# SPEED AND STRACEY LAWYERS

4 September 2012

Ms Fiona Bowring-Greer
Committee Secretary
Parliamentary Joint Committee on Law Enforcement
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Ms Bowring-Greer

**Supplementary submission on Committee's inquiry into the gathering and use of criminal intelligence**

Further to our submission of 20 August 2012 I wish to lodge a supplementary submission.

As per our original submission I advise that recently I represented a client who was involved in proceedings in the NSW Supreme Court in relation to a matter in which the Australian Crime Commission was a party (along with the Australian Taxation Office). The judgment for this case can be found at *R v Seller; R v McCarthy* [2012] NSWSC 934.

The *R v Seller* case is a very useful practical example of the issues which might arise when evidence is collected by the ACC under its coercive powers, and also on how the evidence might be used. The case gives rise to questions which the committee needs to address in the context of its current reference.

It is not the role of a parliamentary committee to stand in judgment on a case before the courts, and to this end the Parliamentary Privileges Act 1987 at section 16 has provisions which prevent Courts taking evidence arising from the parliamentary proceedings. However, for the following reasons parliamentary committees should take an interest in relevant judicial proceedings which may have either direct or indirect relevance to their terms of reference:

- Courts are well placed to make dispassionate judgments on whether the executive arm of government has used its powers lawfully and in accordance with the intentions of the Parliament;

- Courts can bring to the public gaze facts and issues which would ordinarily be kept from the public; and

- Courts often make comments on how legislation can be improved.

**Need to focus on coercive powers as an information gathering tool**

The information gathering powers are clearly the most potent weapon in the hands of the ACC. The potency of this weapon and the threats that it presents to individual rights and liberties was the subject of considerable debate when the Australian Crime Commission Establishment Bill 2002 was debated in the both houses and also considered by the joint parliamentary committee. The report on the Bill by **Parliamentary Joint Committee on the National Crime Authority referred to some of the key submissions to the inquiry:**

> 3.19 Mr Frank Costigan QC was more forthright. At the conclusion of his submission he said: In the end we have a new body to be set up, dominated by police forces and possessed of powers which the Parliament has always refused to give to police forces.
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> 3.20 Mr Ed Lorkin of the Criminal Bar Association of Victoria was equally concerned. In his submission he indicated that the Association had reservations regarding the placing of coercive investigative powers into the hands of an agency of Government that is effectively to be tasked and driven by police and prosecution bodies. [This] unprecedented step should be resisted.
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> 3.21 In evidence given to the PJC's predecessor on 2 April 2001, the Commissioner of the Australian Federal Police, Mr Mick Keelty stated: The AFP enjoys a close strategic partnership with the NCA. The AFP believes it is appropriate for the NCA to exist as an independent agency. It is inappropriate for any police organisation to have the special powers conferred upon the NCA.
>
> 3.22 In his evidence, the Commissioner also referred to a public response to an article which had appeared in The Canberra Times: I wrote a letter to the editor in which I expressed in clear terms that the relationship between the AFP and the NCA had never been better and that we enjoyed a number of recent successes in targeting organised crime groups. I would like to reiterate those comments to the committee today. I repeat that it would not be appropriate to vest those powers into a police agency.
>
> 3.25 Clearly there is a distinction drawn between the authorisation of the powers and the use of the coercive powers. The August Agreement provides that the Board will approve the use to which coercive powers can be applied while the coercive hearing powers would be exercised through independent statutory officers.
>
> 3.26 Under the NCA Act, the authorisation for the use of coercive powers is given through the IGC's approval of references. The IGC includes Ministers from each State whose responsibility is limited to authorising the references, and does not include operational responsibility for the work.

(This is set out in sub sections 8(b), (c) and (ca) of the NCA Act.) The Members and the Chair of the NCA then determine when and how these powers are to be used in developing an investigation, independent of any police involvement.

3.28 There was also a related concern as to whether the new body is sufficiently independent to exercise coercive powers objectively. Mr Michael Rozenes QC representing the Victorian Bar and the Australian Bar Association in evidence to the Committee said: Firstly, we submit that there has been a significant dilution of control over the exercise of the coercive powers that are available to be used in the course of a criminal investigation. Secondly, there has been most recently a significant increase in the potency of the coercive powers granted to the NCA and now taken over by the Australian Crime Commission. To put it in a nutshell, the combination of those two issues means that we now have a police force with coercive powers.

- Committee Hansard, 9 October 2002, p. 93

**Additional Recommendations by Certain Members were included in the committee's report:**

*Hon Duncan Kerr, MP*

*Senator Kay Denman Member for Denison Senator for Tasmania*
*Mr Robert Sercombe, MP Member for Maribyrnong*

**p. 35** - We share Commissioner Keelty's views that it is not appropriate to vest such powers in a police agency.

**p. 36** But we are also mindful that any proposal to vest such special powers of the kind possessed by the National Crime Authority into a body directed by the heads of Australian law enforcement agencies represents a shift not only of emphasis but also of principle. If the objectives of the Heads of Government can be achieved by measures that do not, or that only minimally, impact upon the hitherto clear separation of the use of powers akin to those more normally conferred on a Royal Commissions from those available to Commonwealth and State police forces that course ought be taken.

That is why the threshold issue for this Committee must be where the responsibility should be located for approving references that allow for the use of coercive powers.

The reservations of those Parliamentarians who took an interest in the ACC legislation were to be expected as in criminal proceedings in Australia the accused has a Court protected right to refuse to answer any questions on the grounds that the answer may incriminate or tend to incriminate them. In the United States this right is enshrined by the Bill of Rights.

In 1956 the US Supreme Court stated:

> *Time has not shown that protection from the evils against which this safeguard was directed is needless or unwarranted. This constitutional protection must not be interpreted in a hostile or niggardly spirit. Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honour to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States.*

However in Australia there is no constitutionally guaranteed right to silence. Instead the right to silence is part of Australia's common law and unlike the United States can be overruled by federal and state parliaments.

Although Federal Parliament has permitted the removal of the right to silence during examinations by the Australian Crime Commission, safeguards were put in place to prevent that evidence being able to be used against an accused in any subsequent criminal proceedings.

Notwithstanding these quite significant reservations about the conferral of coercive powers on the ACC, the Parliament ultimately conferred special information gathering powers.

In relation to my client he was summonsed to appear before the Australian Crime Commission and forced to answer all questions put to him concerning a business venture which he had established some years prior. Present during the examination was an officer of the Australian Tax Office who was seconded to and assisted the Crime Commission.

My client was not entitled to exercise his right to silence as that right had been abrogated by Federal Parliament under the Australian Crime Commission Act. Even if the answers might have tended to incriminate him, he could not refuse to answer. In order to provide that any accused giving evidence under this provision be given a fair trial, the ACC legislation has a provision which states that an examiner must give a direction of confidentiality of evidence taken at Section 25A '*if the failure to do so might prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been, or may be, charged with an offence.' (emphasis added)*

Subsequently he was charged with a criminal offences and his case was proceeding in the Supreme Court. The issue before the Court was whether or not he could get a fair trial and whether the administration of justice in New South Wales had been brought into disrepute, and whether it was necessary for the Court to protect an erosion of public confidence in the administration of justice.

During the course of his judgment his Honour Justice Garling held:

> 'It is not appropriate for this Court to permit a trial of their offences in all of the circumstances because it would be an offence to the administration of justice for the applicants to be confronted by prosecution authorities who

> have had access to material ordinarily caught by the privilege against self-incrimination, but which has been compulsorily obtained.
>
> The undoubted and strong public interest in the prosecution of these criminal allegations, and the proof and punishment of their crimes, does not outweigh the public interest in the due administration of justice.'

He further stated:

> 'I am thus satisfied that the distribution of the compulsorily obtained material was intended, and not due to an administrative oversight. It was clearly made without sufficient regard to any of the s 25A(9) directions which prohibited it and seemingly in the wrong belief that s 59(7) of the ACC Act authorised the distribution.'

Another issue which Garling J raised in relation to the perception of there being a fair trial was that the ACC had permitted an ATO official, who was subsequently to become a key expert witness for the prosecution, to observe the evidence taken under compulsion against which privilege against self incrimination had been called. Garling J said:

> 'By way of an analogy, a person who is required to piece together a jigsaw puzzle, does so entirely by the process of sorting the pieces, and then fitting them together. However, if that person has, albeit for a brief period, had the benefit of seeing the entire finished picture of the jigsaw puzzle, the task of identifying the various pieces of the jigsaw and then fitting them together, is much easier, and is much more readily achieved even if the complete picture is no longer in front of them.'

In his text, *Cross on Evidence* 8th Ed, Dyson Heydon refers to the assumption identification rule which 'requires the expert to identify the assumptions of primary fact on which the opinion is offered'. The facts upon which an expert's opinion is based must be made available for scrutiny by the tribunal. An ongoing dilemma in the Seller case is that some of the assumptions of fact made by the ATO officer draw from what he was able to observe at the ACC which was evidence given in secret and should not be available for a prospective jury to consider.

Justice Garling also observed that the ACC required counsel for the person under compulsion to answer questions to destroy all notes taken during the interview. Given that the counsel in this case could have been ordered not to publish his notes, it seems contrary to the principle of the right of a citizen to have legal representation, that this direction was given by the examiner. Here the judge stated:

> On that occasion, Mr Seller again appeared pursuant to a summons in terms similar to that which I have set out above. He was represented by another solicitor from the firm Atanaskovic Hartnell, Ms Hillman. A condition of Ms Hillman's leave to represent Mr Seller was, identically with that of Mr Hartnell for Mr McCarthy, that they were not entitled to keep any notes of the examination and that all notes which they made in the course of the examination either had to be destroyed or else kept in a sealed envelope by the Crime Commission. The statutory basis for this condition was not identified in the submissions to this Court. But as there was no issue before

me that required the determination of the validity of this somewhat curious direction, and no submissions were received about it, it is unnecessary to comment further.

**ACC and its accountability obligations to Parliament**

The term 'coercive powers' is used approximately 60 times in the body of the *Australian Crime Commission Annual Report 2010-11.* It is most often used to describe the nature of the power and to indicate the effectiveness of the ACC's use of coercive powers. This includes particular emphasis on their sharing of criminal intelligence and development of the National Intelligence Fusion Capability (p46) from the use of coercive powers with other government agencies. The report mentions the use of coercive powers when outlining its special investigations and provides data on the number of intelligence reports, examinations of witnesses, and notices to produce documents it has issued for each special investigation and intelligence operation, but does not provide a summary of this data or provide some year by year comparisons.

Also, in the ACC Annual Report 2010-11 it is difficult to find any reference on the checks and balances that ACC deploys to ensure that it uses its powers in a lawful manner. However, in the 2010-2011 Annual Report (p 38) there is one reference to the powers which refers to the examinations being conducted under 'strict provisions' without any elaboration on these provisions. Having regard to the parliamentary sensitivities of conferring arguably the most extreme coercive powers thus far given to any Australian regulator, it is surprising that the Annual Report does not traverse the checks and balances which operate to mitigate potential abuses of power.

**The Administrative Review Council Report on the use of coercive powers**

The Administrative Review Council Report Number 48 (May 2008) identified 20 key principles for agencies which have been conferred coercive powers. It provides a useful reference point for the Committee to assess ACC performance:

**Principle 1**

The minimum statutory trigger for the use of agencies' coercive information-gathering powers for monitoring should be that the powers can be used only to gather information for the purposes of the relevant legislation.

If a coercive information-gathering power is used in connection with a specific investigation, the minimum statutory trigger for using the power should be that the person exercising it has 'reasonable grounds' for the belief or suspicion that is required before the power can be exercised.

If an information-gathering process escalates from monitoring to specific investigation, agency officers should, to the extent operationally possible, inform the subject of the investigation of that change in status.

**Principle 2**

***Before using the powers***

Before using coercive information-gathering powers agency officers should do two things:

- consider alternative means that could be used to obtain the information sought

  and

- weigh up whether the probable importance of information obtained through using coercive information-gathering powers is justified, having regard to the cost of compliance for the notice recipient.

***Drafting notices***

When drafting information-gathering notices agency officers should seek only the information that is necessary for their current information-gathering requirements.

To the extent operationally possible, it is desirable that agency officers consult proposed notice recipients in order to determine the probable scope and nature of information held.

***Exercising the powers***

When exercising coercive information-gathering powers agency officers must choose the most efficient and effective means of obtaining the information. For example, if information is held on computer, the issuing of a notice requesting identification of records held on the system could in the first instance be the most effective and efficient course of action. This could then be followed by a notice requesting the production of relevant documents.

**Record keeping**

**Principle 3**

When an agency uses its information-gathering powers for the purpose of a specific investigation it is good administrative practice for the agency officer concerned to prepare a written record describing the basis on which the threshold trigger for the use of the powers was deemed to have been met.

If the powers are used for monitoring or if an agency regularly issues large numbers of notices, a written record of the fact of the use of the powers is also desirable; it should name the officer who authorised the use of the powers.

## Transparency

### Principle 4

To facilitate internal and external scrutiny of the use of coercive information-gathering powers and to engender community confidence in the exercise of those powers, each agency should regularly publish information about its use of the powers. The information provided should be sufficient to allow anyone seeking to assess the use of the powers to do so, yet should not be such as to jeopardise continuing investigations or reveal details of important investigatory methods.

## Contempt of court

### Principle 5

Agencies should regularly monitor developments in case law relating to contempt of court. In this regard, training and support for officers exercising coercive information-gathering powers are essential.

## Authorisation and delegation

### Principle 6

Legislation should specify who may authorise the exercise of an agency's coercive information-gathering powers.

If failure to comply with a notice would attract a criminal penalty, the legislation or administrative guidelines should specify the category of officer to whom the power to issue a notice can be delegated.

### Principle 7

It is important that an agency has in operation procedures for ensuring that coercive information-gathering powers are delegated only to suitably senior and experienced agency officers.

The officers to whom the powers are delegated should be sufficiently senior and experienced to be able to deal effectively with questions associated with procedural fairness and privilege that can arise in the conduct of examinations and hearings.

## Training

### Principle 8

If the right to exercise coercive information-gathering powers were linked to training or accreditation programs this would help agency officers exercising the powers to gain the requisite competency.

For an agency with a large number of officers exercising coercive information-gathering powers, development of an accredited training

program specific to the agency would represent good administrative practice.

## Accountability

### Principle 9

When an agency confers authority to exercise coercive information-gathering powers on people who are not officers of the agency—for example, state officials or employees of agency contractors—the agency should remain accountable for the use of those powers.

### Principle 10

Senior officers of an agency should regularly audit and monitor the exercise of coercive information-gathering powers within the agency. In addition to ensuring the continuing suitability and accuracy of delegations, the senior officers should ensure that officers exercising the powers have received the necessary training, possess the requisite skills, and have continuing access to assistance, advice and support.

## Sharing resources and experience

### Principle 11

Subject to considerations of privacy and confidentiality, agencies are encouraged to share their ideas and experiences in relation to the exercise of coercive information-gathering powers in the following ways:

- establishing an agency network for the exchange of educational materials, including training manuals and ideas. Discussion and circulation of information about relevant cases and the content and upgrading of instructional materials would be useful—especially for smaller agencies
- establishing an informal peer network within and between agencies for discussion, training and information sharing
- conducting periodic meetings between 'like agencies'
- identifying important across-agency or sectoral topics for inclusion in agency training programs and manuals.

## Conflict of interest

### Principle 12

Agencies should adopt procedures and offer training aimed at avoiding conflict of interest in relation to the exercise of coercive information-gathering powers.

*Decision Making: natural justice*, guide 2 in the Council's series of best-practice guides for administrative decision makers, provides an overview of the law in this area and of its practical application.

**Identity cards**

**Principle 13**

If face-to-face contact is involved, at a minimum officers or external experts exercising coercive information-gathering powers should carry official photographic identification and produce it on request.

In a formal investigative procedure it is good administrative practice if officers and external experts are also able to produce written evidence of the extent of their authority.

**Notices**

**Principle 14**

All coercive information-gathering notices should do the following:

- identify the legislative authority under which they are issued, the time, date and place for compliance, and any penalties for non-compliance
- in relation to specific investigations, set out the general nature of the matter in relation to which information is sought
- consistent with the requirements of the *Privacy Act 1988* (Cth) in relation to personal information, clearly state whether it is the usual lawful practice of the agency to hand information collected in response to notices to another area of the same agency or to another agency
- provide details of a contact in the agency to whom inquiries about the notice can be addressed
- inform notice recipients of their rights in relation to privilege.

***Notices to provide information or produce documents***

It is good administrative practice to specify how the notice recipient should provide the information or how the document should be produced and to whom.

***Notices to attend an examination or a hearing***

Notice recipients should be told whether they may be accompanied by a lawyer or third party and, to the extent possible, the name of the person who will be conducting the examination.

***The time frame for compliance***

Agency legislation should specify a minimum period for the production of information or materials or for attendance for examination or hearing. The

legislation should also allow for exceptions to the rule in specified circumstances.

***Materials covered by a notice***

To facilitate compliance, a notice or its supporting correspondence should clearly identify the sorts of materials covered by the notice, including materials held on computer.

**Principle 15**

Compliance would be further encouraged if terms such as 'information in the possession of', 'in the custody of' or 'under the control of' the notice recipient were defined. Pro forma notices can be useful if differences in expression occur in the legislation of a single agency.

## Examinations and hearings

**Principle 16**

Unless there are special reasons to the contrary, examinees should be entitled to:

- a private hearing—subject to the presence of authorised individuals
- in the absence of exceptional circumstances, the option of having legal (or, if appropriate, other) representation.

The reason for holding a public examination or for denying legal or other representation should be explained and a record of this kept.

Among the matters that should be taken account of in legislation are the taking of evidence on oath or affirmation and the admissibility of the evidence taken at the examination in subsequent proceedings.

Among other matters that may be dealt with *without* legislation are provision for viewing and correction by the examinee of a transcript of proceedings and, where relevant, the circumstances in which a third party may be given a copy of the transcript within the scope of agency privacy and secrecy provisions.

Examinees should be told if legislation precludes subsequent disclosure of information obtained during an examination or hearing. Agencies should clearly differentiate this situation from one in which where there is no such legislative restriction.

## Privilege

**Principle 17**

Client legal privilege and the privilege against self-incrimination—including the privilege against self-exposure to penalty—are fundamental principles that should be upheld through legislation. Abrogation of the

privileges should occur only rarely, in circumstances that are clearly defined, compelling and limited in scope. Legislation should clearly state whether or not the privileges are abrogated and when, how and from whom the privileges (including a use immunity) may be claimed.

Agencies should keep written records of the situations in which the privileges apply, and especially when they are waived. Agency guidelines to supplement legislative directions should also be developed in relation to privilege; among the topics covered should be the procedures to be adopted by agencies in responding to a claim of privilege and the nature and effect of a waiver of privilege.

## Disclosure of information

### Principle 18

The complexity and inconsistency of agencies' secrecy provisions mean that special care is needed when dealing with inter-agency disclosure of information.

In notices and requests it is necessary to carefully describe the information agency officers require in the exercise of their coercive information-gathering powers and the probable uses of that information.

Agencies should provide to their officers guidance about situations in which the use of information for purposes not reasonably foreseen at the time of collecting the information might be contemplated.

Guidelines and training for agency officers in both these areas and in relation to the effect of and interaction between the *Privacy Act 1988* (Cth) and agencies' secrecy provisions are essential.

It is good administrative practice to develop memorandums of understanding between agencies, clarifying the responsibilities of agency officers in disclosing information obtained through, among other things, the use of coercive information-gathering powers.

### Principle 19

Subject to limited exceptions, it is desirable that inter-agency disclosure of information obtained in the exercise of coercive information-gathering powers be subject to a threshold trigger of the same calibre as that governing the initial issuing of a notice (see principle 1). Additionally, privilege and use immunity should be taken into account when the release of information to another agency is being considered.

Examples of situations in which exceptions to the threshold trigger would be apposite are when there is an immediate and serious risk to health or safety and when limited information is required for a royal commission.

As noted, the discretion to disclose information obtained through the use of coercive information-gathering powers should rest with senior, experienced agency officers.

**Record management**

**Principle 20**

Agency strategies and guidelines should operate to ensure the integrity, proper management and accurate recording of information received in the exercise of an agency's coercive information-gathering powers. Wherever possible, receipts should be given for documents and materials furnished to the agency.

An agency that has used its information-gathering powers to obtain information or documents from someone should keep under continuing review the need to keep the person informed, as appropriate, about whether an investigation is still current, when documents can be returned to the person, or whether other arrangements can be made for the person to be given interim access to the documents or a copy of the documents.

**Issues arising from Seller's case and also ARC Report 48**

The matters raised in this submission give rise to a number of issues which the Committee should consider:

1. Does the ACC need to enhance its reporting to Parliament on the use of its coercive powers by providing dissected data in a single table on the use of its various powers and also by way of a discursive statement on how the powers have been exercised over say the last five years along with a statement on issues which have arisen?

2. Does the ACC need to publish a policy statement along the lines suggested by the ARC report number 48? In this regard, it is noted that the ACC statement on examinations was published in 2006. It is further noted that post the ARC report number 48, in 2011, ASIC published a detailed and comprehensive policy statement on the use of its coercive powers.

3. That in relation to the issues which have arisen in Seller's case, has the ACC conducted other coercive examinations which might be in breach of the law in relation to the dissemination of transcripts taken under compulsion, and which might have militated against a fair trial for other accused persons?

4. Has the ACC allowed witnesses from other government agencies to have access to live interviews and/or subsequent transcripts, and has this assisted and influenced the evidence given by the witness from the government agency – thereby undermining the prospect of a fair trial as required in Section 25A of the Act?

5. Does the ACC need to publish a detailed statement on whether the legal counsel for the person under examination should be able to take and keep notes which have been taken during an interview (in relation to Seller, the solicitor had to destroy all notes taken)? It is submitted that that this would be consistent with the report of the 2005 review of the ACC which recommended that ACC develop a practice and procedure manual for the

benefit of practitioners and those summoned for examination or to produce documents.

If the Committee needs any further evidence or explanation the matters canvassed in this submission I would be pleased to attend one of its forthcoming hearings.

Yours faithfully

**Malcolm Stewart**
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