the best outcome for the client.

**CHAIR**—And you would say that there is absolutely nothing wrong—in fact, it is your duty—in going through various alternatives with a client to see how you can best preserve their income, but to do it within the law?

**Mr Sheppard**—Yes, and the old case law says that you are entitled to structure a transaction in a way to achieve the best outcome. You are not obliged to pay the maximum amount of tax. It is where you overstep that mark and it becomes blatant, artificial, contrived and unrealistic commercially—

**Mr Firmstone**—Such that it becomes a tax-driven arrangement rather than a commercial arrangement.

**Mr Sheppard**—Yes, that is when we are overstepping the mark.

**Mr Firmstone**—But our own standards outlaw that as an acceptable code of behaviour for accountants.

**CHAIR**—I gather that what you are saying is that the discussions where you tease out what can be done and what cannot be done—

**Mr Firmstone**—And the canvassing of options.

**CHAIR**—All sorts of misinterpretations could be put on those documents unless there were guidelines.

**Mr Firmstone**—Sure. Often communications are about the outcome not about the process. If a commissioner picks up an outcome and looks at the particular shape of a transaction and it has features to it which would result in less tax than other available outcomes, what it does not show is what was involved in the process of getting to that. The commissioner, with the benefit of hindsight, comes in and has a look and says, ‘This looks tax driven because I read this document.’ All it talks about is the tax savings you are going to make if you do it this way as opposed to that way. The document itself is not going to be necessarily representative of the process in arriving at the outcome. It is going to be more about recording the outcome and the basis for it.

But our case is not about documents which may be misleading. That, at the end of the day, is something which the commissioner and the taxpayer can sort out and, if they cannot, the court can. Our case is more about what is an appropriate way to balance two interests that, in certain circumstances, compete. They are the rights of people to their privacy and the rights of the community to secure that people pay their taxes. It is simply about that.

**CHAIR**—There ought to be a decision maker who is independent of both and that decision maker has been the court.

**Mr Firmstone**—If the tensions between the two get to a point where there is a debate as to who is right, then someone should be able to make an independent adjudication rather than one of the parties who simply say, ‘I make the rules and that’s it.’

**CHAIR**—Thanks for coming down and for giving us your wisdom.

**Mr Firmstone**—Thank you for the opportunity.

**CHAIR**—Do you drive back now?

**Mr Firmstone**—Yes, we are on our way home. I have a meeting at about 1.30 p.m.

[10.08 a.m.]

**BRANDT, Mr Peter George, Manager, Compliance Branch, Health Insurance Commission**

**GATH, Mr Shaun Christopher, Legal Practice Manager, Health Insurance Commission**

**CHAIR**—This is an inquiry into entry and search. Over the years, this has been a matter that has exercised all sorts of people. The Health Insurance Commission itself would have had some experience in this area as it points out. It is trying to get the happy balance between the public interest in seeing that people can go about their lives freely without harassment and the public interest of seeing that public money is preserved and that crime is not committed. How does the Health Insurance Commission do that?

**Mr Brandt**—I will give you a brief history. In 1992 the Health Insurance Commission was audited by the Australian National Audit Office and they made recommendations in relation to both fraud and excessive services.

Basically the recommendations were that the Medical Services Committee of Inquiry provision should be enhanced to improve the actions that we can take in relation to excessive services and a recommendation was made that the commission should be given powers in relation to investigation. At that time we commenced investigations but then, if we had to apply for search warrants or collect evidence, we were dependent on the Australian Federal Police. The Australian National Audit Office found that that contributed to delays and in some cases significant delays, by the commission depending on a third agency or a separate agency.

The recommendation was made that the commission should have powers of its own in relation to investigation. In 1994, on 21 July, the Health Legislation (Powers of Investigation) Amendment Bill 1993 became an act and it amended the Health Insurance Commission Act 1973. Generally those powers affect three aspects of the way we carry out investigations. Firstly, it gives us the power to enter premises with the consent of the occupier; secondly, it gives us the power to compel people to produce information or documents; and, thirdly, it gives us the right to apply to a magistrate for the issue of a search warrant to enter premises and to seize evidence.

All those three powers are dependent upon the managing director approving or authorising an investigation and an investigation can only be authorised if there are beliefs that a relevant offence has been or is being committed. The power of the managing director to authorise an investigation has not been delegated to anybody and the managing director is the sole holder of that power.

There are a variety of steps in place for applications for exercise of those powers to be checked and cross-checked on the way to the managing director. I am not sure whether you would want to hear those now or whether you have specific questions of me.

**Mr Gath**—One additional thing in relation to the 1994 act which I think is very relevant as well is that there was, at the time, a fair amount of concern from particularly the medical

community, but also generally, about the potential for abuse or misuse of these powers that were being put in the hands of the Health Insurance Commission itself rather than through the agency of the Federal Police. And while the recommendation was strongly, at the time, that that should occur, the compromise position that was agreed was that a sunset clause would be inserted into that provision of the act, providing that it would terminate automatically on the 30 June 1996.

**Mr Brandt**—Two years later.

**Mr Gath**—The inaugural period of the operation of the legislation was on a trial—a pilot in effect—subject to further approval and ongoing support from the parliament. That is how the 1994 act went ahead with the sunset provision inserted and there was a further review of the operation of the provisions to see how they were actually operating on the ground. In 1996 a further amendment was made to the act removing that sunset provision. That indicates, I think, on the part of the parliament, a fairly cautious but measured approach to the use of these particular powers, but an acceptance over the period of time that they have been properly employed.

**Mr Brandt**—In relation to the sunset clause the Australian National Audit Office did another audit and Audit Report No. 24 of 1995-96 refers to that. The Senate also conducted hearings and heard submissions from various agencies like the Australian Medical Association, for instance, which supported the commission being left with the powers. Certainly the Australian National Audit Office also supported the commissioner retaining the powers.

**Mr Gath**—It is fair to say that the parliament has been very close to these provisions over an extended period of time and closely monitored first the statutory scheme that saw their implementation. It has had a further role in effect signing off that there is a degree of happiness with the way in which they have been operating—and that is something which has occurred quite recently obviously.

**Senator MURRAY**—This committee in this inquiry will seek to find general principles and methods of operation so that there is consistency—or at least identify inconsistencies—in attending to search and entry powers. It seems to me, reading through your submission and having a general knowledge of what you are on about, that your commission—in contrast to, say, Customs, the ATO, the AFP, the quarantine bodies or anybody else that we look at—is in fact one subject to the most recent, most rigorous and most embracing review. All the other powers have been developed over time and there is a kind of custom attached to them.

**Mr Brandt**—Reviews, in fact.

**Senator MURRAY**—Yes. Are there any aspects of the powers you have been given for search and entry, and the constraints and limitations applied to those, which you think are valuable for other statutory bodies and other institutions in our society to have regard to and to follow?

**Mr Brandt**—I would certainly support their value. If we review the way we did investigations pre-1994 and the way we do them now, they are quicker, they are a lot more

streamlined and the agency has better control—if that is the right word—of what is actually happening. We do not do a preliminary investigation and then hand it over to another agency to complete for us. And you will appreciate there is a third agency involved—once there is a brief of evidence prepared, it goes to the Director of Public Prosecutions for the actual prosecution. So, before, there were three agencies in a row before it got to court, now there are two. It has streamlined and probably has improved the investigation process. Certainly the Australian National Audit Office has found that the investigations are now more efficient and more effective.

**Senator MURRAY**—You stress the lack of delegation. You stress the managing director having control.

**Mr Brandt**—Yes, it is one point that we have been stressing all the time.

**Senator MURRAY**—And is that a valuable protection?

**Mr Gath**—I was just going to make that point, Senator. I think that is an important element of the legal architecture of the scheme, that there are two check-offs at every point. There is the first gateway, through which every investigation must pass, and that is the requirement that the managing director agree to the commencement of an investigation. That process itself involves a certain amount of checking and integrity, and a case has to be put to the managing director demonstrating that there is a sufficiently strong case to warrant an investigation process commencing.

It is only once the managing director, as the chief executive of the organisation and obviously a person very accountable to the parliament and to the government, agrees personally—it is not a delegated power—to an investigation commencing that the remainder of the provisions in that part of the act are activated. Then there is the second set of provisions which allow the formal exercise of search and seizure and other powers, again subject to warrant. So there are those things and the fact that there is that CEO gateway provision. I am not suggesting it is completely unique—I would be surprised if there are not some other agencies that use a similar model—but that seems to be an interesting additional safeguard compared to some other areas where powers of seizure and of search are simply available to investigators.

**Senator MURRAY**—Most other agencies in fact do not—they have highly delegated models. That is what interested me there.

**Mr Brandt**—Before the managing director exercises his powers, the application has to go through several hoops as well. I am not sure if you want to hear about those, but there are in-house jumps, I suppose, that the application has to go over before it gets to the managing director, so it is well and truly canvassed both at the state level and at the central office level.

**Senator MURRAY**—We do not have enough time to do that now but, for the purposes of the secretariat, if you could provide us with a summary of those hoops that would make it possible to deal with—

**Mr Brandt**—Yes. They are discussed in the audit report; there are various committees in place who consider the applications, and they are discussed in audit report No. 24—for 1995-96—from the Audit Office. But I can provide something.

**Senator MURRAY**—Okay. Would those against whom you exercise search and entry powers typically be doctors' offices?

**Mr Brandt**—Typically but not necessarily.

**Senator MURRAY**—Let us just use that as an example. When an officer arrives there, is there any form of caution given out? Is there any piece of paper which spells out rights and protections?

**Mr Brandt**—Certainly a caution is given.

**Senator MURRAY**—Is it verbal or written?

**Mr Brandt**—Verbal. It is a normal caution, that if someone says something it can be recorded and taken as evidence.

**Senator MURRAY**—Nothing in writing?

**Mr Brandt**—They are not given a piece of paper, no.

**Senator MURRAY**—That is a practice adopted by some other institutions and authorities we have questioned. They actually do provide something in writing. It goes so far as to say—this is the case with ATO, I think—that if you are unhappy with it you can consult with the Ombudsman. There is a series of checkpoints.

**Mr Brandt**—We have a brochure which we provide to everybody apart from the actual person under investigation. For instance, if we use the powers under 8P to compel somebody to give us information—not the person under inquiry, but somebody else—we give them a pamphlet, which has a title like 'How you can help us' or something like that, which sets out their rights under the act and the powers that the commission has.

**Senator MURRAY**—Why don't you give that to the potential defendant?

**Mr Brandt**—Because once a magistrate has issued a warrant and entry has been made to, for instance, a surgery and evidence has been collected, we feel it is not really of any significant help to the person to say, 'We have these powers.'

**Senator MURRAY**—Why? A person experiencing such a thing does not automatically know their rights. They would not know whether to remain silent or—

**Mr Brandt**—They are told that what they say can be used against them. They are cautioned. They are told that they are entitled to have a solicitor present. There is a pro forma that is gone through, but it is not provided in writing.

**Senator MASON**—Are they the same warnings that police would give?

**Mr Brandt**—Yes, similar. The police warnings are not identical from state to state. But, yes, they are similar.

**Senator MURRAY**—I think the AFP do give a piece of paper. Do you recall that?

**CHAIR**—We will find out from them.

**Mr Gath**—They are appearing before the committee, aren't they?

**CHAIR**—What is the sanction on the CEO? Just the parliamentary processes and the estimates committee, I suppose.

**Mr Gath**—Sanction for the misuse of the power?

**CHAIR**—Yes.

**Mr Gath**—The most obvious sanction would be judicial review of the exercise of the power, because the power itself is subject to judicial review if inappropriately used. I was merely mentioning the other elements of accountability within the parliamentary process as being additional to that.

**Mr Brandt**—And there is a requirement on the commission to report the use of the powers in the annual report.

**CHAIR**—Can he issue permission for people to go into private houses? He cannot, can he? It has got to be surgeries. Am I right in that?

**Mr Brandt**—No, it is the magistrate who determines where the warrant is exercised, whether it is a surgery or a private house or an office.

**Mr Gath**—The CEO does not enter into it at that more operational level. His function is, as I said, to be a kind of gatekeeper at the outset in terms of being satisfied that there is an appropriate basis for powers under part IID of the Health Insurance Commission Act to be activated.

**CHAIR**—The CEO cannot or does not issue a warrant?

**Mr Gath**—No, it is a magistrate.

**Mr Brandt**—He authorises an investigation. Where he authorises an investigation, and a search warrant is needed, then an application has to be made to a magistrate for the issue of a search warrant.

**CHAIR**—So the Health Insurance Commission does not enter and search unless it has got a warrant from a magistrate?

**Mr Brandt**—No.

**Senator MURRAY**—Not even for any investigation?

**Mr Brandt**—No.

**Senator MURRAY**—No access at all?

**Mr Brandt**—Not without a warrant, we cannot. That was the second provision I mentioned at the beginning. There is a power for us to apply to enter, and we can with the consent of the resident or the owner or whatever, but we cannot require entry unless we have a warrant from a magistrate.

**CHAIR**—But there is no problem if you turn up and somebody says you can come in?

**Mr Brandt**—Well, presumably they are happy.

**CHAIR**—If you feel that your investigations require the Health Insurance Commission to enter and search, you have got to have a warrant from a magistrate?

**Mr Brandt**—Indeed.

**Mr Gath**—Yes.

**Mr Brandt**—And a warrant can only be applied for if there is an authorised investigation by the managing director.

**Senator MASON**—I can detect from your submission, and indeed from the history of the process that you had to go through, certain exasperation at the amount of scrutiny you have been under over the last few years. It is very noticeable on page 6—

**Mr Brandt**—I do not know whether there is exasperation. We accepted that the scrutiny was proper in this case. The powers are extensive and the processes that we have in place to check and countercheck the use of the powers indicate that we take the powers very seriously.

**Mr Gath**—It was certainly true, also, as I mentioned earlier, that the proposal to allow these powers to pass into the hands of the HIC was not something which a number of people in the community felt comfortable about.

**Senator MASON**—Yes.

**Mr Gath**—There was concern at that level as well. It was something that had to be done gradually and the findings generally, and I think the position of the profession, is that it has been a smooth transition and the powers are being used appropriately.

**Senator MASON**—Have there been more complaints post-1994 than pre-1994? Are you getting more and more complaints these days concerning the exercise of your powers?

**Mr Brandt**—It is certainly not true to say that we are getting more and more complaints. Occasionally we get more a question than a complaint. The aspect of the powers which raises the most questions is that if a search warrant is executed at a doctor's practice, for instance, and medical records are taken in evidence, there is a requirement in the act that we notify the patient that their medical records have been taken. Occasionally we have patients writing and saying, 'Is this a breach of my privacy; is this a breach of my doctor-patient relationship?' and so forth. They are usually not complaints, they are usually questions like, 'Can you actually do this?'—and the letters are usually ministerials—but they are very few.

**Senator MASON**—Very few. My next question was going to be how do the number of complaints today compare with the number of complaints you had pre-1994?

**Mr Brandt**—I suppose pre-1994 the situation was a bit different. If a search warrant was executed, it was executed by the Australian Federal Police.

**Senator MASON**—That is what I mean. I am trying to work out what is more—

**Mr Brandt**—In the financial year 1997-98, from memory, I think there were over 10,000 patients written to saying that their clinical records had been taken. The numbers of letters that we had were less than 10.

**CHAIR**—Why do you take the clinical records? What do they show? Why would you take clinical records?

**Mr Brandt**—A lot of the investigations into medical practitioners relate to the item number that was claimed. The clinical records are used, first of all, to substantiate whether or not the patient was seen on that day, and, secondly, they might describe what happened. The Medicare benefits schedule is basically 2,000-odd item numbers, and they are regulated. The practitioner is required to identify the item number correctly. A lot of the investigations that we do into medical practitioners and optometrists relate to whether they claimed the correct item number or not.

**CHAIR**—What do you do to ensure that the records do not become public through some rogue element in the Health Insurance Commission?

**Mr Brandt**—When they are the subject of a search warrant, once the managing director approves the use of the powers and the search warrant has been issued, the officers exercising the powers are only the senior investigation officers. If medical records are to be taken, the senior investigation officer is accompanied by one of our medical advisers. The documents are boxed on the premises and they are sealed and marked 'Medical-in-confidence'. On return to the Health Insurance Commission office, they are retained in a property room which is sealed, and each state office has a property officer who is the only keeper of the key. Generally, the medical records are only accessed by our medical advisers rather than the investigators because they are the ones who can interpret what was actually said or done on the records rather than the investigation officers. They are viewed mainly by medical officers of the commission rather than investigation officers.

**CHAIR**—The number of people who would have access to them is limited.

**Mr Brandt**—Very limited.

**CHAIR**—If there was a leak of confidentiality you would be fairly readily able to identify the—

**Mr Brandt**—Absolutely. To access the records, you would have to sign the property register, the property officer has to let you have access to the records, and they have to be signed in and out on the property book.

**CHAIR**—If somebody's medical record was suddenly produced on the front page of a daily paper, how many people would have access to the records to do that?

**Mr Brandt**—In the Sydney office, for instance, we have five medical advisers—

**CHAIR**—And amongst them, it would not be the five, as I understand it, because there would be only one of those who would sign off.

**Mr Brandt**—Absolutely—I am just saying the maximum number. In the Sydney office, there is a maximum of five medical officers who might be required to have access to the records and there are five senior investigators. So there is a maximum, I suppose, of 10 officers who would have access to those records.

**CHAIR**—Would they have access to all the records?

**Mr Brandt**—No, only to the records maintained for that investigation.

**CHAIR**—But wouldn't you have only one medical officer and one investigator on each case?

**Mr Brandt**—It depends on the size of the case. It would normally be one medical officer, but there could be several investigation officers.

**Senator MURRAY**—The committee has had to deal with two broad classes of interactions. One is the formal adversarial side—typically a bench warrant is used, and then both parties are quite careful about what they do because, as a result of that, they could end up in court or in some kind of strife. The other is much more common, and that is what we would describe broadly—although it is not always—as a non-adversarial kind of administrative interaction, which is, in your case, the consent investigation. Yet the people being investigated, be it the ATO or anybody else, are always alert to the fact that this could lead on to other things and, therefore, they need to be conscious of their rights.

What do you do about the rights side? For example, you call up a doctor and say, 'We are concerned with some discrepancies in your records. We would like to come and have a chat to your accounting people and check your office systems.' And the doctor says, 'Fine, come along.' How do you deal with that? Is there a spelling out of their rights? Is that when you give them this pamphlet of yours? How are they alerted to the fact that, whilst this is

not adversarial, it could develop into something more serious if records were found to be wrong?

**Mr Brandt**—I was just looking at the figures for the last financial year—I will give you a snapshot of our annual report before it is actually printed. In the last financial year, those powers were never used and, in fact, they are used very rarely. If a practice is to be entered for the purpose of an investigation, we will always obtain a search warrant. We will always seek a search warrant—obviously, if we do not obtain it, we cannot enter. When there is an investigation afoot, the powers to enter with consent are not used.

**Senator MASON**—Are they the statistics in subsection 42(3A)(c)?

**Mr Brandt**—Yes.

**Senator MURRAY**—Again I will compare your organisation with other institutions. When they have not pursued a warrant, it often just fizzles away. They have a chat, discuss the problem and nothing emerges. In your case, when you pursue a warrant, is it almost always that a real problem has emerged which has to be pursued?

**Mr Brandt**—Yes. If an investigation proceeds to obtaining a warrant, a very high percentage—well over 90 per cent—will go to the DPP as a brief.

**Senator MURRAY**—Okay.

**Mr Gath**—To some extent, that outcome is predetermined again by that gateway component. We do not investigate unless we are pretty certain that there is something serious going on.

**Senator MURRAY**—That is startlingly different from the other people we have dealt with. They are like a very flat pyramid whereas you are more like a column.

**Mr Brandt**—The way it works in practice is that, basically, there is a ladder involved here. If there is a complaint or if there is some idea that an offence is being committed, first of all, it has to be a relevant offence, an offence which is specified for these powers. The normal course of events is that, once the managing director authorises investigation, the powers under 8P may be exercised—they are the powers compelling somebody to produce evidence or information. By exercising those powers, we will know whether there is any meat on these bones or not. If there is, we will apply for a warrant; if there is not, we will not proceed down the route of a warrant. The 8P powers are really used to determine whether there is real substance to the complaint or concern. That is why I say that, once a warrant is applied for, well over 90 per cent will end up in a brief going to the Director of Public Prosecutions. That does not necessarily mean that the Director of Public Prosecutions will prosecute. Sometimes they will say that they will not prosecute a matter, but well over 90 per cent will go as a brief to the DPP.

**CHAIR**—And all the evidence is handled by the Health Insurance Commission?

**Mr Brandt**—Yes.

**Mr Gath**—It was these elements of the use of the power that were looked at by the ANAO when it did its, if you like, sunset clause review, and those were factors which obviously led to its conclusion that the powers were being appropriately used.

**CHAIR**—What is that—the Australian—

**Mr Gath**—The Australian National Audit Office. I ought to read the conclusions in the pamphlet which were issued by the ANAO at the same time as it conducted that report. The ANAO concluded:

The enhanced powers to investigate fraud and excessive servicing have improved the Commission's ability to conduct investigations and prepare prosecutions. The ANAO considers that without powers of this kind the ability of the Commission to conduct investigations and prepare prosecutions would be impaired. This view has been supported by stakeholders consulted during the audit.

The second finding was:

The Commission is using the enhanced powers in accordance with the legislation and in a professional manner.

**CHAIR**—Who wrote that?

**Mr Gath**—It was not me, but it might have been.

**Senator MASON**—When you apply for a warrant, 90 per cent result in briefs to the DPP. What percentage of those briefs conclude in successful prosecutions?

**Mr Brandt**—It will obviously be an estimate. The percentage is probably different between briefs for public fraud and practitioner fraud. We have a distinction between a conviction and a finding of guilt because there is a tendency in the courts to find medical practitioners guilty but not to record a conviction. If we include finding of guilt and a conviction for practitioners, probably 75 per cent to 80 per cent will go through. If you take the ones who are prosecuted, it will again be well over 90 per cent who will be convicted or found guilty.

**CHAIR**—Is that mainly before the magistrates courts?

**Mr Brandt**—Usually.

**CHAIR**—Before a jury?

**Mr Brandt**—No. Usually, by the time it gets to a hearing, the practitioner pleads guilty. There are not many that go through a trial with a plea of not guilty.

**Senator MURRAY**—With the complaints process, where do people complain to? Obviously, they complain to you initially. Does it thereafter go to the Ombudsman?

**Mr Brandt**—We have probably had three or four over the last four or five years that have gone to the Ombudsman.

**Senator MURRAY**—But that is the next step, isn't it?

**Mr Brandt**—Yes.

**Senator MURRAY**—Or are there any other steps?

**Mr Brandt**—There could be a ministerial—a letter to the minister—a letter to the managing director or a letter to the Ombudsman.

**Senator MURRAY**—But who has the statutory obligation to follow it up?

**Mr Brandt**—The Ombudsman certainly has the statutory power to review the way the powers were used. The Federal Court certainly would have the power to review the way the powers were used. And, certainly, we have had internal reviews of the way the powers were used, as well.

**Mr Gath**—There has been some litigation in the Federal Court recently, involving the exercise of these powers. We are conscious of the need.

**Senator MURRAY**—It is independently reviewable. You always have the court option there, but you have an administrative review as well.

**Mr Brandt**—Indeed.

**CHAIR**—What was the Federal Court case? Was it reported?

**Mr Gath**—There was a full Federal Court decision last year on the matter of Freeman and the Health Insurance Commission.

**Mr Brandt**—I will give you a citation if you like.

**Mr Gath**—I think it is reported, but maybe I am getting mixed up with another case.

**CHAIR**—How much money is involved with each of these cases? I suppose it varies a bit, but can you give us an idea of—

**Mr Brandt**—It varies, absolutely. Generally, if we are talking about practitioners, at the very lower end, we are looking at something around \$4,000 or \$5,000. Our biggest fraud was \$1 million—\$997,000 to be exact.

**CHAIR**—What about the claimants?

**Mr Brandt**—The members of the public?

**CHAIR**—The members of the public.

**Mr Brandt**—Yes, we certainly have prosecuted members of the public. I might also add that a lot more members of the public are prosecuted than practitioners. I think that in the

last financial year there were something like 50 members of the public prosecuted and six or seven practitioner convictions.

Public frauds range from—again, a similar figure—\$3,000 or \$4,000 to probably around \$50,000 or \$60,000, which would be the largest. That also includes doctors' receptionists, for instance. Receptionists sometimes commit offences under the Health Insurance Act, so we include receptionists and members of the public in the same group and practitioners in the other—only for statistical reasons.

**CHAIR**—What do members of the public do? Do they just claim where there is no entitlement to?

**Mr Brandt**—They might add a service, for instance, to an account. They might print their own accounts. These days—and I hope I am not telling them how to do it—with computers and desktop publishing, it is not that difficult to print an account.

**CHAIR**—The reason I was asking is: why do you need powers of entry and search for the public?

**Mr Brandt**—We have used them, for instance, where members of the public have been printing forms at home, and we have seized them and the computer.

**Mr Gath**—You are right, the primary use of those powers is in the larger investigations that are directed to a series of offences over a period of time.

**CHAIR**—Thank you very much, Mr Brandt and Mr Gath.

**Mr Brandt**—Mr Chairman, would you like a copy of this, or would you like me to write something about the administrative hoops?

**CHAIR**—Yes—a copy of that and a copy of the pamphlet that Mr Gath had. The one that said what a tremendous—

**Mr Brandt**—That does not actually say about the way the administrative processes—

**CHAIR**—No, but it says what a good body the Health Insurance Commission is.

**Mr Gath**—It is just their standard little leaflet that accompanies—

**Mr Brandt**—That is just the abridged version of that. I will leave a photocopy of this.

**CHAIR**—Can we get a copy?

**Mr Gath**—It is a tabled document, so it is available through the parliament.

**CHAIR**—We can get a copy, and we will give you a ring if we cannot follow it.

**Mr Brandt**—It is No. 24 of 1995-96.

**CHAIR**—Thank you very much.

[10.50 a.m.]

**PHELAN, Mr Michael Anthony, National Secretary, Australian Federal Police Association**

**CHAIR**—Welcome. We are looking at the power of entry and search and trying to work out the right balance between the public interest in people's rights and liberties being respected and the public interest in seeing that proper intelligence and evidence is gathered. We thought that the Australian Federal Police Association, as it has in the past, could help us with these issues. Would you like to say something on this or would you like us to ask questions?

**Mr Phelan**—First of all, I would like to thank you for the opportunity of letting us speak at this hearing. We have made no formal submission, we are here at your invitation, so I am only too happy to answer any questions you may put. By way of introduction, I will say what the Australian Federal Police Association does and what our role is in relation to this particular part of the Crimes Act.

We represent the industrial and professional interests of members of the Australian Federal Police. In terms of coverage, approximately 98 per cent of the sworn members of the organisation are members of our association. We represent their professional interests and we believe we have a role to play in speaking about the legislation under which they operate. I have had the opportunity of reading the AFP's submission to this committee. I agree with nearly 98 per cent, the majority, of their submission. There are a couple of points that I would like to elaborate on. There is also another matter that we would like to prosecute on behalf of our members that is additional to what the AFP placed in their submission.

If it is all right with the committee, I would like to go through the four main points that the AFP placed in their submission. The first is the use of covert search warrants and the limitations that the act has on such practices. Certainly the association supports the submission that the AFP has made with respect to covert search warrants and the difficulties that have been encountered by our members, particularly since the latest advice from the Director of Public Prosecutions that says such search warrants are not lawful. We would like legislative amendment to make those sorts of provisions lawful, so that we can obtain the evidence necessary without jeopardising any future prosecutions or, indeed, the ongoing nature of the operations. So, to that end, we would support that.

Another matter that is of paramount importance to us is the aspect of seizing material relevant to state offences under Commonwealth search warrants. I have had experience of that as a practitioner, so I have experienced the problem first-hand. The DPP's contention is that, when the parliament wanted to codify all the common law provisions in part 1AA and create the new search warrant provisions, effectively they abrogated the common law because they had codified most of the provisions.

**CHAIR**—Sorry to interrupt you, Mr Phelan. You say you had personal experience. Without going into details of the operational niceties of it all, what happened?

**Mr Phelan**—We were executing a search warrant in relation to social security offences. We went into the premises, we conducted our search and, towards the end of the search, we went out to the backyard and noticed there were between 15 and 20 marijuana plants that were about six foot high. We had just read the latest advice from the Director of Public Prosecutions that said we could not seize those items under the warrant. So, as the next best thing, we called the local state police and arranged for them to get a search warrant. I despatched the majority of my team away from the premises because they were still conducting the social security investigation—it was a coordinated one across a number of premises—and I and another person stayed on hand and waited for the state police to come. It took about 2½ to three hours for them to come because they had to go and obtain another search warrant under their state legislation and needed that time to arrive.

That was all well and good because there was a lot of cooperation, but there were some practical problems there. One could argue that we were trespassers on the premises, given that effectively our Commonwealth search warrant had ended. We had seized all the material we wanted and our people had left.

**Senator MURRAY**—Was it time expired or activity expired?

**Mr Phelan**—Activity had expired. We were staying on premises, we did not leave the premises, but what was the purpose of us being there? The purpose of us being there was simply to wait for the state police to execute their own warrant. It certainly is open to interpretation. In my view, that circumstance is probably unacceptable. We may have had to wait 10 or 12 hours for them to come, depending on their own priorities or how busy they were. We could not just leave the premises and leave 20 plants there—who would know what would happen to them while we were away from the premises?—and we could not lawfully seize them. So our members can be caught between a rock and a hard place. At the time, a tactical decision was made to wait for the state police—and 2½ to three hours is not really that long when you consider it was a cold call to them—they had not expected it. That was the situation that occurred then.

In a nutshell that is our submission in terms of state offences. Certainly we would like, if anything, the common law to be reinstated with regard to that, as there used to be a provision under the common law to be able to take items that related to other offences. I do not think there is any need for me to dwell on the warrant timings, given that the AFP submission is rather lengthy in relation to that and it covers most of the points.

**Senator MURRAY**—Do you support it?

**Mr Phelan**—Yes, I do. I support the uncertainty that is there. If a warrant says that you can execute it between, say, eight o'clock in the morning and 6 at night and if you are on long, protracted fraud investigations—for example, doing a sales tax inquiry on behalf of the ATO which has been referred to us—you can stay on a premises for hours and hours and hours looking for all the documents. You cannot just bulk seize them because you must satisfy yourself for a start that they fit within the provisions of the warrant, and that can take a long time. I have sat on search warrants that have gone for over 36 hours on premises. In particular, that relates to anything from major accounting houses and law firms. These may be in adversarial mode as well, so you really have to stay there and look after the documents

to make sure you keep continuity of them all and that none of the evidence can possibly be destroyed.

You can stay on premises, particularly with protracted fraud investigations at the execution stage of the operation, for long periods of time and at multiple addresses. So certainly there is a need to clarify that point about the expiration time of a search warrant. The long-held view had been that if you executed the warrant, if you entered during the period of the warrant, it was all right to stay there as long as you could, so long as you did the task. But that view has now changed. It creates a problem that needs to be clarified by the parliament.

The next point that I want to talk about and to try to prosecute on behalf of our members is to have provisions similar to those that the National Crime Authority has pursuant to section 29 of their act, that being notices to produce documents rather than having to obtain search warrants. The reason is that the search warrant powers we have are very comprehensive and lend themselves to an adversarial type situation, however, in the Australian Federal Police, with the type of the investigations that we do, we are often required to have documentation from private institutions—for example, banks, accounting houses, institutions like building societies et cetera. They are only too willing to hand over their documents but the problem is that they require legislative protection so that they cannot be sued in tort by their own clients. That in fact happened, I believe, a number of years ago and that has now led all the major banks to request search warrants before they hand over any information to us, which is fair enough.

With the type of inquiries that we are doing, and the way the search warrants are being judicially considered these days, you cannot go to a magistrate with half an information requesting a search warrant. You must go with all the information that you have at your disposal to enable the magistrate to make his or her decision, and that includes all the exculpatory evidence as well. You can appreciate that, in some major investigations, that search warrant information can get to the thickness—and I have actually seen this—of an arch lever folder that has to be given to a magistrate.

In an investigation that goes over and over again, that goes for a period of time, you could end up going to a bank, swearing in information which is an arch-lever folder thick, to get some information from the bank. That information you get leads on to something else, and a week later you have to get another search warrant and again swear the same information before a magistrate, adding the one paragraph that you got from the information that you seized prior to that, and it goes on and on and on. This could go on for years. You could have banks and banks of search warrants that take a long time to produce when, at the end of the day, the banks are only too willing to hand over that information. All they require is some sort of legal instrument to protect themselves.

The National Crime Authority have a power under their act that enables them to ask organisations to produce documents. That power is signed, I believe, by the appropriate level within the organisation. We would certainly like similar powers—coercive powers—in relation to documents. We do not for one moment advocate those in relation to going into someone's house and entering onto their premises to—

**CHAIR**—This would be mainly third parties?

**Mr Phelan**—It would be innocent third parties, yes.

**Senator MURRAY**—Are you sure a search requirement to sign is with an NCA authority? I had the impression it was signed by the Attorney-General.

**Mr Phelan**—I believe it may have been delegated down to some management level within the organisation to be able to sign section 29 notices to produce. But I do stand to be corrected.

**Senator MURRAY**—Yes. I am one of those who think that is entirely wrong—namely, it should not be within the NCA. I think it leads to a potential abuse of power. I do not object to the concept; I just object to it being conducted administratively because it is always an act of intrusion, whether justified or not. It is a search and entry power.

If you were to make this easier—because I understand your concept—are there other ways of dealing with it? The advantage of the magistrate, of course, is that he or she is independent of the person requesting it, who has to go through a process of proof and justification. Are there other ways in which it could be done to make it easier—for instance, with a rolling warrant, or by making it easier to extend a warrant if it is a continuation of the same activity and that sort of thing?

**Mr Phelan**—I suppose a rolling warrant could cover the situation, but there are perhaps too many variables between the time a search warrant is issued and the time you get the next search warrant. I would certainly submit that the better way to tackle it is that, if there were such notices to produce or a similar provision that we do not want carte blanche powers to do so, that external scrutiny—perhaps under the auspices of the Ombudsman or something similar—would be appropriate along the lines of, for example, where, at the moment, when we take a telephone intercept product, the warrant is created by a judge in the first instance, but after that it is stringently monitored by the Commonwealth Ombudsman as to what we do with that product at all times. I would think that, if we did have notices to produce, they could certainly be audited by the Commonwealth Ombudsman or that there could be a provision for them to take up that sort of action.

We would not be averse to any sort of external scrutiny to do it. All I am thinking about is that it is a way to streamline the investigations. It would certainly save time; it would be a lot more efficient way of doing investigations. I understand your concerns, Senator, that there must be some sort of public accountability, but we would not be against high levels of public accountability either.

**Senator MASON**—Could I just ask about the process with notices to produce with respect to the National Crime Authority. What is the process? Is it simply a certain officer within the National Crime Authority? What does he or she do?

**Mr Phelan**—I do not know the exact procedures, but I understand that whoever the responsible authority is in the National Crime Authority has to be satisfied that they are working within one of their own references that has been given to them, because they cannot

work on any particular job; they have to have a reference. It certainly has to fall within the categories of one of their references; it has to relate to that reference; and it has to have evidence that may lead on to something else.

I do not know whether the stringent powers are there or the actual same checks and balances that are in part 1AA of the Crimes Act. Having said that, if any such power were to be given to the Australian Federal Police we would want nothing more than the same conditions that are there: still reasonable grounds to suspect that a criminal offence is going to be occurring and reasonable grounds to believe that those particular items are on the premises. We do not want fishing expeditions.

**Senator MASON**—And potentially, the officer would be a senior police officer who would—

**Mr Phelan**—I would think so. Let us say, for example, to run a controlled operation in the organisation at the moment is at assistant commissioner level and I would think it would have to be nothing less than that level.

**Senator MURRAY**—But as you know, abuse of power can occur regardless of the seniority of anyone.

**Mr Phelan**—Yes.

**Senator MURRAY**—It just does not refer to the police. In the political world and the judicial world, you have got to look out for these things. It is this conflict between administrative efficiency, getting the job done and doing the community work which we all want you to do and at the same time protecting against the abuse. Whilst audit activity and monitoring activity have a 'post facto' value, somehow I am still not satisfied that there are enough intervening checks.

**Mr Phelan**—I would be coming from the angle that certainly our job is getting harder through the effluxion of time and the judicial considerations of our warrants. You will appreciate they come under a lot of judicial scrutiny. At the moment the Federal Police do very well with their warrants. Very few of our warrants are challenged successfully by defendants these days. The reason for that is the information that is put before a magistrate is very comprehensive. It takes days and it is very voluminous to put together and that process in the future is only going to get more so.

**Senator MURRAY**—That is why I am interested in the concept of a warrant continuation or a rolling warrant, so that the threshold for the initial warrant is very high, as it should be—

**Mr Phelan**—Yes.

**Senator MURRAY**—but subsequently it is very low. You would not need to have the same rigour from the magistrate. Is your problem simply the accessibility of magistrates and their workload or is it the preparation of the argument?

**Mr Phelan**—I do not think it is a matter of the preparation of the argument because in any case you will still have to satisfy, to a reasonable standard, whoever the relevant authority is within the organisation to grant any such notice to produce. It is not so much the accessibility to magistrates; it is the time that they have to do these things. If you put together warrants that are arch-lever folders thick and they do want to read them thoroughly, it can take them a couple of days. What used to take a morning or half a day now goes into days.

**Senator MURRAY**—The implication behind your answer is that those couple of days would not occur within the police service. If it is time involved, the implication is you could do it much quicker, which to me is an inference that somebody would not read an arch-lever folder full of documentation within the police service.

**Mr Phelan**—I suppose you could draw that inference, Senator. What I was getting at more was that whenever you ring up for a magistrate you get the next on roster and each different magistrate will have to satisfy themselves. For example, I could give the information one day to one magistrate and the next day have to give it to a different magistrate simply for the same matter—all I did was add an extra paragraph, or one of the investigators added an extra paragraph to it—and they would again have to take a couple of days to read it because they must be satisfied to a certain standard to be able to issue the warrant.

Within the police force, like you said, you could have exactly the effect of having a rolling warrant because they would have read the majority of the information in the first instance. Really, all you would be doing would be placing that extra paragraph or two and bringing that to their attention and they would not have to read the whole thing.

**CHAIR**—The association has talked about this a bit, has it? It is a big issue with the members?

**Mr Phelan**—It certainly is with our fraud practitioners because they are the ones who have to get a lot of these types of warrants from ‘friendly institutions’—for want of a better word. We could do a protracted investigation over a number of years, which is certainly the case now within the Federal Police. We could execute 50 warrants within that period of time, of which 49 will be on nice and friendly institutions and friendly third parties, and it is only the last warrant, perhaps done on the defendant’s premises, that is the one that is adversarial.

**Senator MURRAY**—What would happen if the solution was, in fact, a consent warrant? In other words, you got the initial warrant through the magistrates process but, if you want to continue that warrant, the friendly institution, the third party, could consent to a continuation of that warrant for additional material. Wouldn’t that resolve the problem?

**Mr Phelan**—Yes, it would. But certainly at the moment under the legislation that is not possible.

**Senator MURRAY**—What I am searching for is clarification that always a third party is involved—either an independent person, which is the magistrate or, in fact, a bank or the

institution—that could consent to a continuation of a warrant which had been originally properly procured.

**CHAIR**—But that is your problem, isn't it? Right from the start, the banks have been happy for you to come in.

**Mr Phelan**—That is right. Like I said, if the thrust of my argument—which it is—is to streamline the investigative efficiency of the organisation, and if, in the first instance, you had to put together search warrant information for a magistrate that was a couple of arch lever folders thick, then that would be no problem. If any subsequent warrants that related to the same premises or the same like institutions was only just the addition of an extra paragraph or something similar, then that would be fine, yes.

**Senator MASON**—What we have to keep in mind is that, even if it is with the consent of, let us say, the bank or another institution, the information it is giving out to you is someone else's. It is not theirs.

**Mr Phelan**—Also, one problem I can see with that is that if a magistrate grants a search warrant in the first instance with all the available evidence put before them, and then some time in the intervening period between that warrant and the next warrant or the warrant after that, there is more evidence that is likely to benefit the defendant, or something like that, then that should really be put before the magistrate, and it is not there. There is an ability to abuse a rolling warrant as much as there is to get a notice to produce.

**CHAIR**—How does a notice to produce work? What happens? Mr Delaney, who is due to appear as a witness shortly on behalf of the DPP, would probably know about these notices to produce.

**Mr Delaney**—I know more about them in the Australian Securities and Investment Commission area than I do in the NCA context.

**Senator MURRAY**—They are ugly little documents from the NCA because we do not have much escape from them! I do not think you have the right to be silent under them.

**CHAIR**—Mr Delaney, do you want to come and join the discussion?

**Senator MURRAY**—Shall we finish off here first?

**CHAIR**—Yes, I just thought you might want to proceed with this.

**Mr Phelan**—As far as the association is concerned, I suppose that is the thrust of our submission. We are prepared to answer any other questions in relation to this. I know I have missed a lot of things.

**CHAIR**—I should know the answer to this question, but I do not. What sorts of complaints has the Australian Federal Police had about the execution of warrants generally over the last year or so?

**Mr Phelan**—I do not know. The best people to ask about that would be the AFP and to check their annual report. Certainly, as you would be aware, our complaints regime within the Federal Police is very stringent. We have the Complaints (Australian Federal Police) Act 1981 which more and more of our potential defendants are aware of and which allows them to make complaints against our members that have to be investigated by our internal investigations area under the scrutiny of the Commonwealth Ombudsman. Of course, they can go direct to the Commonwealth Ombudsman. They can complain to members of parliament or, in fact, they can wait until their court case and level their complaints then about the execution of the search warrant. So there are a number of avenues available through which to complain.

**CHAIR**—Is the association getting concerned about the number of complaints in the sense that it has to spend a lot of its time in trying to defend members?

**Mr Phelan**—Certainly, in the recent past, we have not had to expend a lot of time in relation to our members for abuses on search warrants. That is not a product of us not wanting to defend them; it is a product of receiving very few complaints and having the need to defend our members.

**CHAIR**—From that it would seem, by and large, that they are going about the execution of the search warrants in a way that seems to be consistent with good public policy.

**Mr Phelan**—It would be my submission that our members are very professional in the way in which they execute search warrants. That can be borne out by a lot of the judicial considerations. I would hazard a guess to say that the majority of the judicial consideration of the search warrant provisions within the Crimes Act relates to warrants executed by the Federal Police. The DPP continually sends advice out to our members which is promulgated throughout the organisation in relation to court cases that have happened as consequences of our search warrants. So our members are pretty well kept up to date.

Our new members at the college are trained very well. As well, there are ongoing courses in relation to their powers and to new interpretations of the legislation; for example, the time-out provisions and the ability to get covert warrants. Things like that—once they occur—are pretty much common knowledge throughout the organisation, because that advice is promulgated rather regularly, and our members adhere to that.

The way in which operations are run these days, they are very well planned. They go under a fair bit of scrutiny within the organisation as well, particularly coming up to the execution stage. A lot of our prosecutions these days will end up in ‘not guilty’ pleas within the highest courts in the land. So our members are very careful to make sure that what they do, they do well and do properly.

**CHAIR**—Are frauds the main concern? I am thinking here not in terms of being an attack on the public but of getting the intelligence and evidence that you need to counter them. Getting intelligence about fraud and getting evidence to prosecute fraud in the courts would take more time and more investigations—going to banks and financial houses—than other matters. Is that right?

**Mr Phelan**—Certainly, within a long and protracted fraud investigation, we would do more search warrants over a period of time than perhaps we would in a narcotics investigation. In a narcotics investigation, we would most likely do all the search warrants on one or two days at the final execution phase. But within a fraud investigation, they would be at periodic points throughout the investigation, simply because the ones done on friendly organisations are not going to alert their potential defendants or suspects in this matter so there is no need to worry about that aspect of the inquiry. Certainly, within fraud investigations, there would be a lot of warrants.

**CHAIR**—As you say, the real issue with the warrant in fraud cases is to protect the friendly third party.

**Mr Phelan**—Certainly that is why the third party requires a search warrant. My experience from many years ago was that a search warrant was not always required, but certainly that is the case now and it has been for a number of years. Search warrants are required from all institutions these days to get any sort of information that relates to their clients. That is understandable—they need to protect themselves.

**CHAIR**—You do not look all that old to me, but what used to happen in the old days?

**Mr Phelan**—I have been in the organisation for 14 years. Right from the beginning, information from banks and like institutions, before they were sued, could just be handed over.

**CHAIR**—You would just go to the institution and ask, ‘Could you help us here?’ and they would say, ‘Right.’

**Mr Phelan**—That would be an accurate assessment of what used to happen. It certainly does not happen any more, and it has not happened for at least the last 10 years.

**CHAIR**—I am just trying to get a mental picture of what happens. What happens now is that you would get your warrant and swear for it on the basis of the material that you have got. Then you would go to, say, a bank, and start going through the documents. Then what happens? If you find something that is about to put you on to another path, you would say, ‘I can’t go down that path because it is not covered by the warrant.’ Is that the sort of thing that happens?

**Mr Phelan**—It is a very difficult question to ask when talking about how you execute a warrant on a bank. As you can image, you cannot walk into a branch or their records section and say, ‘Let’s find it,’ because it takes a lot of time for them to find their records. Normally you would supply them with the information that you require, they would go and look for it for you, then you would execute the warrant once they had found it, rather than getting the warrant to go and look for it, because you cannot close down a branch and you do not want to close down their records section. It can sometimes take them a week or so to find something.

**CHAIR**—So they find it. If, when they get it, you look at it and say, ‘There is some additional material here,’ you have to then go back and get another warrant?

**Mr Phelan**—Essentially that is what occurs, yes. That can happen time and time again, particularly when, for example, you are following the money trail on a laundering investigation. You would appreciate that if you open up seven different false bank accounts and follow the information to where the transactions eventually go, you might discover more accounts and they will not be within the scope of your original warrants, so you will have to go and get some more.

**CHAIR**—I suppose you cannot make your application for the warrant wider?

**Mr Phelan**—To do so you would have to tread very warily. You really do run the risk of having your warrant thrown out in court and then, of course, it will be subject to the judge's discretion as to whether or not any of the information will be allowed in. Quite frankly, our members are not prepared to take that risk. We would rather take time in the investigation and get it right—

**CHAIR**—Take years?

**Mr Phelan**—Yes, you would rather do that than chance your arm.

**CHAIR**—Otherwise you might do three or four years on an investigation and get it thrown out.

**Mr Phelan**—Yes. You would also appreciate that within a long-term fraud investigation, for example, it might only be one or two documents within the whole scope of everything you eventually seize that is the 'smoking gun', for want of a better word. You do not want to risk having that particular smoking gun thrown out because you were less than diligent in the way you executed or obtained your search warrants.

**CHAIR**—As there are no more questions, thank you for coming to appear before the committee, Mr Phelan. Will you thank the association for coming again. They really do give parliamentary committees a lot of help, so I would like to acknowledge that.

**Mr Phelan**—Thank you very much.

[11.29 a.m.]

**DELANEY, Mr Grahame, Principal Adviser, Commercial Prosecutions and Policy, Commonwealth Director of Public Prosecutions**

**GRAY, Mr Geoffrey, Assistant Director, Criminal Assets, Commonwealth Director of Public Prosecutions**

**CHAIR**—Welcome. As you know, this is an inquiry into the issue of entry and search. It is looking at the classic balance—which you no doubt do day in and day out—between the public interests of keeping the society a free and caring one, the sort of society we want it to be, and of keeping it one that is as free as possible from crime. It is looking at the balance between those public interests which you would have read about in cases over the years, and we thought you would be able to give us the answer.

**Mr Delaney**—I do not know about giving you the answer, Senator. It is a very fine balance. I will make some opening remarks which will give you an idea of where we stand on the general issue of search and entry. As we are responsible for Commonwealth prosecutions, my comments will be directed primarily to the entry and search for evidence of offences rather than the warrants that monitor compliance. I will be primarily looking at entry and search for the purposes of criminal law enforcement, rather than a regulatory purpose.

The committee will be aware from previous evidence that the courts insist on strict compliance in the legislation that governs entry and search powers, and that such legislation is construed strictly, so I suppose it is fair to say we take a conservative and cautious approach to the advice we give to law enforcement agencies. We regularly rely upon evidence that has been secured by means of search and other warrants in the prosecution of serious drug prosecutions, fraud, and corporate and commercial prosecutions. We therefore have an interest in such evidence being obtained in compliance with the law because, as the committee would appreciate, if it is not there will be questions about its admissibility. And that is apart from any other reasons of ensuring that there is compliance anyway, just simply because of the fact that it is the law.

One of our functions, which has now been more specifically made in a regulation, is to give legal advice on law enforcement issues generally, as well as on particular investigations, and to assist the AFP and other Commonwealth authorities with compliance with the provisions governing search warrants. The DPP has produced, and Mr Gray is the editor of, a manual on search warrants which is provided to law enforcement agencies or those departments that have a law enforcement function. In another publication, which is the guidelines for dealings between Commonwealth investigators and the Commonwealth DPP, there is a requirement for Commonwealth investigators generally to consult with the DPP before issuing warrants. In that way we hope to have a general supervisory role in seeking to ensure that there is compliance with the rather rigorous provisions in relation to search and entry.

**Senator MURRAY**—All people who apply for warrants, or just the police?

**Mr Delaney**—All government departments that have a search warrant power. We have issued guidelines that require them to seek advice on the information before the warrant is applied for. Our expectation—and we have no reason to think that it is not being adhered to—is that if an agency other than the Australian Federal Police were to be seeking a warrant for evidence of criminal offence, they would seek our advice on the information that is to be presented to the magistrate for the issue of such warrant.

**Senator MASON**—For example, the Health Insurance Commission?

**Mr Delaney**—Yes.

**Senator MURRAY**—Are there less able, less capable or less professional organisations or authorities compared to others? Is there a lower standard in anyone who comes to you and needs much more advice, much more help in getting it right?

**Mr Delaney**—If there is a need for a greater degree of advice it is only perhaps because the practice is not as regular in those areas as it would be with the police, so the familiarity is probably somewhat less. But I would not put that in terms of competence; it is simply practice, I think, and the more practice people have at these things the better they get at it.

**CHAIR**—On this issue of the investigating authorities and prosecuting authorities having to stick strictly to the law, is Ridgeway the last case that that is discussed in or is there a series of cases that we ought to be looking at?

**Mr Delaney**—I think there is a series of cases. I do not know whether the Australian Federal Police provided the committee with part of the manual that was distributed.

**Senator MURRAY**—They were going to. We asked them for it.

**Mr Gray**—My understanding is they did.

**Mr Delaney**—There is a fairly good summary of the requirements for warrants in that document. Perhaps I could very briefly indicate the sort of model that we recommend and that Mr Gray oversights. In general in relation to document cases, fraud cases, we set out in the manual a sort of pro forma for what has been called a three condition warrant. The requirement and the information for the magistrate is that, firstly, the document will list the classes or categories of documents or things that are being sought. Then it will limit that by relation to particular individuals or particular transactions. Then, in the third condition, it will specify the reasonable grounds to suspect that those documents or things will provide evidence of specified offences in the information. That is, if you like, a minimum requirement we would put in most cases for document intensive investigations.

The manual has a couple of hundred pages, so it is quite comprehensive. It gives what we would hope is fairly comprehensive guidance but, we stress, has to be the subject of particular advice in a particular case. So there is the manual to give overall guidance and then we ask that informants come and see one of our officers before they seek the issue of the warrant before the magistrate. We cannot say that there is universal compliance with that

request, but I know of no instances where it has not occurred. I do not know whether Mr Gray knows of any.

**Mr Gray**—No. The last thing most agencies want to do is go and get search warrants without support and approval from the DPP.

**Senator MURRAY**—It struck me during this inquiry that at the level of warrant seeking, particularly because of the involvement of the DPP and the need to get a matter through court, the procedures and practice followed are of quite a high standard. It seems to me that our major problem is in the non-litigious area where authorities have search and enter provisions which are not subject to warrant powers, which are a consequence of their own powers. Those would seldom run on to you, would they? You would seldom have the opportunity to evaluate those against your own processes?

**Mr Delaney**—Yes, that is true in a general sense. There are occasions when we seek to have adduced as evidence material that has, for example, come from an exercise by the tax office of its powers, and there has been a later criminal investigation. But, except to that limited extent, we really do not have a lot to do with the exercise of regulatory powers, if I can call them that.

**Senator MURRAY**—How different are you as a DPP in terms of your oversight of this area? How different would you be to state DPPs? Is there a varying standard throughout? Do you act as the kind of model or—?

**Mr Delaney**—It is a little difficult to talk about other DPPs because I am not familiar precisely with the way in which each of them approaches it, but I think it could generally be said that we are perhaps more available in terms of advice on such things as search warrants. I do not know that all DPPs provide that particular advice.

**Senator MURRAY**—I do not ask this question idly. I ask it because there are a number of laws where federal matters will in fact be taken up in the state court system. State magistrates issue the warrants and so it goes. I just wonder whether in fact there is a need for—or whether it happens automatically—the various DPPs to consult with each other on best practice, as it were, in these areas.

**Mr Gray**—Ninety-eight per cent of all Commonwealth cases are prosecuted in the state courts, but the search warrants are still obtained under Commonwealth law. They are issued by state magistrates.

**Senator MURRAY**—That is right.

**Mr Gray**—It is a complicated procedure, but they will apply the Commonwealth law, so section 3 of the Crimes Act gives power to state magistrates to issue search warrants. Occasionally, you will get a case where we will prosecute on the basis of evidence obtained under a state warrant, but that will be because the case begins as a state investigation. They get the evidence and then decide it is really a Commonwealth offence, and then material will be passed to the Commonwealth.

**Senator MURRAY**—But are there cases where the state DPP will prosecute Commonwealth law?

**Mr Gray**—There are. We have joint trial arrangements; most of those are joint trial situations. So, if there is an importation and a drug deal, you have a mixture of charges. Sometimes we prosecute those with the state charges thrown in, and other times the state DPPs will do them. Yes, it can get fairly complicated. The issue of the warrant will depend on what offences they are looking at at the time they execute the warrant. So, in a situation like that, if it is a state bust and there is a state organisation distributing drugs, yes, you could get them going as state warrants—get evidence of Commonwealth offences and prosecute the Commonwealth offences. But, ostensibly, the warrant has been issued because, on the basis of the suspicion of state offences, they would never go in—

**Senator MURRAY**—But they have not come to the federal DPP for the advice or guidance which was the point of discussion—

**Mr Gray**—No, in that situation—

**Senator MURRAY**—and they might not have the practice of going to the state DPP if they have not developed that culture if they have not developed guidelines. That is what lies behind my question.

**Mr Delaney**—That is possible, I have to say. I am sorry, I cannot help you on a jurisdiction by jurisdiction basis as to which DPPs have arrangements with the state police to give such advice.

**Senator MURRAY**—You know how all the auditors-general get together and have discussions and all the liquor licensing division directors in the country get together. Do you have that sort of thing?

**Mr Delaney**—Yes. There are meetings of all state DPPs and the Commonwealth DPP, which occur two or three times a year.

**Senator MURRAY**—But this area has never been an agenda item?

**Mr Delaney**—I am not aware whether or not it has been, but I can certainly find that out.

**Senator MURRAY**—Is it an appropriate matter to be encouraged? Is there any indication that other state jurisdictions might possibly be of a lower standard? Without embarrassing you and making you point the finger, is there a possibility?

**Mr Delaney**—I suppose it is always possible, although I must say that I have not seen any evidence of it myself.

**Mr Gray**—They operate differently. We see it at various levels. We have never done any detailed studies, but one of the other areas that I get involved in is mutual assistance in criminal matters. We have an arrangement with the police, and we do a similar thing with

search warrants. We provide the advice and support and passing through. I have never come across another DPP which does the same function, and I think the same thing would flow through to search warrants. The state DPPs do not operate in the same way that we do and in the same environment. In a lot of the states, they still have police prosecutors running a lot of their cases. Most of our cases are in the cities.

**CHAIR**—The Victorian police still prosecute, I think, don't they?

**Mr Delaney**—Yes.

**Senator MURRAY**—And Western Australian.

**Mr Delaney**—I think there is a bit of a tradition as well within the state police to have their own legal officers who perhaps check things like search warrants.

**Mr Gray**—It really just cannot translate. I am not saying it should not be discussed and there might not be scope for discussing it, but to say, 'This is the way the Commonwealth DPP operates; therefore, everybody else should,' would never be asserted by us.

**Senator MURRAY**—You might not, but we might. I do not say that lightly. I think it is unlikely that other state parliaments will conduct an inquiry such as this. I think it is likely that this report will be a useful document for all jurisdictions that are interested in this area. If your activities were best practice, then it would be appropriate for us to point that out and perhaps make some commentary on the matter. That really lies behind it.

The other thing also exercising my mind is the prospect that, with the recent court decision—and I do not remember which one it was; but it was the one that spins Corporations Law back into the hands of state courts—we may see many more prosecutions, warrants and all the attached paraphernalia going back into state jurisdictions.

**CHAIR**—That was Wakim. Do you have any comments about what courts ought to do if evidence is obtained in breach of a warrant? Should the courts be ready to throw it out holus-bolus, or what? Do you have any thoughts about that?

**Mr Delaney**—I think the way in which the discretion is exercised now, inasmuch as it is a discretion rather than as in some other jurisdictions where there is automatic exclusion, is a better approach than an automatic exclusion. I think the courts are reasonably well placed to judge the seriousness of the offence that is being prosecuted, the nature of the breach and its seriousness and the nature of the evidence and weigh those three things up and decide whether, in their discretion, there ought to be an admission of the particular evidence. Whilst it is hard to think of other sanctions, the public interest really is not served, I do not think, when admissibility is denied in a serious prosecution because of a technical breach.

**CHAIR**—I imagine the difficulty a judge would have if he or she were put in a position where the evidence has been obtained in fairly blatant breach of the rules. What is he or she going to do? Is he or she going to say, 'You shouldn't have done that'? You said yourself that it is difficult to see what else can be done. Have you thought about that at all—what alternative sanctions could be applied?

**Mr Delaney**—This is a personal view, and I do not attribute this to the director personally. My view is that the public interest is better served if the documents or the evidence is admitted and the public interest is served that way and, if there has been a breach by particular officers of their code, they are dealt with separately.

**CHAIR**—Separately.

**Mr Delaney**—Yes—by way of disciplinary charges or whatever the case may be. It is more important that the prosecution goes forward. You can get some absurd situations where admissibility is denied in an important prosecution because of something that has been done by servants of the Crown. You have to look at what the motivation was. If it was a simple mistake, there is even more reason for—

**Senator MASON**—Do you consider issues like that in exercising your discretion to prosecute?

**Mr Delaney**—We do to the extent that we have to apply the test of whether there is a reasonable prospect of conviction. We have to make some judgment about the likelihood or otherwise of admissibility of particular evidence. If our conclusion is that it will be rejected, that may well affect our decision on the prospects of whether there will be a successful prosecution.

**Senator MASON**—Is there a public policy or a public interest component in the exercise of that discretion?

**Mr Delaney**—There is. That is the other side of the coin. Again speaking personally, if there was an arguable case that the material ought to be admitted, I at least personally would tend for the prosecution to go forward and for that argument to be had before the court.

**CHAIR**—What was that case from South Africa, from your part of the world, where the British police took a person and brought him back and he was prosecuted absolutely, according to Hoyle. The Appeals Court or the House of Lords threw it out on the basis that they should never have taken him from South Africa in the first place. What was that?

**Mr Gray**—That was an extradition case. It was Horseferry Road Magistrate's Court.

**CHAIR**—That is right.

**Mr Gray**—He is, at the moment, in Australia and we are trying to send him back, on different charges. His argument is that they are the same charges. These people get around. He has been in prison in Australia. I have forgotten his name—but I think it was Bennett.

**CHAIR**—In writing our report, we have to say something about this.

**Mr Gray**—In an exercise of discretion we still get some very strange decisions. We lost a prosecution for a major drug importation coming in Western Australia. The TI warrant, the telephone intercept warrant, was not dated. We had all the evidence thrown out because the warrant was not dated. Recently, a warrant was obtained by a police officer who was

attached from the South Australian police to the NCA. He took all his powers only under the South Australian law, if there was a piece of paper signed by the Commissioner of Police. They forget to get one. Again, we have lost the evidence for the warrant—

**Senator MURRAY**—Can you appeal that?

**Mr Gray**—No, we cannot.

**Senator MURRAY**—Isn't that one route?

**Mr Gray**—Actually, we can in that South Australian case because it is a preliminary ruling on evidence. We do have a mechanism.

**Senator MURRAY**—But isn't that one of the things that should be available to prosecuting authorities—that the exclusion of admissibility of evidence should be capable of appeal?

**Mr Gray**—I think that is coming. The problem has always been the mechanics. If you lead your evidence at trial and you get an adverse ruling, what do you do? You stop the trial and go away and appeal. Then there are appeals from the appeals and it goes all the way to the High Court and the jury has spent six months sitting in a back room.

**Senator MURRAY**—But the inference behind your remark is, here is a particular judge with a rather narrow and technical view of the world where the greater good is not served by a minor action. There was a famous case in America, which I do not remember the name of because I do not have your memory for these things, but in the 1970s an American judge refused the admissibility of evidence of murder when a car was stopped for a speeding offence, the officer forcibly opened the boot and there was a dead body in the boot. But he would not allow the prosecution on that basis.

**CHAIR**—A lot of it depends upon the mood of the moment. If the police have been overzealous, the courts tend to react to that. A lot of it comes back to the grounds of whether they can be assured the system is running fairly. If you put yourself in the position of the judge, you want to see fairness done. If the system looks as if it has been perverted, you are going to take a different view from one where you think that the whole show has been run fairly well and this is a technical view. That is why it is so important that the whole investigative prosecutorial process is seen to be done. I must confess that at the federal level that seems to be the position.

**Mr Gray**—There are some developments in this area. The South Australian one that I mentioned is interesting. What is tending to happen these days is a greater move to resolving issues as preliminary issues before the jury are empanelled. I had not realised until I was looking at the case that I mentioned that things had got as formalised in South Australia, where the prosecution presents a list of its evidence, the defence indicates those bits which are challenged and indicates the grounds of challenge, they go before a judge and he makes the rulings. There is, in fact, a right of appeal.

**Senator MURRAY**—To whom?

**Mr Gray**—It would go up to the Full Court, or the Supreme Court if it is a district court judge.

**Senator MURRAY**—Do you regard that as a favourable development?

**Mr Gray**—It is a brilliant development because you get those preliminary issues sorted out before the jury are there. You can get them sorted out in the cold hard light of day, not in the heat of battle.

**Senator MURRAY**—Isn't that an American and indeed a European system, where you have a pre-trial?

**Mr Delaney**—I am not sufficiently familiar with those systems. It does vary from jurisdiction to jurisdiction in Australia. It is a bit caught up in the concept of prosecution and defence disclosure and getting the issues narrowed prior to the trial. There is some resistance to that from some lawyers because they feel that the prosecution carries the onus right through and therefore they should not have to say anything at any stage, whereas others say that it just isn't feasible any more to have trial by ambush.

**Senator MURRAY**—Yet you have to deal with laws and cases such as those the ATO have where reverse onus of proof applies, when it is the defendant who has to prove the other way around.

**Mr Delaney**—Yes. They are usually of a less serious type, I guess.

**CHAIR**—Do you want to say something about the difference in the reliability of evidence you might get when somebody is being questioned by the police, or by some other authority, and he or she might feel that he or she cannot really do justice to himself or herself because of the emotion of the situation and documentary evidence which is prepared by people without that sort of pressure on them and which can be gathered up in an entry and search situation?

**Mr Delaney**—I think that is a fair differentiation because documents speak for themselves. They were either found where it is said they were found or they were not. In big document cases it seems to me rather absurd for there not to be the sort of preliminary processes that Mr Gray has been talking about, to have a decision made between the prosecution and defence as to what precisely is an issue. Is it contended that these documents are not those of the defendant or those prepared on his behalf? Let us get those things sorted out before the trial. If there is a ruling that either party does not think is a correct one, they can be appealed at that point and the situation sorted out. Often you will have a very long trial, things will be put in issue during the trial, rulings will be made and at the end of the day, if there is an acquittal and the prosecution feels aggrieved that some of the documents that have been ruled out ought to have been ruled in, that is the end of it; there is no prosecution appeal, except in Tasmania and WA.

**CHAIR**—What happens in Tasmania and Western Australia?

**Mr Delaney**—The DPPs have a right of appeal against an acquittal for the wrongful rejection of evidence or grounds of that nature. They are the only two jurisdictions, to my knowledge.

**Senator MURRAY**—But they are examining the possibility now of the defendant case being put before as well, which is interesting. Let me go back to your submission and see if I understand it correctly. You say that, in your view, of the search and entry provisions you deal with, none are excessive in power or badly administered.

**Mr Delaney**—Yes, that is so, so far as our knowledge is concerned.

**Senator MURRAY**—Secondly, you support the AFP's submission in the changes they are arguing for.

**Mr Delaney**—Yes.

**Senator MURRAY**—Thirdly, you believe that the issue of discretion should be reasonably exercised along the lines we have been discussing.

**Mr Delaney**—Yes.

**Senator MURRAY**—Fourthly, you believe, if I understand it correctly—and you may have other points—that, where evidence is uncovered which might be attractive for another prosecution through search and entry, that should be appropriate and followed through and there should be no restraint on that happening.

**Mr Delaney**—Yes.

**Senator MURRAY**—Some of the evidence earlier was interesting from the police union about a situation where they observed a state matter, kind of phoned through on a friendly basis and said, 'We will wait, and you come along and serve your warrant.' I am not sure that is possible in every state.

**Mr Delaney**—No, I am not aware of the particular situation in each state either.

**Senator MURRAY**—I think there are real difficulties.

**CHAIR**—There seems to be a lot of law and understanding regarding the gathering of information through entry and search for prosecutions. I suppose you would feel shy about it but have you any comments about entry and search for the gathering of information by the ATO, or any other body for that matter? Would you know any law on this? There are a lot of provisions which enable various bodies to enter premises and look at things for the purpose of gathering information for all sorts of things.

**Mr Delaney**—I have to confess to not being particularly across that area.

**CHAIR**—Do you know anything about it, Mr Gray? Do you know any cases of it?

**Mr Gray**—There are cases on the section 263 entry powers. May and DCT were fairly recent cases. I do not think I have a note. They deal with legal professional privilege and 263 powers. In regard to the general powers of entry outside the tax area—the City Bank case springs to mind—I do not think there have ever been any cases. The fact that there have not been any cases suggests to me that those powers really are not being abused. We only see little points. A case will come up and the evidence initially came from the exercise of those powers. We have some involvement. We have done some drafting of the monitoring warrants. To assist agencies we have done search warrants for them and we have also done monitoring warrants. So there are little things here and there, but I have never seen anything to suggest that those powers are being abused—leaving aside tax; I think tax can speak for themselves—by all these other agencies.

I suspect the reason is because, although in theory they can go into any premises at any time, they do not. Meat inspectors go into meat plants and deal with the same people. Everybody knows the rules of the game. It is very hard for us to say there is not a problem there but we have never seen any evidence to suggest it is a real—

**Senator MURRAY**—There was something in your submission that our cheat sheet said we should have asked you, and we probably should. It says:

The DPP supports an amendment to expand the seizure power, but notes that there is a question whether such an expansion is within Constitutional power.

What constitutional power?

**Mr Delaney**—I think that was for state offences.

**Mr Gray**—Yes. The AFP person spoke about the common law power of seizure. So an AFP officer goes in with a Commonwealth search warrant and sees evidence of state offences. Nobody was quite sure what the position was at common law. When section 3E was enacted back in 1994 the position was codified, essentially, in that act. It is limited to giving power to seize other evidence if it is offences against other Commonwealth acts. The reason it was limited—we know, because we have had discussions with the Attorney-General's Department—is they got constitutional advice to say that the Commonwealth cannot enact a provision which allows a Commonwealth officer to seize evidence of state offences. That is why it has been narrowed down. I personally take a different view of the constitutional power. We have had discussions with the department and suggested that they revisit that issue. Hopefully one of these days they will. Obviously, if they revisit and they get advice confirming these constitutional limitations, then that is not our business.

**Senator MURRAY**—If COAG agreement was established, it would not be a problem.

**Mr Delaney**—Yes, true.

**Senator MURRAY**—I cannot understand why the second step has not been taken.

**Mr Gray**—We would fully support anything because, as the man from the AFP Association mentioned, it is silly.

**Senator MURRAY**—Right behind the questioning I have been pursuing is I have always been offended by the idea in Australia that the rights and obligations and duties of our citizens vary according to the state. I find that extraordinary here—Australian citizen or not. The search and entry powers are typical of that. The more uniformity, the more harmonisation and the more consistency we can establish the better. I would have thought this is an instance where that desire of mine, which I think is shared by a lot of people, will be right.

**Mr Gray**—It is hard to comment on that other than in general terms that we support uniformity and consistency.

**Senator MURRAY**—It is open to this committee to make a recommendation that that be pursued and be pursued via the mechanism of COAG agreement. I find it difficult to expect any resistance. I do not know what you would expect, Mr Chairman.

**CHAIR**—It might be a matter of who can give power to whom, I think—whether the states can refer power to the federal police.

**Mr Delaney**—Yes, there would be those issues, I suppose.

**CHAIR**—Are you getting some advice about that?

**Mr Gray**—No, it rests with the Attorney-General's Department. They administer the act. It is based on operational experience. What the DPP have is operational experience of how the provisions work in practice. What has come up is a number of issues and when they do we pass them on.

**Senator MURRAY**—I wonder if I may request formally through the chair that you ask the secretary to write to the Attorney-General's Department and let us get a formal note from them on this issue.

**Senator MASON**—On section 3E, before the amendment you relied on the common law power, but in effect you could garner evidence for state offences as well as Commonwealth offences. Is that right?

**Mr Gray**—It used to be that section 10 of the Crimes Act did not say anything about material falling outside the wire. So there are English cases that we would rely on. We would advise the police that if they are on premises lawfully and they come across evidence of an offence, it is their duty to seize it—let alone whether they should have power to do it. I find it bizarre that a police officer on premises sees offences being committed and cannot do anything about it. But that was our interpretation of the common law. Essentially, I think if there is a constitutional limitation with what can be done under statute, I suspect the same—

**Senator MASON**—Why does the common law not just extend that? What I do not understand is: okay, there is legislation, fine. Even if there is not, and unless the constitutional power has been deliberately taken away, why does the common law not extend the power?

**Mr Gray**—I suspect because we are talking about the common law of the Commonwealth, which is a very interesting concept and nobody quite knows how far it goes. If there are constitutional limitations on the statutory power, then there must be constitutional limitations on the common law power as well. So it is possible that we were misinterpreting the scope of the common law power.

**Senator MASON**—Originally, before the amendment, yes.

**Mr Gray**—We were never quite sure. That was why we welcomed the issue being addressed in the legislation. Unfortunately the provision they came up with was a little more narrow than we wanted. So it went halfway. It confirmed that a police officer can seize things outside the warrant, which was great. It then put a limitation on how far that could go. That was another point I was going to raise.

**Senator MURRAY**—It must have relevance, surely, when there are numerous laws where harmonisation has, in fact, occurred, where the COAG meet, agree and duplicate the laws and so on. But it does not automatically run on, does it? Even where we have existing COAG agreement for dozens, perhaps hundreds, of laws—transport, health, you name it—section 3 still prevents you from crossing the boundary between a Commonwealth law and a state law, even if the two have similar intentions, doesn't it?

**Mr Delaney**—Yes, there is that limitation.

**CHAIR**—It gets down to that idea of the hot pursuit—of the policeman from Victoria pursuing somebody who drives across the Murray. What is the hot pursuit, here? Is it in sight? How does that work?

**Mr Delaney**—I think it is a classic question of fact and degree.

**CHAIR**—But if you are not in hot pursuit, you have to get an extradition warrant.

**Mr Gray**—I would like to finish what I was saying before, now that I remember what else I was going to say. There is an argument which, from time to time, people have wanted us to run with, that a police officer executing a warrant carries with them all the powers they would have as a citizen. If a citizen finds evidence of offences against a state law, they can seize that evidence. There is an argument that, outside the warrant, there are powers that come with it. As Mr Delaney said, we take a conservative view, and if we do not think the courts are going to favour those arguments, we advise the police not to act on them.

**Senator MASON**—Do you remember all those cases about the powers of the constable? Do you know those powers of the constable and Commonwealth law?

**Mr Gray**—I do, but the contrary argument is that the power of entry is given under Commonwealth law. The Commonwealth law says what can be done. It is a sort of codification argument.

**Senator MASON**—Right. So the Commonwealth law narrows the powers of the constable and the citizen?

**Mr Gray**—Yes. The position would be different if you were invited into somebody's house, wandered around and saw evidence of offences. What you could do then is totally different from what you could do if you were there under a warrant.

**CHAIR**—This brings us to the question Mr Phelan was talking about: the need to get a series of warrants and to swear them out before different magistrates, depending on what day the police go along. Do you have any comments on that? Would you just agree with him?

**Mr Gray**—I am not sure of the question.

**CHAIR**—I do not know whether you heard Mr Phelan saying that one of their problems with the investigations is that, if they go to a bank—it could be a friendly bank—the bank will want a warrant to protect itself. He was saying that the present system is one where the police have to keep going back to get a warrant to extend the investigation, even though the extension is not all that big, as I understood from what he was saying.

**Mr Delaney**—Yes. The other point he seemed to be making was that he thought there might be some benefit in a 'notice to produce' provision for the non-adversarial execution of warrants, if I can so describe it. That is a reasonably difficult area, and we now have financial institutions generally content with the way things are at the moment, where the police will go down and talk to the bank people, tell them generally what the warrant is going to say, perhaps give them a copy of the warrant and then come back once the material is collected.

**Senator MURRAY**—You said 'perhaps'. Do you mean they are not obliged to?

**Mr Delaney**—No. This is a friendly approach—if I can so describe it—because what they are entitled to do is go down to the branch and say, 'We have a warrant; we are going to do a search.'

**Senator MURRAY**—Yes, but surely you would get a copy of the warrant automatically.

**Mr Delaney**—Yes. What I am saying is that they get advance notice.

**CHAIR**—What I think is being said is that, if you had a warrant and went down in an unfriendly way, the bank would say, 'There you are. Search through the files.'

**Mr Delaney**—Yes. And it disrupts the business of the bank.

**CHAIR**—And it does not help the police because the police have got a lot of stuff to look at—

**Mr Delaney**—Precisely.

**CHAIR**—in trying to find the needle in the haystack, and the bank has got confusion.

**Mr Delaney**—Yes. The approach often is to give a copy of what is going to become the warrant, allow the financial institution to gather the material, and then come down with the warrant and do it in that way.

**CHAIR**—Then if there is any complaint from the customer, they can say, ‘Here’s my warrant.’

**Mr Delaney**—That used to be a real difficulty because financial institutions were very reluctant in the early days. Going back to the 1980s, there were challenges on the basis that they had their duty of confidentiality. The question for the courts was: did that override the search warrant? The ultimate answer was no, it did not, but they went through all that litigation because they were concerned about suits from customers, that sort of thing. My view is that that has really been resolved now. To go back to talking about notices to produce and that sort of thing would perhaps lead to another round of litigation to find the circumference, I suppose, of the banks’ rights, the customers’ rights and the law enforcement officers’ rights.

**CHAIR**—Have the DPP’s officers adjusted to the present situation well enough?

**Mr Delaney**—In general terms we have, yes. I understood the AFPA representative to be saying that it is reasonably onerous on the AFP officers. On the other hand, there is an independent magistrate who vets the information and there is the protection that the financial institution obtains through that process.

**CHAIR**—Thank you, Mr Delaney, for coming down and giving us your wisdom, and I say that advisedly. Thank you, Mr Gray. It will be interesting to see what happens with the constitutional issues because there is only one group that says what the constitutional answer is.

**Mr Delaney**—Ultimately, that is precisely right.

**CHAIR**—And they change from time to time. Are there any prosecutions going at the moment?

**Mr Delaney**—Yes, we have got numbers at the moment, generally in the drugs area.

**CHAIR**—What about the fraud area and corporate area, which was an issue Mr Phelan was interested in because that seemed to be where there was a lot of work involved? How many prosecutions would you have for fraud which involved big investigations?

**Mr Delaney**—It is hard to be precise but we would have half a dozen very large ones at any one time.

**CHAIR**—That is a lot.

**Mr Delaney**—Yes.

**CHAIR**—Thank you again.

**Proceedings suspended from 12.18 p.m. to 2.06 p.m.**

**ANDERSON, Mr Iain Hugh Cairns, Solicitor, Australian Taxation Office**

**DARMODY, Mr Mark Francis, Manager, Strategic Management Technical, Large Business and International, Australian Taxation Office**

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

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

**PEARCE, Mr Thomas, Officer, International Tax Division, Australian Taxation Office**

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

**CHAIR**—Welcome. Thank you for the further submission, which was very comprehensive. Did you want to add anything to that or shall we go straight into questions?

**Mr D'Ascenzo**—We have a comprehensive submission, so I am happy to go straight to questioning.

**CHAIR**—We have had some evidence this morning to do with guidelines and a suggestion from the Institute of Chartered Accountants that those guidelines be put into legislation. The committee was told that the Australian Taxation Office had some difficulty with that. It was proposed that it be put into legislation because the guidelines as they now operate are unenforceable by the people who come up against the tax department. Would you like to comment on that?

**Mr D'Ascenzo**—In terms of legislation, that is really a question for government at the end of the day. In relation to the comment that the ATO has concerns, basically we would put our view to the government but it would be up to the government whether or not it decided that guidelines should be law or not law. Interestingly enough, in terms of enforceability and what the guidelines have tried to do, this is really not a search and access issue at all; it is a question of whether or not we would, as a tax office, try to treat accountants in a similar manner to the way that we treat lawyers having regard to legal professional privilege. At the time that those guidelines were developed—and they were developed in consultation with the bodies themselves and agreed to—the concept was that we should have access to information. In fact, it was never disputed in the whole process of those guidelines that the tax office had a right, and should have a right, to that factual material. When you look at the guidelines, what they provide is a protocol for us of how we should go about accessing that information.

Basically what the accountants said was, 'We accept that the scheme of the act is this way. The scheme of the act says that taxpayers lodge their returns based on self-assessment, they do not have to substantiate what they have put in the return in terms of taxable income, and the scheme of the act says that the tax office then has a right to go and check that to substantiate the claims that have been made.' What the protocols say is, 'Well, that is fine, but you should not be trying to piggyback off the technical advice that might be given, whether it is by accountants or lawyers.' We accepted that and that is why we have

developed the guidelines. But the guidelines themselves say that if, having gone through these various protocols, we are not able to get the basic information that allows us to check the veracity of their claims, then we should have access to what we call the source materials.

When we talk about enforceability in relation to the guidelines, they are guidelines, so there are limitations to judicial scrutiny of those things. But in one case where the guidelines were raised—I think it was the Deloitte's case—the judge there said that the guidelines provided a reasonable expectation on behalf of the taxpayers that we would operate in accordance with those guidelines. So once there is that reasonable expectation at law, if we do not operate in accordance with the guidelines then the courts can come back and say to us, 'No, there was a reasonable expectation of the taxpayer. It is as if you had not given them natural justice, so go back and do it properly.' I am saying now that, in view of that case, there is some judicial enforceability in that area.

Interestingly enough, the Institute of Chartered Accountants in their submission referred to a case that had been referred to the Ombudsman. I understand that the Ombudsman has now completed the examination of the case and has concluded that the tax office had been more than reasonable and that it actually had given the taxpayer, the adviser and the clients every opportunity to provide information to verify their claims. Indeed, the Ombudsman was disparaging about the accountant who was trying to use the guidelines as a blocker, as a means of frustrating processes rather than helping them.

**CHAIR**—So you are saying that whether it ought to be in legislation is a matter for government, but that the guidelines do give some legal protection in any event. Do you know the name of that case?

**Mr D'Ascenzo**—It is Deloitte's. Would you like a copy of that decision?

**CHAIR**—Yes, thank you very much.

**Mr D'Ascenzo**—Would you also like a copy of the guidelines? We can provide you with that. We have not got it here.

**CHAIR**—That would be nice.

**Mr D'Ascenzo**—We can do that. In terms of the process, this is if you go outside and seek a redress outside the office itself. But if people have a concern about the guidelines not being applied, the avenues for complaint, both internal and external, which we have on all our access powers apply here as well, so it is not a problem about the taxpayer, aggrieved, going forth and seeking intervention at senior levels. In the case cited by the Institute of Chartered Accountants, that actually happened. In fact, it went through very senior people in the organisation who gave due regard to what ultimately were found to be vexatious complaints.

**CHAIR**—In the submission you talk about 280,000 interviews or instances that occur. That is your estimate over the year.

**Mr D'Ascenzo**—It is really just a guide. I do not put any faith in 280,000 as being the number. We are just saying that it could be of that order.

**CHAIR**—There is a lot.

**Mr D'Ascenzo**—There is a lot. That is probably the best description.

**CHAIR**—Are they cases where you enter and search or are they cases where you just approach somebody and say, 'Can I have a look?'

**Mr Thompson**—That would include things where, with a third party, we would explain the 263 access and ask for access. It would include when we go to banks and ask for information; it would include when we are in business premises and ask for access to records. That would include the access in terms of section 263.

**CHAIR**—The Australian Federal Police Association said that, when they go to banks to get information, they go with a warrant because the banks want them. Have you got that problem or does the bank help you over that?

**Mr Thompson**—Sometimes we would actually go to the bank to seek access to documents if we know or expect that they are held on those premises. There might be other documents that are held in a general store. A number of banks might move things nationally and have them in a large storage area. In those cases, we might write a letter in terms of section 264, which would ask them to provide identified records.

**Mr D'Ascenzo**—In terms of banks, it is quite an interesting example of the way that we use our powers. Banks have confidentiality with their clients. Therefore, in trying to provide information that is relevant to the ascertainment of taxable income, we often use that third party information as a check in these circumstances. To protect the banks we do use the access powers, but it is often at their request that we formally take access there. Again, the thrust of our proposition is that we do see our role in terms of ascertaining taxable income as a distinction between that and what a criminal focus investigation would have. If we were conducting a criminal investigation, we would use the search warrant procedure.

**CHAIR**—I think there was a case recently where somebody was sentenced for an offence against the tax department, and the full court in Victoria then took away that sentence because it would be too long coming. I am trying to remember the name of that, but I cannot. In that case, I think the tax office had proceeded to recover the tax and then sent it to criminal proceedings much later down the line. Does that sort of thing happen much in the tax department? Why I ask that is because you make the distinction—which I think is a clear distinction—between trying to gather information for purposes of collecting tax and gathering information for prosecutions. Does the situation arise where you gather information for the purposes of collecting tax and then later use that for criminal proceedings?

**Mr D'Ascenzo**—There are two things. In terms of criminal proceedings, it is very important for us to see as early as possible whether a matter falls within a criminal perspective because on one footing we use a different range of processes. We have

guidelines with the Director of Public Prosecutions that indicate the sorts of criteria we have to look at. If the matter falls within those criteria it is taken to the DPP. We are then led by the Director of Public Prosecutions, and all the processes are usually done at their behest or through the AFP in other forums. If we have collected bona fide information just through our checking processes and that information discloses, let us say, a fraud or a criminal sort of charge, then we look at the guidelines. If the guidelines are there then we would refer the matter to the DPP.

But then the question of the admissibility of the evidence becomes more real. Usually, when we have acquired it for the purposes of our investigations, we would not have access to the documents because we do not have seizure powers. So, if we were to have a copy that we wanted to use for our own purposes, it would not be admissible. So we really face the situation where there are admissibility issues. That is usually subject to the discretion of the court, so one could conceive of situations where some of that information might get into evidence. But there is that distinction drawn about admissibility at the court stage. Also, if you look at it in the context of the number of cases where we innocently pursue the assessable income of a taxpayer and that turns out to be a fraud case, I think you will find that is a very low number in that sense.

**CHAIR**—When you say that you do not have seizure powers—

**Mr D’Ascenzo**—I was referring to the income tax side of things. Sales tax has some and excise has some as well.

**CHAIR**—Yes. Do you go into premises and make copies; what do you do?

**Mr D’Ascenzo**—We are able to make copies. Sometimes it is just a question of having a look at the record. If it reflects what the taxpayer has said, no copies are necessary. We are not going in there for any subsequent curial purposes. We are just there to check the veracity of what they have put in the return.

**Senator MURRAY**—But, properly speaking, you cannot make photocopies; you have to make notes. Isn’t that right? You cannot physically take the—

**Mr D’Ascenzo**—I think we can make photocopies, but we cannot make them away from the premises.

**Senator MURRAY**—That is right.

**Mr D’Ascenzo**—In those circumstances, if we want to take photocopies, we ask the taxpayer whether we can use their facilities.

**Senator MURRAY**—The seizure provisions would prevent you from doing that.

**Mr D’Ascenzo**—That is right. The point is that we do not necessarily go there looking for evidence. It is very much a verification of what they have put to us. The scheme is: ‘Put it to us, don’t give us the substantiating information and we will chase it up later in our risk management approach.’

**CHAIR**—But you want powers to go in there to check whether or not the self-assessment is working?

**Mr D'Ascenzo**—That is right.

**Senator MURRAY**—You have those powers.

**Mr D'Ascenzo**—That is right.

**CHAIR**—Can you go into private homes?

**Mr D'Ascenzo**—You raised this last time. I am conscious of the idea of going into private homes. I do not think that would be the typical situation. You have to remember that a lot of our inquiries are in relation to large companies and corporates. It is not the individual's privacy we are talking about here; it is often the privacy of the corporation. Some business people do run their businesses from home. That is where their records are kept. It is not usual to check the private homes processes unless there is some reason. Often that reason is associated with a joint task force activity with the NCA or the AFP. In that case we invariably use a search warrant instigated by the AFP or the NCA. I cannot remember going into people's homes other than in the contexts I have referred to. The fact is that it is there, and I can understand the committee having some concerns about that.

**CHAIR**—What concerns me is that people should be able to walk into premises without really any occasion for doing so—and you are part of the community as well. It seems to me that people should be able to go about their business without being set upon by anybody for any purpose.

**Mr D'Ascenzo**—I can understand that. There is a trade-off: if we wanted to run the system that way, we would say, 'You must substantiate all these claims with your return.' So you are going to impose a whole lot of compliance costs on a whole range of people as well as costs to the community in terms of being able to process that information up-front. Really, it takes our attention away from being able to use our resources in a much more holistic way—for example, to provide educational services, as we have to do through the new laws being introduced.

**Senator MASON**—So it is the price of self-assessment, in effect?

**Mr D'Ascenzo**—It is one of the aspects of it. The parliament, the government and the community say, 'You work out what the taxable income is and do not worry about trying to substantiate every claim. We are not going to go through every claim, but you have to give the tax office the right to come in and have a look at that factual information at the end of the day.'

**Senator MURRAY**—Has the tax office or a previous government ever considered differentiating your rights and powers by the class of taxpayer?

**Mr D'Ascenzo**—I do not think so. That could be something that could be considered.

**Senator MURRAY**—I will give you an example: as we all know, in criminal law and indeed in civil law classes of persons are distinguished. For instance, you do not have the same rights and powers over a child as you do over an adult, and there are the distinctions in law. It seems to me that real civil liberties require that the weak, the disadvantaged and those who are at the bottom of our society—not necessarily financially either, but just by virtue of being old, young or on their own—receive greater protection than giant corporations with huge resources. Would the tax office favourably consider a differentiation of rights by class of taxpayer?

**Mr D'Ascenzo**—Interestingly enough, right after the last committee hearing I was thinking over those possibilities in my own mind. I think one of the main concerns of some committee members was the concept of going into individuals' homes. We find that this is really not the common course of events. I do not think we have thought about whether or not it is favourable, but I think there is an area of consideration that can be given to that concept.

**Senator MURRAY**—The real ability to avoid tax in large amounts of money is to have either masses of people running through the black economy so that you get low amounts by large numbers and a large amount or relatively few people with huge amounts each. It strikes me, having listened to tax people in various forums around the parliament, that you are most successful and most focused on the latter rather than on the former. To wipe out the black economy is near impossible. People taking cash in the hand and not paying tax seems to be more difficult. If the rights or the powers you seek are relative to the efficiency of generating taxable income, is it appropriate on those grounds to distinguish a right; and, if you were to distinguish rights, how would you do it? Would you do it by entity type, by potential turnover or by potential revenue? How would you address such a problem?

**Mr D'Ascenzo**—It would be hard. I thought about that after our last hearing as a possible accommodation of different views. Thinking that through, you would have to address the sorts of issues you mentioned. One of the areas that I am a little concerned about is where a business has their records other than where they operate. If they have them in their home, that is really their home office. That is their office and that is—

**Senator MURRAY**—And that is increasing, isn't it?

**Mr D'Ascenzo**—That is right.

**Senator MURRAY**—It is not like the old days, when it was at your home only if it were also a farm, or something of that sort. But now I would suspect that you are moving into millions, not hundreds of thousands, of businesses in homes.

**Mr D'Ascenzo**—That is right. The other side of it is the economy side. Access to bank records would also be very important to us in that process, because that is one way of being able to reflect what income they would have had behind them. That is third party information. In the large corporate area, that should be okay in terms of public companies. Again, even the records of private companies are held off site so to speak. There are differences to be made and considered. I am not using these as total obstacles. I am just saying that it would be a difficult exercise. Whichever way we were to cut it, I think there

would be anomalies. Having said that, that might well be a valid trade-off for ensuring that the checks and balances are there that people think are appropriate. From a tax office perspective, we are more than happy to work with others to explore those alternatives.

**CHAIR**—Last time you were here you said that the culture in the department had changed—that it was quite obliging. You always get complaints from people who are going to pay tax, I suppose; there is no doubt about that. I was just wondering how you could encourage such a culture. It would solve a lot of the problems if the culture inside the office were to link tax with some sort of understanding that we are all citizens.

**Mr D'Ascenzo**—I gave a talk to the Tax Institute on the weekend, and they were actually interested in our compliance activities. I indicated to them that we are at a period of change in terms of massive tax reform, where people are going to be under pressure, and that we saw our role as being important in trying to support people in understanding and applying those rules. I was quite honest about that perspective, and I used words denoting that, in that sort of period, people deserve some tolerance in terms of having to cope with a great deal of change in a difficult period.

We have tried to build that into our Taxpayers Charter. Internally, we work very hard at trying to make sure that those values cascade and belong to the people at the front. I cannot stand here and say that everybody is built with a certain way of looking at things. That means that problems are not there. But we have tried to do training exercises that we can build upon. After our last meeting, I went back to make sure that we had effective training in the area of access and use of powers. I am in charge of the reskilling exercise associated with tax reform, and I am going to make sure that we do not drop training in that area. In fact, I am happy to keep that sort of training very high on our priorities.

There is the idea of making sure that taxpayers know their own rights. We spoke last time about the booklets, the procedures, the authorisation procedures and the establishment of specialist areas. So, if people are concerned, they can go back to people with perhaps a little more experience and a little more judgment in how to deal with those sorts of issues. I think there is a need to try to emphasise the avenues of complaints, both internally and externally, so that people understand that it is not going to be hard for them and that it is not necessarily going to require them to go to the courts—which might be expensive for some people, as you mentioned last time, Senator—but that they can have access to somebody else.

Whether or not that other group has sufficient powers to cover their area, the facts are that very few people have seen the need to make use of those avenues of complaint. Of those ones that have been made use of, invariably the people involved have seen that we have been very reasonable in the exercise. I think that is all we can do: we can train; we have guidelines; we can authorise; we can make sure they are accountable; we can tell taxpayers their rights; and we can make sure that, where taxpayers are concerned, they have avenues of redress both within the organisation and, if they do not feel that is good enough, externally, as well.

The proof is that we have been shown to be operating very well when we have been put to the task of complaints. I think that the one raised by the Institute of Chartered

Accountants is quite telling. The Institute of Chartered Accountants made a submission and one of their main concerns was this person who had a complaint. The Ombudsman said, 'The tax office has been very reasonable.'

**CHAIR**—All we can do is try to put up a structure which operates outside the tax office in some way that gives people the ability to put a restraint—and I do not say it in any sort of derogatory sense—on the tax office. But from what you say, that is already the system.

**Mr D'Ascenzo**—We are serious about these things. As you said, Senator, people do complain about their tax. The style of organisation we want to develop is one where there is sometimes a soft edge—where we can provide some support and help people through it. But sometimes it has that hard edge because, at the end of the day, our deliberations show that the income should have been more than perhaps they said it should have been. I cannot get away from that, but I think we have to make sure that the way we do it has regard to people as individuals and that it provides them with an understanding of their rights and avenues to ensure that that right is protected.

I would be sitting with you there if, consistently, those avenues were being used and the consistent judgment of others, or even internally, was that we were not doing our job well. In that case, I would have to say to you, 'I haven't succeeded in my task of trying to get the right mind-set with our own people, and maybe we have to do something different.'

**CHAIR**—I am trying to remember the name of that case.

**Mr D'Ascenzo**—I do not know the case.

**CHAIR**—It does not matter; I will get it. I think it went through a whole series of processes—not only the tax office but the DPP.

**Mr D'Ascenzo**—It is interesting. Again, since the last hearing, because of the sorts of issues that were raised, I wanted to see what our record was in terms of complaints. Some of my officers spoke to the Privacy Commissioner; some of my officers spoke to the Ombudsman. I arranged for us to have a good look at our problem resolution area. We have some figures on that.

**Mr Pearce**—I found only two cases that have been dealt with in relation to taxpayers who are concerned about our use of section 263 to access their premises. I will just give you a bit of background. This was received from a colleague who told me that there has been one matter that has been dealt with involving the execution of a search warrant by—

**Mr D'Ascenzo**—In fact, the complaints happened when we were actually in search warrant mode.

**Mr Pearce**—I withdraw the earlier comment about section 263. This was about the execution of a search warrant by AFP officers. Basically, the matter was under the Crimes Act and not the Income Tax Assessment Act. That matter is still ongoing; it has not been resolved yet. That is with our problem resolution service.

Another taxpayer complained that, instead of sending out a notice informing him that he was going to have a section 263 notice served on him and access taken under that section, we just turned up at the door.

**Mr D'Ascenzo**—And what was the outcome of that?

**Mr Pearce**—We found that his allegation, his suggestion, was incorrect and that, in actual fact, there was a notice in that case.

**Senator MURRAY**—Returning to the chartered accountants submission, they have not done any surveys on the problems of a more aggressive nature although, anecdotally, they believe that the tax office is being more aggressive about trying to recover taxable income, for which the Treasurer probably is pleased with you. They have noticed some statements by the commissioner and, of course, have noticed a couple of cases. Bearing in mind that it is all a bit insubstantial for us—there is not much evidence of it—nevertheless, on the grounds of equity, they are arguing that their existing confidentiality and privacy protections be extended to a qualified and limited form of professional privilege, but they do not seek to go as far as the full gamut of legal professional privilege.

There is an issue I raised with them which I would like to bounce off you, and that is the question of their clients' perceptions. My assumption is that every client believes that they are protected by legal professional privilege however they would describe it themselves with a lawyer. My assumption is also that most clients of accountants think the same thing applies to them. When I put that to the accountants, they said instinctively that they thought that was possible. If people are not protected by privilege, do you think it would be appropriate for accountants, in fact, to qualify any advice they give to their clients that they are not protected, with regard to the tax office anyway, from search and disclosure?

**Mr D'Ascenzo**—One of the reasons for setting up the guidelines for accountants work papers was that we did not piggyback on their advice. But I think if you asked the clients of accountants, and also the clients of lawyers, if they thought the facts of the transactions were subject to privilege, they would probably say no. Certainly in the accounting and tax agent profession, they have been very used to the previous assessing system whereby, when they lodged their returns, they lodged full and true disclosure. In fact, the law required them to lodge full and true disclosure, so the factual materials substantiating the claim were lodged with the return.

It was a very expensive exercise for everybody involved. It was a fairly inefficient exercise because, by the time people sorted out all the papers, the year was over and we were on to the next round of returns. We did not have any time to be proactive, to take any risk management approaches and to provide the range of services that we now provide. So if we went back to that system, we would want more resources to carry out the similar services that we provide now.

**Senator MURRAY**—Probably what I am outlining to you is potential danger—that is, at present, I think clients provide their accountants with fuller disclosure than they might if they were aware that, under the self-regulation system, they need not do so, and if they were aware that they were not covered by privilege. In other words, you are probably benefiting

from a lack of clarity in their minds as to what goes on and, from your point of view, as tax collectors, it might be counterproductive for clients of accountants to be, in fact, more fully aware of this kind of loophole.

**Mr D'Ascenzo**—I would be comfortable if they were to provide that proviso. Basically, our guidelines are public. There has been a fair bit of talk about them in the community. The tax profession knows where it stands. At the end of the day, it is all about getting facts. I think their clients know, and even legal clients know, that really, at the end of the day, facts are not the sorts of things that are covered by legal professional privilege.

**Senator MURRAY**—Another question I asked them related to what I think they described as multidisciplinary firms where, in particular, lawyers and accountants are under one roof. That creates the potential for legal professional privilege to be thrown over, if you like, accountants' work, such that you would be forced to discovery if you wanted that, and it raises all sorts of other things. You would not have the access you want at present, and there is the danger of unfair competition emerging from that. So, with a sole accountant practitioner, you could go in as normal and get what you want, whereas an accountant who is under a lawyer's hat might simply refuse you, and you would have to fight for the information. Are you running into that problem at all? Is it a problem you think could grow or is real?

**Mr D'Ascenzo**—I think a number of large accounting firms have separate legal sections. I have spoken to people there and they have explained to me that their concept is to provide a one-stop shop for their clients—some clients want to be able to do a full range of things.

**Senator MURRAY**—Have they ever used them to apply legal professional privilege over what you would expect to be normal accounting information you could otherwise get?

**Mr D'Ascenzo**—I have no instances in mind, but I cannot be categorical that that has not occurred. Does anybody here have any examples in mind? We do not have any examples in mind, but that could occur.

You mentioned the discovery process, and that is the interesting thing. What we are doing is very much just trying to establish our position up front—we are not necessarily going there with a view of proceedings. It may be that, once we have seen the facts, we move on. It is not as if we have necessarily formed a view and are trying now to find evidence to substantiate that view. So discovery is almost one step further. We do not get to discovery until we have settled a view. All we are really wanting to know is whether or not there is any reason for us to be concerned about what people have stated in their returns.

**Mr Pearce**—If that question is important, we can investigate that and report back to you, if you want.

**Senator MURRAY**—I am just trying to get a sense of how those professions are changing. In fact, the New South Wales proposed practitioners act will advance it even more. Law firms there are going to become corporations. Under normal entity terms, they might employ accountants, valuers or whoever they like and just cast professional privilege over

them all, or at least tell you they have, and you would have to challenge it. Why wouldn't they, if they thought it was in their interests?

**Mr D'Ascenzo**—I suppose it is a community tax system. It is based on a proposition that, if we had a system that said put your return in and provide full disclosure, then that would mean providing a lot of substantiating documentation. But we have a system that does not go through all that cost all the time, but we ask that documentation be available and accessible to the tax office. The tax office, in terms of its inquiries, has gone to the extent of developing guidelines and protocols which may have created reasonable expectations that we would be living within those guidelines, and we are.

**Senator MASON**—They argue that you have not. I think the words were 'nibbling at the edges', or something, of protocol.

**Mr D'Ascenzo**—And the example they give is one which the Ombudsman said was frivolous and vexatious.

**Senator MURRAY**—If we look at this question of privilege being extended to accountants, my assumption—based on human nature and my business experience—is that the rich and powerful would use that to keep tax records away from your eye as much as they could, but the ordinary person would not really be aware of it and it would not affect them much. Is that the right assumption?

**Mr D'Ascenzo**—I do not think it is a right assumption; it really depends on people's perspective of their commitments to the community through the tax system. Not all taxpayers, whether they be rich companies or otherwise, would see it that way. I think the majority of taxpayers see that they provide information in their return and that the tax office has the right to get the facts to substantiate what they have put in their return. That is what I believe is the common situation. If people take a more aggressive stance there, then it causes governments of all persuasions to think of other, more and different taxes and it complicates the processes immensely.

**Senator MURRAY**—But a typical tax planning scheme which might arrive, in fact, at tax avoidance—not tax minimisation—would be in the form of advice. The question of professional privilege always attaches to advice.

**Mr D'Ascenzo**—That is right.

**Senator MURRAY**—It would be more difficult for you to establish intent on the whole construction of such things.

**Mr D'Ascenzo**—Yes, it is.

**Senator MURRAY**—That is where millions and millions of dollars have, in fact, been syphoned out of tax revenue. It is in the very area we are attacking right now.

**Mr D'Ascenzo**—There is a lot of that.

**Senator MURRAY**—So to me, the danger is automatic. I am surprised by your response, frankly.

**Mr D'Ascenzo**—I think the answer is this way: if we can get the information that says, 'There was transaction A and transaction A was to B, and B was in the Cook Islands; with C there was a security with X bank in Hong Kong; with X and Y the money came through to party C who is connected to party A,' then we do not need their interpretation of how the law operates.

**Mr Anderson**—There might also be some issues there where the structure is actually being run by accountants or advisers on behalf of their client, which is something that the lawyers might not be doing. So we might also simply be wanting information about the structures themselves and, similarly, it is just fact based information.

**Mr D'Ascenzo**—If they are very concerned about that and if they are of the type—Senator, I am not saying that there are not people who would take the very aggressive approach that you said they could take, and not that you have condoned it at all—who could just shred it as soon as they got it, and they do.

**Senator MURRAY**—There was a premier of Western Australia who shredded a lot of things too, of course.

**CHAIR**—What was said by an accountant was that they might be teasing things out in trying to help the client to minimise the tax within all that was right, both morally and legally. But there was a concern that the tax department might come and take that document, which is really just a document that is trying to get to a proper position, and use it in a wrong way by saying that was a final form and it was a conspiracy—though they did not use that word I suppose that is what was meant, whereas it really was not. It was just a testing out of different schemes, and that the tax department might handle that wrongly if there was not some restraint put upon it.

**Mr D'Ascenzo**—The evidence shows that that has not occurred. The evidence shows that we have actually built protocols, which we did not need to in the strict sense. The evidence shows there are all these other courses of action that have occurred. To go back to Senator Murray's propositions, why I spoke in terms of saying that a lot of taxpayers will not do that is that we do have a voluntary system of compliance, in that much of the money that comes through the door comes through people carrying out their affairs. Any tax administration that has to rely on the tax office being on everybody's back is really one where—

**Senator MURRAY**—I am not suggesting the tax office being on everybody's back, but there is a culture amongst some business people and some professionals—

**Mr D'Ascenzo**—Yes, there is.

**Senator MURRAY**—that they will pursue that course of action.

**Mr D'Ascenzo**—You are right.

**Senator MURRAY**—That is why we have transfer pricing problems and why certain people do not pay their way. Others, I agree with you, are outstanding. They are ethical, moral and do the right thing. There is a big enough percentage for us to be concerned.

**Mr D'Ascenzo**—I accept that. It is very easy to paint people black and white one way or the other. That is what I was concerned about. That is the area we have trouble with. They end up doing things that are designed to keep it out of our attention. I do not think it as easy as saying, 'Don't go into that draw because that is where it is.' They will put the documents offshore, they will challenge this, they will challenge that.

**Senator MURRAY**—The reason they use the words 'rich and powerful' is simply that, the more money is at stake, the greater the temptation—often, not always. It is relative. But there is a great deal of temptation if it is possible to do that.

**Mr D'Ascenzo**—More with private arrangements than public arrangements. If you are in a public company you do not necessarily have the personal interest, depending on the level of your shareholding of that public company. The public companies—this was the area I was concerned about painting too darkly—would like to comply with what they saw to be the law. They would certainly be looking to reduce tax as a means of cutting their costs. They would take aggressive positions, provided they had a reasonably arguable position. But I am not sure you would then necessarily have to try to hide the information because, at the end of the day, if you think you have a reasonable argument the courts are always there to see whether you did or did not. Often when you get into more vested interests the concealment and the destruction become more prominent.

**Senator MASON**—Can I ask a very broad question on that? I was not at the last session and as a newcomer to tax I know nothing about it, but how do you determine your priorities? How do you determine who you will go after?

**Mr D'Ascenzo**—That was asked at the last hearing. Unfortunately, because we have such a big organisation—

**Senator MASON**—I asked because there might be a huge pot of money, but it may take 100 lawyers and accountants and so forth three years to get the evidence. It might be a lot easier sending two lawyers out to get someone because you are after \$100,000 and that is a lot easier to get to. In other words, are we talking about administrative efficiency?

**Mr D'Ascenzo**—No, it does not work that way. Let me give you some dated information. I used to be in charge of the audit area back in the late 1980s, early 1990s. We broke it down into three types of profile cases. One was the large end, then there was the small end and then there was non-business individuals. I think I had something like 4,000 or 5,000 auditors working at that time. I could say, 'In terms of dollars per auditor and in terms of voluntary compliance the bigger the turnover, the more likely the bigger the claim.' It only takes one very large one to swamp 100 or 1,000 small ones. So I could get more efficiency by putting all my resources at the top end of town. You really have to have integrity.

**Senator MASON**—So why don't you do that?

**Mr D'Ascenzo**—Because you have to have integrity across-the-board. It is no use only going for the direct dollar take. The whole idea of an audit program or a compliance program, from my perspective, is to support other taxpayers who are doing the right thing. It supports them in this way saying, 'There are laws which are imposed by the community; those laws map out the tax to be payable as this amount.' In paying your tax, we use our slogan, 'Building a better Australia'. It is the basis of the community and the society. I think a lot of people find that comfortable, but they do not find it comfortable if they believe that the person next door, or the big company, or the small company, the black economy, are not complying, that there are too many easy, free riders on the system. Then they say, 'It is broken; it is not going to work; why should I be the only one complying?' So you have to get this level of confidence throughout the community, with people from all walks of life, to the extent that that is capable in the system. There are trade-offs of how much you want to do in that area and how much you do not want to do.

**Senator MASON**—If you are saying that it is not the dollar outcome—

**Mr D'Ascenzo**—It is not.

**Senator MASON**—So you actually have a policy process you go through to decide who to—

**Mr D'Ascenzo**—We do have difficulties, as every organisation or every tax administration has with the black economy. I think we have done pretty well working with industry over the last few years. We have lifted our compliance rates in a whole range of cash industries. The government has recently made some changes to cash industries in terms of their reporting requirements and the like. We have made an inroad into the industries we have been involved in. For instance, I gave a talk last year to the building industry. They were very pleased that we were there working with them. The way they saw it, the more we could work with them and the more we could get a better level of behaviour in that industry, the better it was for people who wanted to comply.

If you are not in there it becomes a cancer, at the individual level, at the small business level and at the large end. You need to have a reasonable spread of resources in that sense to maintain that, and you have to make judgments out of that as a tax administrator. You have to make judgments as to how much resources you put in to, let us say, your work related expense type issues compared to your transfer pricing type issues. I do not believe you can just single one out. I think that will cause the community's perception of the tax system to falter. Once you lose community confidence in a viable tax system, it is really hard to pull back. You cannot pull it back other than in draconian ways.

**Senator MURRAY**—Just back to some of the key things regarding the search and entry provisions. Our 'cheat-sheet' here says that Ms Felicity Hampel QC, from Liberty, Victoria, put to us the principle that the powers given to the AFP under the Crimes Act should be a benchmark and that the search and entry powers given to others should be no greater than these unless for a defined purpose subject to scrutiny. Lying behind that proposition is the view that in certain respects you have powers in excess of those which the police force has. I think attached to that is an understanding of community awareness. The community seems

far more aware of the limits of police power than they are, probably, of the limits of your power.

**Mr D'Ascenzo**—I can understand the view put. I am not saying it is right, wrong or indifferent. We have tried to put to the committee that basically the way we have structured the scheme of our acts is 'Don't give us a full and true disclosure of the facts with the return but give us the right to access those. We are not necessarily pursuing those rights to get evidence to convict you or to find criminal behaviour on your part; we are using that evidence to verify what you have put to us.'

**Senator MURRAY**—There is a critical difference between you and the police service, is there not, because any police person anywhere can use reasonable force to arrest you, can cause you to be locked up—in other words you can lose your liberty—or can oblige you to go to a place for questioning. You do not have those equivalent powers unless you actually—

**Mr D'Ascenzo**—That is right.

**Senator MURRAY**—call in the police. Therefore the restraints on them relative to that power need to be great. It comes back again to the view that possibly your rights should be diminished depending upon the weakness of the person or entity concerned, and your rights increased depending upon the size and strength of the person or entity concerned. That is another way of approaching it.

**Mr D'Ascenzo**—Yes it is. In terms of the limits and the public knowledge of our powers, again we go some way to try to explain to people what their rights and obligations are through our booklets and so forth. I suspect they probably know more about the tax office powers once we provide them with that information than they know about the police or other agencies. But I do not put that too highly. I do say that we try very hard to make sure that people do know their rights and the limits of our powers and have those rights of recourse if they feel they are being hard done by. But I can understand the perspective you are putting. I think there is some justification to it.

**CHAIR**—Are you saying that right across the taxation system, whether it is indirect tax or income tax or whatever else, there is nobody who is put on trial on the basis of evidence that is collected other than under a warrant? Is that right?

**Mr D'Ascenzo**—There is a range of different offences, so it is probably not that—

**CHAIR**—It is outside the compliance area.

**Mr D'Ascenzo**—So it is not totally right in that sense. If we get to a case where we are looking from a criminality perspective up-front, then that is invariably done through the Director of Public Prosecutions, the AFP and sometimes the National Crime Authority, or sometimes all three. There are situations where people have made it an offence that is prosecutable under our act and which does have some sort of criminal sanction. That is done through our prosecution units. Those offences are a tiered offence type structure where

usually the more serious consequences of those prosecutions would occur for habitual processes. So that could happen, in a sense.

Again, when we get evidence for those sorts of prosecutions we really start to revamp it into a criminal case. We start to apply your formal processes for getting powers through our search warrants. We do not want to take a case on if we do not have information that is going to be able to prove the point, if we do not have information that might be admissible. So the reason we have set up our prosecution units is to try to gather the forensic evidence in a much more formal and protected way. But I cannot be categorical—and I have to be honest with you—there might be some information that we have obtained bona fide for the purposes of the act early in the piece that may somehow find its way into some of those activities. The fact that we know the information already puts us on a better footing than if we did not know it.

**Senator MURRAY**—But that practice is accepted as public policy, isn't it? The whole business of linkages between different government authorities is designed to establish that someone in social security is not doing something in tax, that they are not doing something in another act. These are well covered by ANAO studies. That practice of consequential information flow resulting in administrative actions elsewhere is well established.

**Mr D'Ascenzo**—But while that is established, actually, the way the law has been developed both for ourselves and I think for other agencies is that there are some very precise checks and balances in that exercise in the sense that the law has had to be changed to allow us to get better communication with the Department of Social Security. The information that we get through our forms and through Department of Social Security forms has had to comply with privacy provisions. We have a little note on the front of all of our forms saying, 'This information may be provided to the Department of Social Security.'

**Senator MURRAY**—There are a number of them. Vet affairs, I think you have, and Social Security?

**Mr D'Ascenzo**—Yes, that is right.

**Senator MURRAY**—Do you have access on the Medicare side?

**Mr Pearce**—I cannot recall at the moment but, if you want, I can check on that.

**Senator MURRAY**—No. I think there are a number of acts where you get—

**Mr D'Ascenzo**—The scheme has been to try to ensure a better linkage of that public information. But in the way that it has been set up, it has had to take into account the privacy and other commitments in the way that we deal with those things.

**Senator MURRAY**—And we have covered it before. You have the links to the NCA and to other—

**Mr D'Ascenzo**—That is right.

**Mr Pearce**—This is all set out in our legislation. So it is not a difficult thing to find out for you.

**Mr D'Ascenzo**—Even the NCA was an interesting one because it has been only over the last 10 years that we have had a special provision that allows us to provide information to the NCA on serious crime. There has been a history of governments saying—within the concept of people's rights of privacy, proper procedures and proper checks and balances for the use of the information—'There should be some sharing of information between public authorities, but within these limits and no more.'

**Senator MURRAY**—You know that some states have confiscation of assets legislation—and so does the Commonwealth, I think—for crimes.

**Mr Anderson**—Proceeds of crimes.

**Senator MURRAY**—Yes. Do they approach you and say, 'Tell us about this person; tell us what you know about their assets,' so whoever is the administering authority gets the full picture.

**Mr D'Ascenzo**—Usually when that occurs it is likely to have been a joint task force from the beginning where the NCA have approached the tax office on the basis of pursuing the affairs of this taxpayer or that taxpayer.

**Senator MURRAY**—But apparently—this might not be a good interpretation—as I understand it, in some states' legislation, if a person is reasonably suspected of having assets which are not justified by their income, they can go to that person and say, 'If you cannot justify this, we are going to take it away from you.'

**CHAIR**—Where is that?

**Mr D'Ascenzo**—It is true.

**Senator MURRAY**—They are trying to introduce such legislation in Western Australia, and that is where I saw this stuff.

**Mr D'Ascenzo**—To be honest, I do not know the detail. I can get some information. I will give you an example. I had worked in this area in the past. One of the concerns is where the state has applied their powers to seek to get the proceeds of crime into their bailiwick, and we have already covered it as tax. So it is a question of competing demands over the same pot.

**Senator MURRAY**—Prostitution would be a typical example which for you is a taxable activity and in law in many states is an illegal activity.

**Mr D'Ascenzo**—It is usually in the context of drug dealings where this issue arises.

**Senator MURRAY**—Let me go back to why I raise this in the search and entry format. I can see in many respects we would probably be sympathetic if you are after criminals but I

can see someone saying to the tax office, 'We think you should employ your search and entry provisions to establish what kind of assets and income such and such a person has.' And you go in and discover that assets do not match income or whatever. You advise the people who asked you in the first place—

**Mr D'Ascenzo**—No, we cannot do that.

**Senator MURRAY**—You cannot do that?

**Mr D'Ascenzo**—We cannot do that because again it goes back to the limitation in our powers which is for the purposes of the act—the act being the Income Tax Assessment Act.

**Senator MURRAY**—Is it a self-regulatory device? If you did do it, what would happen? How would anyone know?

**Mr D'Ascenzo**—The taxpayer himself could go to the court and say, 'They did not do it for the purposes of the act.' The normal rights of complaint that we did not do it properly are there in that circumstance. Certainly, if the courts found that out and put us in front of the witness stand and we said, 'We did it to get information for those purposes,' the courts would intervene and say that that is not proper. But we would not do it anyhow.

**Senator MURRAY**—Because that was at the heart of your question, wasn't it? Can you use the act for other purposes and your powers for other purposes?

**Mr D'Ascenzo**—No. It is limited by the purposes of the act and that is a judicial and legislative limitation—an inherent limitation on our powers.

**Senator MASON**—It is an interesting assumption. The assumption is that information given to you or indeed procured by you through search and seizure provisions is information given to you only for that particular taxation purpose.

**Mr D'Ascenzo**—That is right.

**Senator MASON**—And not for government purposes.

**Mr D'Ascenzo**—That is right.

**Senator MASON**—It is interesting, isn't it, as a theoretical issue.

**Mr D'Ascenzo**—But that is exactly the way we started. This is why I tried to explain—

**Senator MASON**—The government in fact is not a government. It is tax, social welfare, health or whatever.

**Mr D'Ascenzo**—That is right. There is a public policy issue here in taxation because the principle is that taxation is different. The government are saying, 'We want to make sure'—and Senator Murray talked about prostitution—'that they pay their tax; if they are employees, that they pay tax instalment deductions.' We regularly collect tax from people

engaged in what would otherwise be criminal activities. The idea was that they should be able to do that and not have that impact on their criminality issue.

**Senator MASON**—Some people would not agree with that line.

**Mr D'Ascenzo**—Over the last 10 years, I have talked about the NCA, I have talked about the access and linkages between public authorities. This is a question for parliament and government itself.

**Senator MASON**—They will back you because they want the revenue. The matter of principle is a different issue.

**Mr D'Ascenzo**—Our point of view was that we wanted to keep the separateness because we felt that tax was different from criminal processes and that is the hardest argument.

**CHAIR**—That is what gives us our problem.

**Senator MURRAY**—Let us assume there was a Mr Big out there knocking off the heroin sales in this country and generating a billion dollars of income—let us make it large. But if he paid you every dollar of tax that he should, you would never report on him?

**Mr D'Ascenzo**—Prior to the provisions that now require us to report serious crime, we would not.

**Senator MURRAY**—How do you classify a serious crime? Is it classified in the act?

**Mr D'Ascenzo**—It is in the act. It is in a separate act, actually. It is not in our act at all.

**CHAIR**—Is that not the problem? If it was still separate, then there would not be a real issue on it.

**Mr D'Ascenzo**—But once you get to serious crime—

**CHAIR**—Once you mix your functions then that causes a problem.

**Mr D'Ascenzo**—But once we get to serious crime we no longer use our functions under the act.

**CHAIR**—But who decides that? You decide that.

**Mr D'Ascenzo**—No, the law says we cannot.

**CHAIR**—No, but you interpret the law.

**Mr D'Ascenzo**—I think it is fairly clear. If someone is involved in a criminal process what happens in those situations is that the NCA would usually come to us and say, 'Look, we think Mr Big has been in the drug trade and gets \$100 billion there and we want you to be in a joint task force under our leadership.' It is not under the tax office; it is either the

NCA, the DPP or the AFP. We go there to try to work out the financials but we do not use our access powers. In fact, I think if you are using access powers, then you would be better off using the NCA powers otherwise—

**CHAIR**—But if you have used those powers over the years, the information that you have gathered is made available to the NCA, is it not?

**Mr D'Ascenzo**—But the evidence may not be admissible.

**CHAIR**—Yes, but it is made available at an investigatory level. Your investigatory level is a prosecutory level and there is information gathering. It is all mixed up and that is what makes it difficult. If you had the thing separated out, the situation would be much more comfortable in terms of entry and search.

**Mr D'Ascenzo**—Again, this is really the exception to a very large general rule.

**CHAIR**—Yes; nevertheless, it is open.

**Senator MURRAY**—Is there a danger that you would lose taxable revenue? In other words, if people of varying criminality now believe that you will report them in terms of their earnings, will they no longer disclose them?

**Mr D'Ascenzo**—That was the balance that people had to make when parliament drew the balance. I do not want to be in parliament's mind, but I would have thought this is only in relation to serious matters. I would have thought that the person who was involved in a billion dollar drug deal probably would not disclose his billion dollars. That is why they thought it is not really a problem.

**Senator MASON**—I am not sure that tax actually is that different, but your argument will always be sustained by parliament because of the revenue base. Honestly, I am not sure whether tax is much different from health or anything else. I would have thought government was government, but apparently not.

**CHAIR**—Thanks very much and thanks for taking the matter seriously and producing that submission.

**Mr Pearce**—I forgot to give you a copy of this report.

**CHAIR**—That makes it even more impressive.

**Mr Pearce**—No, that is not our submission. You were interested in the Internet. It was a report we released in 1997.

**CHAIR**—All right. I think you have put the issues very clearly. The only way to carry out the present tax system is to have a checking process. But if that is all mixed up, with no more serious consequences for people in the terms of perhaps later prosecutions and what have you, it makes it all very difficult. We can keep thinking about it.

**Mr D'Ascenzo**—Senator Murray made the distinction in the possibility of consideration of varying types of taxpayers, varying degrees of turnover and varying types of inquiries and you could see a distinction being made. If you get into the serious crime referral you do not provide tax information prior to the commencement of that activity.

**Senator MURRAY**—I was thinking about it after the last interaction with yourselves. It struck me that we distinguish between taxpayers by entity, by the tax liability—if you earn a little money, you do not pay as much tax; some earn a lot of money and do not pay much—by tax concessions, by the ability to rollover in some instances and by cut-offs and thresholds, so there is constant differentiation between taxpayers. Yet, on the powers side, there is almost no differentiation. That struck me as odd, because it is a natural thing within your main goal of maximising your taxable income for the tax office to seek the widest powers to meet the worst circumstance. A committee like this, which is concerned with civil liberties in this respect, may say, ‘That is appropriate for the worst circumstance but how would we limit it and on what rational basis?’ That is what drew me to that remark.

**Mr D'Ascenzo**—That is certainly an area to consider in that context. This is in the income tax side of it. I wondered whether or not parliament had thought about it itself. In some other areas, it has slightly changed the access powers. In sales tax, it has allowed for some seizure. The same thing occurs with excise. In the GST we do not go to the homes. Am I right there?

**Mr Duda**—No, it is the same as the sales tax. It allows for the powers of sampling and testing, which do not appear in the income tax law.

**Mr D'Ascenzo**—There have already been slight variations, but I am not sure whether that has been done consciously with the degree of segmentation that you had in mind, Senator, but there has been some of that.

**Senator MURRAY**—I am not proposing it as a policy. It just struck me as one way of approaching what is both a perceptual and an actual problem. The community wants you to deliver large sums of money. It wants you to chase down all the tax avoiders but, at the same time, is very concerned if your powers are extended to the ordinary person.

**Mr D'Ascenzo**—More so, if the powers are extended in an abusive way. We have tried to make sure as best we can that that does not occur.

**CHAIR**—That sums it up, I think. That is right.

**Senator MURRAY**—There is a fair deal of discretion, isn't there?

**CHAIR**—It is the process that people are worried about. How do you go about the task? The task obviously needs to be done. It is a matter of how you do it.

**Mr Anderson**—Could I just point out that that is also one other check in the exchange of information area where you had some concern. If you are a prosecuting authority, you are normally very concerned to try and limit the number of collateral challenges to the exercise

you are carrying out. They are very cautious that they do not take anything from us, even if we were going to give it to them, and that they use their own powers, in my experience.

**Mr Darmody**—One thing perhaps you should consider here is that a lot of taxpayers actually use agents and so we would often access the documents at the agent's premises. I think that is worth considering. Another way of looking at it is that, when we conduct audits, we do tailor the audit process according to different sorts of taxpayers. Usually with individuals, the audit process may well be just a letter inquiring, for instance, on dividend and interest where perhaps they have not declared their interest. We just send out a letter asking them whether they have received any interest. We have already got some information on that and we ask them to complete it. We never really go near them in those instances. I think that is worth considering as well.

**Senator MURRAY**—There is the professional privilege question, of course. With the exponential increase in the use of tax agents, it means that many more people would be covered by privilege than before.

**Mr D'Ascenzo**—The question of privilege is one where we as an organisation would like public consideration of the issue to determine what the right standard is, in terms of its coverage, and whether or not its current coverage is appropriate.

**CHAIR**—It has to be used for a proper purpose too?

**Mr D'Ascenzo**—That is true. The problem that we have is whether or not, in the area of tax where we ask for information, you should put full and true disclosure there and whether the LPP principle which was originally designed for giving people the right in litigation is appropriately spread to tax inquiries. We accept that legal professional privilege is there for lawyers, provided it is in relation to documents that have been created for the sole purpose or, now, dominant purpose of providing advice to their client. We have given basically the same type of protection but limited—at the end of the day we want the facts—to the accountants.

There is a real question of how those principles should operate in that sort of environment. I do not want to push one side or the other; I am happy for the community to try to provide me with a platform. I have got to say that I am not sure that the community has quite grappled with the issue of what is appropriate in this area.

**Senator MASON**—In fact the debate will be overtaken by what Senator Murray referred to before as the integration of accountancy in law firms.

**Mr D'Ascenzo**—That is why I think rather than asking, 'The lawyers have got this. Shouldn't the accountants have this?' a better question is, 'Is this an appropriate principle for the community to go forward with in this area of the law?'

**CHAIR**—It is there so that your litigation can flow so that courts can operate properly.

**Mr D'Ascenzo**—There have been a number of jurisdictions, like New Zealand for instance, that have been looking to limit it to the litigation process.

**CHAIR**—Thank you very much. We can always give you a ring if we need to.

**Mr D'Ascenzo**—Basically, as I said the first time, when you mentioned about taking it seriously, we certainly take these proceedings and all proceedings of parliament seriously. We see ourselves as being here to answer whatever questions and provide whatever information you want to make your deliberations that much better.

**CHAIR**—Thank you very much. I thought it was a very lucid submission.

[3.29 p.m.]

**LONGO, Mr Joseph Paul, National Director, Enforcement, Australian Securities and Investments Commission**

**CHAIR**—Welcome. As one of our members will be leaving before the end of today's hearing, we will now form a subcommittee. Mr Longo, could you give us some information about yourself and then we will ask you questions.

**Mr Longo**—I am based in Sydney and I am responsible for the overall coordination and direction of all ASIC's enforcement activity in Australia. That includes the practices and procedures the commission adopts in the course of the investigations it conducts and other enforcement activity.

**CHAIR**—As you know, we are looking at the issue of entry and search provisions. We are trying to get that magic balance between the rights and dignities of people in the community and the need to ensure that the laws of the community are carried out. We are looking to you to tell us how. For the record, if you think that there is any intrusion upon something that ought to be kept in camera, just tell us and we will avoid that.

**Mr Longo**—Yes, of course. I am very much in the hands of the committee. I wrote to the secretary of the committee earlier this year, and made a submission about what ASIC could usefully say about entry and search provisions. As a generalisation, ASIC generally does not enter upon premises looking for information. Our most common method of information gathering is simply asking people questions. We usually invite them to assist us voluntarily or, depending upon the circumstances, we will compel individuals to attend at our offices to give evidence—much like in this kind of environment—informally but privately. We also have powers to require production of documents.

They are really the two key information gathering provisions that we use all the time. We ask questions and we gather documents. Occasionally, we execute search warrants. That is not unusual. That is a reasonably frequent sort of activity. Of course, we apply for a warrant to a magistrate. We generally do that after taking advice from the DPP. Our documents are usually prepared with the assistance of experienced DPP officers. Those warrants then enable us to enter upon premises to look for evidence of the offences that underpin the warrant.

We have provision in our own act to apply to a magistrate for a search warrant. That provision applies after we have made documentary requests and we believe there has been a failure to comply. In those circumstances, we have the option of going to a magistrate and seeking the power, with an AFP officer, to go onto premises and obtain material. Alternatively, we have power to apply to the Federal Court for what is called a section 70 application, which is basically an order requiring a person to comply with a notice or requirement that we have made under the act.

**CHAIR**—That is section 70 of—

**Mr Longo**—It is section 70 of the Australian Securities and Investments Commission Act. In general terms, that is the framework. It generally works, from our point of view. I can assure the committee that it is extremely unusual to get any complaints or concerns about the exercise of those powers. I am open to fielding any questions about how we do it in practice.

**Senator MURRAY**—Where do complaints go, if they occur?

**Mr Longo**—People sometimes complain to the Ombudsman. They sometimes write to our chairman. If they write to the chairman, depending on the nature of the complaint, it will be inquired into and dealt with.

**Senator MURRAY**—If the minister receives a complaint, where would he refer it to?

**Mr Longo**—He would write to us and ask that it be looked at. Depending on the seriousness of the complaint and whether it is a formal complaint within the meaning of our guidelines, we will appoint a senior officer—usually someone from another office who is not connected with the issue—to inquire into the circumstances of the complaint. Again, depending upon the seriousness of the allegations, that person will make a report to the chairman or to the regional commission. The complainant then gets a response. We report upon that in our annual report.

**Senator MURRAY**—It strikes me that, from the kind of organisation you are, you should be more like the ATO than you are. From listening to the ATO it seems their most common form of personal interaction is investigatory, just in the sense of confirming that something is appropriate, and it is a minority that goes off to a search warrant in the more severe cases. If I have understood you correctly, you do not do that much across the table work?

**Mr Longo**—It is a big subject. We call that surveillance. We increasingly do a lot of surveillance and compliance related work. A good recent example would be the section 235 campaign with company directors. Section 235 of the Corporations Law requires directors of companies whose shares are listed to disclose to the Stock Exchange within 14 days that they have traded in the securities of the company of which they are a director. In the course of our work, our staff in Victoria discovered that there seemed to be poor compliance with that provision.

We have written to all company directors and reminded them of their obligations to comply with section 235 and we have a systematic campaign in progress at the moment designed to lift compliance with that provision. It is more a compliance oriented sort of campaign and we are not at this stage prosecuting anyone, on the basis that we believe that once people realise the provision is there, and are educated about it, standards of compliance will go up.

**Senator MURRAY**—At what stage would that move on into search and entry provisions?

**Mr Longo**—I am just giving you an example of where we write to people. At some stage we will make an announcement that says, ‘We have been telling you about this provision for six months. Compliance has improved, but many of you’—if this were the case—‘are still not complying. We are just letting you know that we are going to start prosecuting.’ That, in itself, I do not think would require any search and entry.

**Senator MURRAY**—But how would you do the search and entry? That is our interest.

**Mr Longo**—That particular provision would not, on the face of it, attract any search and entry. Our search and entry powers—

**Senator MURRAY**—But you just said that you would pursue prosecutions—

**Mr Longo**—That is right.

**Senator MURRAY**—and I presume that to do that you would have to identify in some way that there have been share transactions. How would you do that?

**Mr Longo**—We would do surveillance afterwards. We would question people and, from responses to those questions, we would find out whether they have been complying.

**Senator MURRAY**—When you are questioning people are you questioning directors or—

**Mr Longo**—Directors, or those acting on their behalf—brokers. Generally speaking, that would not involve any need for search warrants.

**Senator MURRAY**—Would that be random?

**Mr Longo**—It would be targeted.

**Senator MURRAY**—We are not just dealing with search warrant activity here. It is the ability of officers of authorities such as yours to enter a premises by virtue of the provisions of the law. The tax office will go and say, ‘Can we come and talk to you about this?’ If the person refuses, they say, ‘We will come back with a warrant.’ So because they have the ability to use a warrant they have an entry provision. Once they have entry, they say, ‘Can we have a look at documents?’ If the person refuses, they say, ‘Well, we will come back with a warrant,’ so they let them look at documents. So search and entry provisions as used by the ATO are capable of being used without having to go to the extent of a warrant.

The question I am asking you is: do you ever get involved in that? The tax people justify that as an interactive consensual situation, which generally is conducted on a non-adversarial basis. People are used to that way of operating.

**Mr Longo**—It is not easy to get a search warrant. I can assure you it is a last resort.

**Senator MURRAY**—Do you do that kind of work, though?

**Mr Longo**—Generally speaking, almost invariably we will issue document notices. We will write to people and say, ‘Produce documents.’ Then, based on that production, we might have a talk with them or ask questions about the documents they produced. But the sort of dynamic that you have described does not strike a chord with me; it is just not our normal procedure at all. Nor could it be—it is not a very efficient way of proceeding.

If there are issues that require our attention, we will very often raise them with those we are dealing with. It may or may not be necessary after that to examine people in an environment such as this, or to require production of documents. You might say, ‘Well, what if people don’t produce documents?’ Generally speaking, that is a pretty hard issue because, when we request or require production of documents, unless there is something in what we are given or not given that makes it obvious or reasonably suspicious that there has not been compliance with that notice, we might go to the next step and go to the Federal Court for an order that there be compliance with that notice, if we can establish there has been poor compliance, or, if we have enough to suspect that an offence has been committed, we might go and get a search warrant under the Crimes Act. But that is pretty unusual. So we do apply for search warrants, but it is usually in circumstances where the investigation is sufficiently progressed to justify their use.

A classic example of search warrant use that got some notoriety was when we executed warrants on Mr Hannes’s home in the insider trading case. At that stage of the investigation, we had strong suspicion that Mr Simon Hannes was the person responsible for the trading in the TNT options. At that stage we made a strategic judgement that it would be inappropriate to simply issue him with a document notice, so we executed search warrants in those circumstances because we were concerned about evidence disappearing on us. Indeed, a lot of the evidence we obtained had to be retrieved from the computer hard drive, using forensic computing techniques.

So it is circumstances such as those where we think there is a real concern about evidence disappearing on us once our interest is known that might warrant applying for a warrant. Even then, we may not have enough and we just have to take the risk. We routinely take that risk when we issue document notices. You never know what someone is going to do in response to a document notice. We generally hope and expect that people will do the right thing and produce whatever they have in their possession that is relevant to the notice. But search and entry is not a major part of our work. We are a regulator. It is not an issue that is a big issue for us. Our basic information gathering powers usually work.

**Senator MURRAY**—With regard to the activities which result from warrants, various accounting bodies today put a case to us that they would like to see qualified or limited professional privilege extended to them.

**Mr Longo**—It is a big issue for the accountants.

**Senator MURRAY**—Yes. How do you react to that? Would that impede your abilities to operate or is it not an event?

**Mr Longo**—I think it would.

**Senator MURRAY**—It would impede?

**Mr Longo**—I think it would, yes. Accounting advice covers a vast array of subjects. If what accountants do were to be beyond scrutiny, other than through compulsive processes, then it would make our job even more difficult. It is a big subject. I was here for the last few moments of the tax office's evidence. Legal professional privilege has two aspects. There is the aspect that protects any communication given in confidence for the sole or dominant purpose of legal advice. The other limb of privilege is litigation privilege. There are actually two separate principles.

As far as legal professional privilege is concerned, under our act we have the power to compel production of material that is the subject of legal professional privilege from the client. We have not got the power to require it from the solicitors or the lawyers. If you go to section 68 of our act, our position is slightly different to the tax office's. That arises from a judgment of the High Court in Yuill's case in 1989. So our legislation has been construed to mean that the parliament has overridden legal professional privilege for us.

**Senator MURRAY**—In the client's hands?

**Mr Longo**—That is right, but that is pretty significant. Although we cannot compel a lawyer to disclose what he or she has told a client, we can compel a lawyer to produce documents in his possession and we can compel a client to produce documents in his possession. A lawyer, for example, under section 68(3) of the act is required to tell us what he has got in his possession that he has created for a client and then go to the client and require the client to produce the material that the lawyer has created for the client.

**Senator MURRAY**—Do you have seizure powers?

**Mr Longo**—When you say seizure powers—

**Senator MURRAY**—You can go in and actually take the documents.

**Mr Longo**—Only with a warrant.

**Senator MURRAY**—With a warrant?

**Mr Longo**—Search and entry is a very specific power which we do not have without traditional approval in effect.

**Senator MURRAY**—The tax office explicitly can go in and look at the documents. They have got the entry, they have got the search, but they have not got the seizure power. You can actually take them away.

**Mr Longo**—We can only take material away that is given to us based on response to a notice, which is a compulsory form of production. I just cannot go on to someone's premises and take material, even under notice, without a warrant. I do not have the power to push the door down.

**CHAIR**—How important would an entry and search power be today when things are done electronically? I am well behind in any sort of knowledge of how technology works very well.

**Mr Longo**—It is still a very significant power. It is true we are living in a world of increasing electronification—everything is electronically stored—but there is a lot of hard copy material out there in the possession of people or companies we have an interest in, and it is still a largely paper based economy. One should not underestimate the significance of powers requiring production of objects.

As far as electronic storage is concerned, I go back to the Hannes case. It is still the case that that material is stored on something, a hard drive usually, and we will seize that under a warrant.

**CHAIR**—If something has been put on the computer, can you always get that back?

**Mr Longo**—We often can. In the Hannes case, the material had been deleted but, with the use of forensic computing techniques, we were able to restore what was deleted and have access to it.

**CHAIR**—Would that be seizure? Have there been any cases on this? Say, as in that case, the material is deleted or the person thought it was—

**Mr Longo**—Some attempt is made to destroy what we would say is relevant evidence.

**CHAIR**—and then you get it back. That would be a seizure, would it? Are there any cases on that?

**Mr Longo**—I think seizure from our discussion today is a term of art. In practical terms, people produce to us electronic records all the time. One should not confuse that with what happens with a search warrant. The big difference between a search warrant and everything else we do is that there are particular circumstances in the matter which make us feel that using the traditional, orthodox methods of information gathering are likely to be frustrated by the response to the person we are looking at. Otherwise, we are routinely quite happy to issue notices and examine people in a normal way. The warrants are generally used where there is extreme urgency or where there is a great concern that evidence is going to be dissipated.

**CHAIR**—I am just thinking from the point of view of us writing our report.

**Mr Longo**—Retrieval of electronically stored information is a big subject, and it is one that we have put a lot of resources in to understanding. Just now, for example, I know in our Victorian office we have made an investment in special computing hardware to enable us to analyse a copy of a hard drive with the help of expert assistance. You need special computing power to do that, as well as expertise.

**CHAIR**—Do you know whether there are any cases here or overseas that discuss that issue of retrieving electronic material?

**Mr Longo**—I am sure there are. There must be many cases.

**CHAIR**—But you do not know of any?

**Mr Longo**—It depends on what point or issue is at stake. Most of the search warrant cases deal with the validity of the warrant—whether the judicial officer who issued the warrant acted reasonably. Some of the High Court cases on this deal with what information the judicial officer should have in front of him for issuing the warrant. That is a key document and there is a lot of case law on the whole question of how you attack that process.

**CHAIR**—I understand that but, on this electronic stuff, you would always get a warrant.

**Mr Longo**—But in principle there is no difference. On the fact that it is electronically stored or in hard copy, there is no legal impediment to the warrant covering all of that. I keep referring to document notices but the definition it covers is really information no matter what form it takes.

**Senator MURRAY**—The witness from the Australian Federal Police Association today said that the process of securing warrants resulted in unnecessary delay and aggravation where it was a continuation of a warrant, generally speaking, exercised on a third party like a bank or financial institution of some sort. He said that they go to great lengths to swear the affidavit and to collect the case for the warrant, and then they discover there is a small addition that they want after they have exercised it the first time, which results in the whole process having to be gone through again. Do you have the same problem? Is the process for securing warrants difficult?

**Mr Longo**—I think it is theoretically there. We are usually pretty focused. We have a pretty good idea of which offence evidence is relevant to what we are looking for.

**Senator MURRAY**—So sequential warrants are not a big issue for you?

**Mr Longo**—They have not been a big issue for us. Warrants for us, although we are skilled at applying for them and we do not infrequently use them, they are nonetheless treated very seriously. We do not usually deal with them without getting advice from the DPP. Usually our senior officers are involved in executing them. We usually go with experienced AFP officers to execute the warrant.

**Senator MURRAY**—You go with the police?

**Mr Longo**—Absolutely. An early warrant I was personally involved in—when I first started working with the commission—was being executed against a man who had been convicted of armed robbery. He had been promoting what were then called ‘prescribed interest schemes’. It was a very interesting case. We had a belief that he could be dangerous, so we took special steps to ensure that people executing the warrant were experienced people. I did not have my own staff doing that because we were worried about how he might react. You have got to be very careful executing a warrant—firstly, in how you apply for the warrant to ensure that it is in proper form and substance, that there is no overreaching, and

that it will withstand a collateral attack; and, secondly, that it is done properly when you go to execute it. Very often, if there are children or family involved, we do our homework. We try to make sure that there is counselling going on while we are trying to execute the warrant. A lot of judgment has got to be applied to do them properly. So you do not really go for them unless it is really necessary.

**Senator MURRAY**—Is there a cut-off from whom you get your warrant or do your warrants all come through magistrates?

**Mr Longo**—We apply for them regionally from a magistrate in the city where the investigation is being conducted.

**Senator MURRAY**—I make no judgment, because I have no background to make such a judgment, but someone once described magistrates to me as varying from ‘the abominable to the satisfactory’. If that were a true description, would an abominable magistrate provide appropriate protection to somebody who is the victim or the defendant, if you like, when a warrant is being sought? Is a magistrate the appropriate protection?

**Mr Longo**—I really cannot comment on magistrates generally. I can say that an organisation like ours has no interest, in the end, in going to a magistrate who is regarded as someone who will easily give you a warrant.

**Senator MURRAY**—But you do not have a choice, do you? Is it not a roster system? You get whoever is there?

**Mr Longo**—My point, though, is that you should always be aiming your documentation—that is, it has got to stand up whether it is a magistrate or a High Court judge. The standards of drafting and the standards that one applies in thinking through whether to apply for a warrant are entirely unrelated—in my view and no doubt in the view of the people who have created our responsibility for this—to what sort of magistrate you are going to get.

**Senator MURRAY**—So you set your documentation as if it were the very best magistrate, not the very worst.

**Mr Longo**—Absolutely. Life is too short. A perfectly good prosecution may founder on material that was improperly seized under an invalid warrant. So, if anything, we are very cautious. Generally speaking, we work with the DPP, who have a high degree of expertise with search warrant law. They have a national resource—a search warrant manual—that we have access to which assists us in ensuring that our documentation is of a high standard.

**Senator MURRAY**—We heard from them today on that basis. Do you interact with the state DPPs at all?

**Mr Longo**—No, very rarely, because all of our criminal work is done by the Commonwealth Director of Public Prosecutions. Each state in Australia these days has a state Director of Public Prosecutions, but all of our work is prosecuted by the Commonwealth Director of Public Prosecutions.

**Senator MURRAY**—And the Wakim case will not change that?

**Mr Longo**—No, because criminal matters are dealt with in state courts. The typical procedure is that our officers will form a view that a search warrant is appropriate in the first place. That view is usually tested against a senior enforcement staff member, usually an SES equivalent, a senior person in that regional office. The documentation is prepared. It is then shown to the DPP. The DPP will comment on its adequacy. In fact, a lot of the time, when the application is made, the magistrate will be told that we have sought the advice of a DPP in preparing the documents as part of our submission to the magistrate. The idea is to let the magistrate know that this picture has not just come from ASIC; it has also come from the DPP. So there is a sort of double balance in there.

**CHAIR**—We do not have to worry with ASIC outside the criminal area, do we? There is no issue of entry and search other than when you intend to take criminal proceedings.

**Mr Longo**—I think that is generally true. I do not want to be dogmatic about that, only because I am sure there must be matters where we obtain material which, for whatever reason, does not end up being the subject of a criminal prosecution but could end up being used in a civil action.

**CHAIR**—It is not, in any event, like the Tax Office—and you might have heard them—where they say they have to go in and look at documents to check the validity of the tax returns. So they do it on a pretty broad basis.

**Mr Longo**—Our act enables us to serve a notice on someone. Section 28(b), if my memory serves me, deals with issuing notices for the purpose of producing documents to see whether or not there has been compliance of a scheme. It states ‘for the purposes of ensuring compliance with a national scheme law of this jurisdiction’.

Very often, we will issue a notice like that just to see what material there is to ensure there has been compliance with an aspect of the Corporations Law. That would normally happen by people producing material. Sometimes, if it is convenient, a recipient of a notice might say, ‘There’s just so much material here. We’re quite happy for you to come to us and you can see what is relevant and what isn’t.’ A lot of the time, there is cooperation in that area. Going for a search warrant generally means that an investigation has commenced and it has reached a point where we form the view that offences have been committed and there is evidence of those offences on premises and that we believe using our normal information gathering processes are not going to be adequate because, once our interest in the matter is known to the person who is interested in the investigation, there is a real prospect of evidence disappearing.

**Senator MURRAY**—Do other agencies—the NCA, the Federal Police, Tax—ask you to do things so that, as a result of what you do, certain material might be flushed out? For example, people might not have been putting in their returns.

**Mr Longo**—Our practices on this are generally set out in Policy Statement 103. The starting point is that information we gather in the course of our functions has to be kept confidential. Section 127 of our act provides the framework for release to other

Commonwealth agencies and to third parties, like the Australian Stock Exchange, for example. Generally speaking, we cannot compulsorily gather information unless it is for one of our own purposes. So if the Tax Office calls us up and says, 'We want you to conduct an investigation for us,' it just does not work that way. Our powers flow from having a reasonable basis for suspecting a contravention of a national scheme. Everything flows from that.

**Senator MURRAY**—Do you do it the other way around—do you approach the tax office and say, 'We are concerned about an issue'?

**Mr Longo**—We have a memorandum of understanding with the tax office and other Commonwealth agencies, and we need to bring ourselves within their legislation and ours to get that information. In fact, the tax office is probably the worst example—worst in the sense that the legal framework for information sharing with the tax office is very tight.

**Senator MURRAY**—Do you ever trigger their search and entry?

**Mr Longo**—No, I do not think so. The tax office has all sorts of sources—

**Senator MURRAY**—They have greater powers than you, don't they?

**Mr Longo**—I do not know about that. I have difficulty, for the purposes of our discussion, in making the leap from what we do to search and entry. Search and entry is just not part of our thinking for daily information gathering. It is part of information gathering, and people are obviously aware of the capacity to apply for search warrants, but most of our information gathering is under the ASIC Act and is usually through document notices, through exchange of correspondence and through asking questions at section 19 examinations, which are 'in private' examinations. Whether the tax office goes off and applies for a search warrant is a matter for them. We can share information with the tax office, but it has to be within the terms of 127. The chairperson has the capacity to share information under 127(4), where we are satisfied the information will assist, and then we can pass it on. Sometimes there are procedural fairness issues.

**CHAIR**—Do you get any pattern of people who have been getting themselves into some difficulty under the Corporations Law and under the tax law and whatever other law there might be around?

**Mr Longo**—There are some well-known links. We are constantly warning people about getting into high risk, high return tax effective schemes, so we and the tax office both have an interest and we do cooperate with one another, consistent with the legal framework, to warn people not to put their money into a scheme without satisfying themselves that it is in fact tax effective, and they have consulted with the tax office. There are some kinds of schemes, for example some agricultural schemes, where experience has shown that they are particularly at risk of not getting the tax treatment that investors think they are going to get.

**Senator MURRAY**—On these inconsistencies in the acts you administer, harmonising them will actually increase your powers under those acts, won't it?

**Mr Longo**—It depends on what powers we end up with. It is part of the CLERP 6 process to end up with a single set of powers. But before we get to what powers we have got or will end up with, we can all agree that a single regulator has now been given responsibility for a range of additional functions and responsibilities—from 1 July last year—so it makes sense that, in the day-to-day information gathering and enforcement and regulatory work that goes on, there is a single set of powers to operate from. So harmonisation is important, just from the point of view of efficiency and good administration. I think that is a worthy goal in itself.

As to the content of the powers—and this is very much in the melting pot at the moment, very much part of the CLERP 6 process—our basic view is that we are content with our basic powers under the ASIC Act. Whatever functions or responsibilities ASIC is being asked to discharge, we think it should be a single set of powers and we think our traditional ASIC Act powers are appropriate and suitable. That is certainly the submission we are making to Treasury.

There are some additional powers that we do not have—one or two—and consideration will have to be given by government as to whether, in the harmonisation process, they should be included in the ASIC Act or not. It is not entirely clear how that is all going to pan out. But, in general terms, harmonisation is important because very often in the same situation we will have the power to compulsorily acquire information under the ASIC Act but not have the power under SIS or under the Insurance (Agents and Brokers) Act, yet the misconduct arises out of the same situation. So there is a real issue there about how that will work.

**Senator MURRAY**—One thing we have been concerned with is not just that powers exist but that people understand their rights with respect to those powers. In other words, whether they have the right to remain silent, whether they have the right to have a witness or lawyer present, whether they can record what is happening and those sorts of things. Do you have explanatory material? Is there a process whereby people are informed?

**Mr Longo**—Yes, that material is routinely attached to a notice requiring compliance.

**Senator MURRAY**—It is in a documentary form?

**Mr Longo**—Yes. It is generally given in documentary form.

**Senator MURRAY**—Could we have a copy of that?

**Mr Longo**—Yes. The other we do is documents accompanying notices.

**Senator MURRAY**—We are doing a cross-comparison. It strikes me that, even when powers are appropriate, unless you know your rights with respect to them you are probably at a disadvantage as a person.

**Mr Longo**—The other thing we do is before each section 19 commences. Section 19 is a very fundamental part of our information gathering powers. It enables us to compulsorily require people to come and talk to us. Before the examination begins, we have a standard

description of what to expect and what people's rights are. We are always finetuning it, but I can give you the current version of what we say to people at the commencement of a section 19 examination.

**Senator MURRAY**—Yes, if you could.

**Mr Longo**—It covers issues like rights to lawyers and the need to keep the material confidential, and what the role of the inspector is.

**Senator MURRAY**—With regard to search and entry, which is almost always exercised under warrant with you, would you describe those situations as commonly being adversarial?

**Mr Longo**—In a search warrant situation?

**Senator MURRAY**—Yes.

**Mr Longo**—It depends. Fortunately, most of the times we execute search warrants the people we serve them on are very cooperative. It is not adversarial in the sense that violence occurs.

**Senator MURRAY**—Is it because it is being served on a company and you are dealing with officers?

**Mr Longo**—It can be for that reason. Another reason is because people are cooperative. I will make a note that as well as giving you the section 19 material I will give you our practice note concerning complaints about staff.

To get back to search warrants, there are protocols that have been worked out between the Law Council of Australia and the Australian Federal Police for when warrants are executed on solicitors' premises. They deal with legal professional privilege. So there is an established body of practice that we are not formally a party to but that we routinely observe. The AFP and the Law Council of Australia have agreed guidelines for what to do when you execute a warrant at solicitors' premises and you seize material which could be the subject of legal professional privilege. There are practical steps that everyone has agreed should be followed to deal with any claims of legal professional privilege following the execution of a search warrant. That is worth mentioning.

As far as what happens when a warrant is executed, so much depends on the circumstances. We do frequently execute warrants on companies. I will go back to the Hannes case because it really has a lot of classic investigation features to it and it is one I can talk about. In that case, on the day we executed warrants, we executed warrants on Mr Hannes's home. At the same time we executed a warrant on Macquarie itself in the city of Sydney.

**Senator MURRAY**—A third party element.

**Mr Longo**—Yes, his employer.

**Mr Longo** - We were very careful to do several things. Firstly, we took every reasonable step open to us to ensure that there was no publicity associated with the execution of those warrants because we did not want people's reputations ruined unnecessarily. So no-one found out that we had executed a warrant on Macquarie. That would have been very newsworthy but everyone displayed discretion on that occasion, as is usually the case. Secondly, a senior officer of the commission, the chairman and I made contact with Macquarie senior management after our staff were on their premises. We said, 'Our staff are on the premises. They have a warrant to search the premises. This is what it is all about. We expect you to cooperate. If there are any issues, will you please let us know?'

Although we had compulsion of law behind us and we had AFP officers and our own staff on the premises at Macquarie at the time that call was made, it was a courtesy as much as anything else. It was designed to facilitate cooperation of the warrant. There is just no point in going in and bashing down doors when there is absolutely no indication at all that there is going to be anything other than complete cooperation with that warrant. Generally, that is what happens. Most companies, when faced with a search warrant that is being executed in a professional, sensible manner, will be cooperative.

But with individuals, so much depends on the circumstances. Professionalism and skill have to be displayed. Most of the time the warrants we execute do not attract any particular concern. We are in an area of the Commonwealth's law enforcement business where we do not have to generally worry about people being armed and overreacting to our interests.

**CHAIR**—What happened in the case of the person with the prior conviction for armed robbery?

**Mr Longo**—That all worked out in the end. On that occasion we found some firearms on the premises. We were in the hands of some experts. The AFP handled that and it all went very well. We seized this fellow's hard drive and got evidence that we were looking for that he was running a prescribed interest scheme.

**CHAIR**—I think we ought to be looking at just what happens with these sorts of things. On the occasions that you have been part of executing a warrant, it has generally been done in a very civilised manner.

**Mr Longo**—Yes, absolutely. There is no interest for us in raising the temperature.

**Senator MURRAY**—In the interaction with Ms Felicity Hampel QC, the question of rectification of occasional wrong with regard to the issuing of warrants was raised. Warrants, quite properly, are sworn in private and generally should be executed—

**Mr Longo**—Within three days.

**Senator MURRAY**—Yes, but also with regard to people's privacy—although we do know that the worst police services will let out what they are doing, which is very unfortunate. Assuming that had not happened and the warrant was felt to have been improperly served, or sworn, or wrongfully pursued, the ability of a person to have that

wrong rectified is public. So you are protected until you want to rectify a wrong. You then have to go to court and make the whole issue public.

**Mr Longo**—Yes.

**Senator MURRAY**—Is it your view that, if somebody wished to rectify that sort of wrong, there should be a private hearing as well so that people are not publicly embarrassed?

**Mr Longo**—That is a difficult question. I am just trying to think from my own experience of what happens in ASIC. As I mentioned earlier, a warrant might be properly executed and, for whatever reason, there might be an issue about whether any material obtained or seized under the warrant should have been seized. That is the issue you are raising. Whether that becomes a real issue or not will often depend on what we do after that. If no charges are laid, or if no other action is taken, the material is simply returned.

**Senator MURRAY**—Let us assume there were two John Smiths. By some extraordinary coincidence they were on opposite sides of the street and the wrong premises were searched.

**Mr Longo**—That happens.

**Senator MURRAY**—It does happen.

**Mr Longo**—It happened to us a few weeks ago.

**CHAIR**—It happens quite often.

**Mr Longo**—It is exactly what happened to us. We are investigating at the moment a very interesting spamming exercise involving half a million emails being sent to people in the US and Australia with the purpose of manipulating the stock of a US listed company. We have reason to believe that an Australian citizen in Australia was responsible for that spamming exercise. We were doing all this clever forensic computing and we got this information from the SEC.

We think we have narrowed it down to three potential people. Two of them we got were the wrong people. But we were able to work that out within seconds of knocking on the door. We just turned around and said, sorry, and walked out again. On that occasion we executed warrants, our staff turned up; knocked on the door; the person answered the door and within minutes we knew that we did not have the right persons so we let it go.

**Senator MURRAY**—But this is where the civilised approach pays dividends.

**Mr Longo**—If you know, but we were not to know till we tried.

**Senator MURRAY**—I take it a little further. Let us assume our two John Smiths did live opposite each other but that the whole process went through and as a result the wrong person suffered stress, aggravation, concern, and might even have suffered cost. He rang up his lawyer to get advice. Unless the authority dealing with such a person said that they understood and would he accept such and such in consideration for pain and compensation,

if he were difficult about it, to get that wrong rectified, that person would have to go to court. If he went to court, would that not become a public matter?

**Mr Longo**—That is true of a lot of things that happen. The principle that is really underlying your question is of a much broader application. For example, we routinely put people to expense when we serve them with notices and when we ask them to come and talk to us. We routinely put them to expense, whether it is obtaining legal advice or accounting advice. It is in the nature of law enforcement generally that there are a lot of expenses that the general community incurs in their capacity as citizens.

**Senator MURRAY**—It is their compliance cost.

**Mr Longo**—Yes. There is an interesting case about this. Westpac sued us—I do not know if you remember this case. I will send you a copy of it. It is a very interesting case in Queensland. Westpac was suing us for \$4,000. They were very irritated with us because we did not pay their cost of retrieving from archives a whole series of banking records. We have a discretion with section 89 of the act to meet claims of this kind. We knocked them back and they judicially reviewed our decision to knock them back. There is some interesting material in that judgment about this whole question of innocent people—you do not have to be the subject of a mistaken search warrant—who happen to have possession of information that is relevant to an inquiry. They may need to take advice in response to our request. We take all that into account, of course, when we go about asking questions because we do not want to put people to unnecessary expense. But it is certainly the case that a lot of people do feel inconvenienced. We all do when we are asked to cooperate in some form or another.

In terms of general principle, I would bear that in mind. Going back to your specific question of the search warrant, a lot depends. If the search warrant were properly obtained in good faith and on reasonable grounds, then generally speaking that would be the end of the matter. Otherwise there would be claims on the Commonwealth for a whole range of expenses that may not be properly recoverable, nor should they be properly recoverable as a matter of policy. I am not very familiar with that area of the law.

**Senator MURRAY**—All I am suggesting is that a legal power privately obtained should perhaps be capable of being privately resolved.

**Mr Longo**—The courts have a discretion in this issue. In criminal trials the courts have the power to suppress publication of evidence.

**Senator MURRAY**—There is always a public process before that happens.

**Mr Longo**—In civil matters, as a general principle the courts do have a discretion to suppress publication of the existence of proceedings or what happens in the course of proceedings. It is not a discretion they lightly exercise, and there may be circumstances where a person would feel that the commencement of legal proceedings acts as a discouragement or disincentive to pursuing their rights. That is a general issue in our legal system which places a big value on these issues being resolved transparently, publicly and in an open environment. The courts do have a residual discretion to suppress publication of material.

**CHAIR**—If it gives an order suppressing in one state—if it is a state matter—the papers will publish it in the next state.

**Mr Longo**—I am not familiar with the practice with search warrants. It could very well be that an application could be made to the court not to make publicly available the fact that proceedings have been commenced to challenge a warrant. One hears of proceedings that are kept in camera for a long time before being made public. So the courts have developed their own procedures, and there is a residual discretion in the courts to suppress or control publication of proceedings. So I can see where you are coming from.

**CHAIR**—Senator Murray's question encompassed that situation where—not with ASIC but with some state police forces—the warrant is executed and the television is down there, and, of course, the person who is the subject of the search or the arrest has not had an opportunity of going to a court. But that does not happen with ASIC, of course.

**Mr Longo**—I hope not. In my experience it has not happened, but things can go wrong. We certainly try to adopt procedures and attitudes that ensure that they do not. It is not an issue that is easily dismissed. Warrants are the most intrusive of our information gathering powers and attract the most process, if you like, in adopting and using them in the area, as they should.

**Senator MURRAY**—They are also a secret part, and that is the point.

**Mr Longo**—Certainly the application for the warrant is ex parte, it is secret, but the execution of the warrant is not, and any steps taken to challenge the warrant are all judicially supervised.

**CHAIR**—The only problem is, what chance has the judge got of seeing whether what is set out in the warrant is correct. That is one of your problems. The warrants are not tested, I do not think.

**Mr Longo**—People swear on oath. They are at risk of perjury. It is pretty serious business. People do not lightly swear out affidavits in support of these applications, and it is a very serious offence.

**CHAIR**—I suppose that is taken into account.

**Mr Longo**—Life is too short, I think. It is usually one of our staff members, an investigator, who swears out the warrant and the affidavit in support of the warrant. As in fact in the Hannis case, there were aspects of the information gathering there which were the subject of cross-examination of our staff.

**Senator MURRAY**—But your staff have qualified privilege under your act, don't they?

**Mr Longo**—There is no privilege against telling lies in an affidavit.

**Senator MURRAY**—No, not that.

**CHAIR**—But I think that is a thing we ought to have on record—and thank you for putting that on—that as far as ASIC is concerned in any event the culture there is it is a very big thing to be swearing an affidavit upon which you are going to get the warrant.

**Mr Longo**—I am sure it is the culture of all Commonwealth public servants. I would be very surprised if it were otherwise. The affidavit sworn in support of the application is usually checked by a lawyer who is not swearing the affidavit and, as I say, is generally checked by the DPP as well. They are very carefully drawn documents. A lot of care is taken for all sorts of reasons. That does not mean that things cannot go wrong. They do go wrong occasionally. But they certainly should not go wrong for lack of good faith, for lack of reasonableness or for lack of reasonable care. They are certainly things that should never go wrong. Warrants should never be applied for in bad faith, for example. That would be very serious. Certainly no-one should be telling lies in any material in support of a warrant.

With regard to the point Senator Murray was making, if you are the recipient of a search warrant and you want to judicially challenge it then, yes, I suppose generally speaking that would be a public process. But it need not be. It may very well be the case that your solicitor or you, personally, would write to the agency that has applied for the warrant and ask questions about it. One does not necessarily rush to the court to assert one's rights. There are other things you can do before going to court. If you are not satisfied with the response you get to those questions—it may be an Ombudsman complaint; it may be a complaint to a chairman—that might be independently examined.

**Senator MURRAY**—This issue of secrecy, rights and process matters in this sense: even where you have sworn an affidavit and pursued your search and entry and seizure—if that is part of it—and then gone to a prosecution, you might not get a conviction, in which case the entity in law is innocent. I may be wrong, but I understand that in Queensland there can be no publication of any matter within the state—of course, it happens outside the state—until such time as a conviction is secured. I do not know if that is or is not true.

**Mr Longo**—It sounds like an overstatement of the position.

**Senator MURRAY**—I understand that is so in certain legislation and in certain respects. I sometimes wonder if those who are innocent, those who are pursued but who are acquitted because it was discovered by law that it was a wrongful pursuit or there was insufficient evidence, should be subject to all the public embarrassments they go through. You have plainly indicated that you seek to avoid that until such time as you are certain that, arising from the long process, you have enough evidence to pursue a prosecution.

**Mr Longo**—There are a number of issues there. All the information gathering techniques are supposed to be confidential. When we section 19 someone or issue a document notice, none of those things are the subject of publicity—certainly not executing a search warrant. But when a criminal prosecution commences, that is a public act.

**Senator MURRAY**—The reason I raised this is that you made the point earlier that the execution of a search warrant is public.

**Mr Longo**—No, it is not.

**Senator MURRAY**—You said that earlier.

**CHAIR**—No, I think I was giving examples of where some jurisdictions have the cameras there. But that was in contrast. Mr Longo was saying that that had never been the situation.

**Mr Longo**—Let me make this absolutely and abundantly clear: executing search warrants is a private activity; that is a private and confidential activity. We take every precaution to ensure that people do not know when the warrant is executed. If there is a leak, one hopes that it is not from us. The example I gave was the Macquarie case. A lot of people knew we had executed that warrant, but there was no publication of the fact.

All I am saying is that once a criminal prosecution has commenced it is in the public domain. But even in the course of a criminal trial, any evidence given outside the presence of the jury cannot be published. It is sort of *voir dire*. Even with material given in the presence of the jury, there is still a discretion in the court for there to be suppression orders if there is thought to be undue prejudice or some issue of confidentiality that requires special protection. So there would be no doubt at all that all our information gathering activities are confidential. It is routinely not our practice to confirm or deny whether we section 19 someone or issue a document notice. We do not give information about that as part of our investigation activity.

It puts us in a difficult position sometimes because the market or the general community or the press want to know what we are doing, but we can say very little about what we are doing until we are in a position to either commence a civil action or a criminal action, in which case our interest in a matter will be revealed. It is only at the trial that issues about the admissibility of evidence and who the witnesses are and how the case will be proven will unfold. But then it is in open court in the presence of a judge, with all the procedures of a trial designed to ensure a fair trial.

From ASIC's point of view, our search and entry powers, such as they are, are adequate. We do not want any more. We are happy to apply to a judicial officer for a search warrant on those occasions we think one is necessary. We are using sections 35 and 36 a little more frequently now because we are finding that, regrettably, there is a bit of a practice of our notices not being complied with as much as we think they should be. It is a strategic issue we will be identifying in the next couple of years. I think you will see us going off to court more frequently to enforce compliance with notices and to lift awareness of the need for people to comply with our notices. We rely heavily on that, on a higher standard of compliance, because if there is a higher standard of compliance there is no need for a search warrant.

**CHAIR**—Is the search warrant a sufficient instrument to get things done quickly? If you think this person is going to throw evidence to the bottom of the harbour—to coin a phrase—have you got sufficient powers to encompass that problem?

**Mr Longo**—I think so. It is a matter for judgment in the end. Generally speaking, we do not conduct our information gathering activities on the assumption that people are going to destroy evidence when they know we are interested in them, otherwise we would be going

off to the judicial officers for execution of search warrants all the time. It is an entirely impracticable way of going about our work. We try to display some judgment.

In insider trading-type investigations, which are notoriously difficult to prove, where we think we have the right person and where we think there may be evidence there that, if our interest is known, may disappear, then in that kind of situation we would be more open to using a warrant. It all depends on the nature of the offence, what our experience has been—we have been establishing offences of that kind—and just practical issues about whether there is any real point in seeking to execute a warrant in the first place. They are pretty resource intensive activities. You need AFP officers, several people of our own have to go through the material, so all that has to be weighed up. Our resources are limited.

**CHAIR**—Thank you very much, and thank you for staying on, Mr Longo. Thank you, Hansard.

**Committee adjourned at 4.33 p.m.**

