UNCLASSIFIED

AUSTRALIAN CRIME COMMISSION

OFFICE OF THE
CHIEF EXECUTIVE

Mr Peter Hallahan
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Hallahan

Thank you for the opportunity to contribute to the Committee's inquiry into the Crimes Legislation Amendments (Serious and Organised Crime) Bill (No. 2) 2009. The Australian Crime Commission's submission is attached.

Yours sincerely

Michael Outram
Acting Chief Executive Officer
13th October 2009

ACC HEADQUARTERS
44 Mort Street, Braddon, Canberra, ACT 2601
Tel: (02) 6243-6613, Fax: (02) 6243-6679, Internet: www.crimecommission.gov.au
GPO Box 1936, Canberra, ACT 2601

UNCLASSIFIED

SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE INQUIRY INTO THE CRIMES LEGISLATION AMENDMENTS (SERIOUS AND ORGANISED CRIME) BILL (NO. 2) 2009

The Australian Crime Commission (ACC) welcomes the opportunity to comment on the Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009.

As a general comment, the ACC considers the proposed amendments will enhance the capacity of Commonwealth law enforcement, and of Australian law enforcement more generally, to address the challenges posed by serious and organised crime in an effective and responsible way.

The following comments are addressed to Schedule 7 to the Bill, which is expressed to amend various provisions of the *Australian Crime Commission Act 2002* (the ACC Act) and to make consequential amendments to provisions of some other Acts.

Background—Structure and functions of the ACC

The ACC is an agency established by a Commonwealth statute, the ACC Act. It exercises powers conferred by that Act and, in relation to offences against State laws, by corresponding State/Territory Acts.

The functions of the ACC are, in summary:

- to collect, correlate, analyse and disseminate criminal information and intelligence and to maintain a national criminal intelligence database;
- when authorised by its Board, to undertake and report on investigations and intelligence operations into indications of serious and organised criminal activity; and
- to provide strategic criminal intelligence assessments, advice on national criminal intelligence priorities and other criminal information and intelligence to the Board.

The ACC is managed, and conduct of its investigations and intelligence operations is controlled, by its Chief Executive Officer (CEO), a statutory officer appointed by the Governor-General. However, the coercive powers of the ACC are exercised independently by examiners, who are also statutory officers appointed by the Governor-General and who are not otherwise involved in the management of the ACC or the conduct of its investigations and intelligence operations.

The ACC is overseen by a Board, which is chaired by the Commissioner of the Australian Federal Police and comprises the heads of four other Commonwealth agencies (the Attorney-General's Department, the Australian Customs and Border Protection Service, the Australian Securities and Investments Commission and the Australian Security Intelligence Organisation) together with the heads of all eight State and Territory police forces (including the Chief Police officer of the Australian Capital Territory). The CEO of the ACC is a non-voting member of the Board.

The main functions of the Board are:

- to determine national criminal intelligence priorities;
- to provide strategic direction to, and to determine the priorities of, the ACC;
- to authorise the ACC to conduct investigations and intelligence operations into indications of serious and organised criminal activity and to determine, where

appropriate, that these are 'special' investigations/ operations in support of which the ACC's coercive powers may be used (a special determination)
- to disseminate strategic criminal intelligence assessments to appropriate Australian and foreign agencies.

Above the Board, an Inter-Governmental Committee (IGC), comprising the Commonwealth and State/Territory Ministers responsible for the ACC legislation, monitors the work, and oversees the strategic direction, of both the Board and the ACC and receives reports from the Board for transmission to the governments represented. The IGC must be notified of every special determination by the Board and may revoke such the determination within 30 days of notification.

Summary of the proposed amendments

Amendments are included in Schedule 7 to the Bill for the following purposes:
- to establish a procedure by which people who refuse to cooperate at an ACC examination may be dealt with by a superior court for contempt, as an alternative to prosecution (items 1, 3, 18, 20, 21, 23-26 and 29);
- to add the Commonwealth Commissioner of Taxation to the ACC Board (items 2, 7;
- to amend the definition of 'intelligence operation' to clarify that particular activity undertaken within the scope of an intelligence operation may have the character of a criminal investigation (items 4, 6 and 27);
- to expand the range of statutory exceptions to an examiner's power to prohibit a person who receives a summons or notice to produce under the ACC Act from disclosing the existence of the summons or notice (items 5, 15-17)
- to give the Chair of the Board a longer period within which to notify the IGC of a special determination (item 8);
- to strengthen safeguards in relation to the issue of summonses and notices to produce by examiners exercising the coercive powers of the ACC (items 9-14 and 28);
- to expand the range of conduct at an examination that constitutes a criminal offence (items 19 and 26);
- to ensure that an independent review of the operation of the ACC Act to is conducted every five years (item 22).

Contempt procedure

A key feature of the ACC is the power of its examiners to summon witnesses and compel them to give evidence under oath, even in cases where the evidence given would tend to incriminate the witness or otherwise expose the witness to a penalty. In this way obstacles may be overcome that would frustrate normal police inquiries. Witnesses are indemnified against the direct use of self-incriminating evidence against them, but the investigative leads obtained by means of such coercive examinations will often result in the discovery of independent evidence of the criminal activities of the witness or others which will be admissible in a prosecution.

While the capacity to conduct such examinations is a powerful investigative tool, its effectiveness depends on the willingness of witnesses to cooperate. The ACC Act and its predecessor, the *National Crime Authority Act 1984* (the NCA Act), have always provided criminal penalties for non-compliance.

The bulk of witnesses do cooperate, but a small minority refuse to do so. This minority includes many of those we would expect to have the most intimate

knowledge of organised criminal activity. For example, many uncooperative witnesses are members of outlaw motor cycle gangs, whose behaviour at examinations may be defiant, disruptive, offensive or even threatening. The failure of such witnesses to cooperate has a significant impact on the progress and direction of investigations.

For many years now the ACC, and before it the National Crime Authority, has sought means of improving the rate of compliance at examinations. The two main options considered have been increased penalties and the institution of a contempt procedure.

The *National Crime Authority Legislation Amendment Act 2001* (the 2001 Amendment Act) increased the maximum penalty for non-cooperation offences under the NCA Act from two to five years imprisonment. The increased penalties were carried forward into the ACC Act. They have resulted in the courts imposing somewhat higher penalties for these offences but there is no indication that compliance levels have improved significantly.

The National Crime Authority Legislation Amendment Bill 2000 (the 2000 Amendment Bill) also included provision for a procedure under which, if a witness failed to cooperate at an examination, the presiding examiner could refer the matter to the relevant Supreme Court to be dealt with as if it were an alleged contempt of that court. Opposition in the Senate compelled the then Government to withdraw that part of the Bill.

The 2001 Amendment Act required an independent review of the enhanced coercive powers it introduced after five years. That review was conducted by Mark Trowell QC in 2007. It concluded that, while the other enhancements introduced by the 2001 Amendment Act were working well, there was a need to introduce a contempt procedure along the lines of the provisions that had been withdrawn from the 2000 Amendment Bill.

Agencies established under State law with similar powers to the ACC to investigate serious and organised crime and/or official corruption all have the option of citing a witness for contempt before the relevant State Supreme Court. This power is rarely used but its availability appears to have a salutary effect on witnesses. It raises the prospect of immediate custody and detention for an initially indeterminate period, even if the alleged contemnor is able to obtain bail pending a full hearing of the contempt allegations. This is a strong motivation for an initially recalcitrant witness to reconsider their position and to purge their contempt by complying with the original requirement.

By comparison, prosecution for non-compliance offences appears to be relatively ineffective. Prosecutions must be initiated by summons, as there are not normally grounds to arrest the alleged offender. Prosecutors and the courts are understandably reluctant to give offences such as failure to take an oath or answer questions priority over serious crimes against the person or property or major drug offences. As a result a person charged with a non-compliance offence may not face trial for many months or even upwards of two years. If a defendant is ultimately convicted, the effective penalties imposed remain comparatively light.

By way of example, in 2007-08 there were 12 convictions solely for non-compliance offences. The average sentence was 10.6 months imprisonment suspended after

2.3 months on a recognisance for 18.5 months. The average delay between the initial charge and sentencing was 28.5 months.

This situation is hardly calculated to impress upon a person with a criminal background an urgent sense of the need for compliance. Accordingly, the ACC strongly supports the view that a contempt procedure, with its more immediate impact and its potential for applying continuing pressure to a recalcitrant witness, is more likely to ensure compliance.

The ACC does not entertain unrealistic expectations that it will be able to achieve 100 per cent compliance by witnesses. However, appropriate sanctions will allow the ACC to make its powers as effective in practice as is possible. A contempt procedure is familiar from the practice of the courts and would ensure that sanctions are applied by the courts, not the examiner concerned. It has been applied effectively by bodies with similar coercive powers to those of the ACC. The ACC submits that such a procedure is a proportionate and appropriate response to the challenges posed by the application of coercive powers to organised crime.

Commissioner of Taxation

The proposal to add the Commissioner of Taxation to the Board of the ACC is a product of the Board's practical experience.

It has found over time that taxation issues arise in relation to so much of the work of the ACC that the Commissioner has been regularly invited to sit in on Board meetings to provide the members with advice on tax aspects of the matters under discussion. In these circumstances the Commissioner is required to absent himself from sections of the meeting to which his expertise has no apparent relevance. While this may be an appropriate arrangement for an agency head who is invited to sit in on discussion of a single item it is an unsatisfactory situation when the same agency head's input is regularly needed.

Despite the fact that this will result in an increase in Commonwealth representation on the Board, the Board collectively has indicated agreement with this proposal. Accordingly, the ACC does not anticipate that the States and Territories will have any concern about this change.

Amended definition of 'intelligence operation'

The distinction drawn in the ACC Act between 'intelligence operations' and 'investigations' as ACC activities authorised by the ACC Board creates uncertainty about:

- the extent to which ACC staff may engage in conventional police type investigative activities in support of an ACC inquiry that is designated an 'intelligence operation'; and
- the application of certain provisions of other Acts that refer to 'investigations' in relation to activity being carried out within the scope of an authorised ACC intelligence operation.

For example, in the course of an intelligence operation it may be necessary to identify the membership, structure and general mode of operation of a criminal organisation. To do this it may become necessary to observe particular courses of

criminal conduct. Although the objectives of such an exercise may be broader than supporting prosecutions for the specific offences identified, this type of operation will in effect involve the investigation of particular offences, and will ultimately require provision of admissible evidence obtained against the individuals involved to police or prosecuting authorities under s 12 of the ACC Act. Questions have been raised as to whether such inquiries can lawfully be pursued within the scope of an intelligence operation. If not, evidence obtained in the course of such inquiries may be liable to exclusion from any resulting prosecutions.

Effective conduct of such an investigation may require measures such as execution of search warrants or use surveillance devices. However, there has been considerable uncertainty as to whether this type of activity, falling within the scope of an inquiry designated an 'ACC intelligence operation' as opposed to an 'ACC investigation', qualifies as an investigation for the purposes of s 3E of the *Crimes Act 1914* or s 14 of the *Surveillance Devices Act 2004*. This uncertainty has raised doubts as to whether ACC staff may lawfully apply for such warrants for the purposes of a component of an intelligence operation even if that component has the characteristics of an investigation.

A recent decision of the Federal Court at first instance (*SS v Australian Crime Commission* [2009] FCA 580), considering the argument that the Board had invalidly purported to authorise conduct in the nature of an investigation as part of an intelligence operation, has indicated that the concepts of an investigation and an intelligence operation are not mutually exclusive. However, the ACC believes that it is important that this should be made clear on the face of the ACC Act, so as to avoid further argument or uncertainty about this issue.

The effect of the proposed amendment will be to confirm the decision in *SS* and to ensure that there is no doubt that the ACC may apply for issue of a warrant that is available for the purposes of an investigation of an offence if the warrant is intended to support an inquiry that has that character, even if the inquiry is being undertaken as part of an ACC intelligence operation. This will ensure that opportunities to gather evidence against organised crime are not lost because of doubts about the lawfulness of taking investigative action, including seeking and executing warrants, in such cases.

Exceptions to non-disclosure notations

When an examiner issues a summons under s 28 or a notice under s 29 there will often be reason for concern that, if the recipient discloses information about the summons or notice, the disclosure may be contrary to the public interest in some way. The most obvious examples are that a disclosure may prejudice the safety or reputation of a person (such as an actual or potential witness or a person under investigation) , the fair trial of a person who has been or may be charged with an offence or the effectiveness of an ACC intelligence operation or investigation for the purposes of which the summons or notice was issued.

Section 29A of the ACC Act addresses this risk by giving the issuing examiner a discretion, and in some cases an obligation, to include in the summons or notice a 'notation' prohibiting disclosure of information about the summons or notice or of any 'official matter' connected with it. 'Official matter' is defined as any of the following things:

- in the case of a summons—the Board's determination that the relevant operation/investigation is a special operation/investigation;

- an ACC operation/investigation;
- an examination; and
- court proceedings.

Because a complete prohibition on disclosures would entail significant inconvenience to the recipient and hamper the exercise by the recipient of legal rights in relation to the summons or notice, there are two classes of exceptions to the prohibition imposed by a notation. First, the notation may specify exceptions. These are intended to meet the requirements of an individual's circumstances and may in practice be varied or added to by the issuing examiner on an application by the recipient of the summons or notice.

The second class comprises statutory exceptions set out in s 29B. In summary, these exceptions permit disclosure by the recipient and by a person to whom a disclosure has been made under one of these exceptions as follows:

- to a legal practitioner to obtain legal advice or representation and by a legal practitioner to give legal advice or make representations;
- to a legal aid officer to obtain legal or financial assistance under s 27 of the ACC Act;
- among officers or agents of a body corporate that is the recipient of a summons or notice, to ensure compliance;
- if the recipient is a legal practitioner, to obtain another person's agreement to the practitioner disclosing information or a document that would disclose a communication in which that person has client legal privilege.

The Bill would make amendments to the statutory exceptions for two purposes. One amendment (item 16) will provide that a legal practitioner to whom a disclosure has been made may disclose the information he or she has received for the purpose of obtaining legal advice or representation. This will ensure that a solicitor can lawfully refer a matter to counsel without the need for a variation of the notation. This is essentially correcting an anomaly in the existing list of exceptions and will facilitate the recipient of a summons or notice obtaining appropriate legal advice and representation.

The other amendments (items 15 and 17) respond to a recommendation by the PJC-ACC that the statutory exceptions should be expanded so as to allow the recipient of a summons or notice to lodge a complaint with the Commonwealth Ombudsman without requiring a variation of the notation. In principle, the existing situation places the examiner in a conflict of interest if asked to vary a notation to allow disclosure to the Ombudsman for the purpose of complaining about an action taken by the examiner or at an examination. In practice, an examiner could not properly refuse a request for such a variation, since the notation would otherwise hinder the recipient's exercise of his statutory right to seek review of administrative action. Accordingly, it makes sense to provide a statutory exception for this purpose.

The advent of the Integrity Commissioner and the Australian Commissioner for Law Enforcement Integrity, established under the *Law Enforcement Integrity Commissioner Act 2006* raises parallel issues. The Bill therefore properly includes amendments which provide a statutory exception for disclosures made for the purposes of a complaint to either the Ombudsman of the Integrity Commissioner.

Notification period for special determinations

One of the significant innovations in the structure of the ACC in comparison with that of the NCA was the transfer from the Inter-Governmental Committee (IGC) on the NCA to the new ACC Board, composed of Commonwealth and State/Territory agency heads, of the power to determine which investigations or intelligence operations required the use of coercive powers.

As a safeguard following the devolution of this power from Ministers to senior officials, the ACC Act provides the Inter-Governmental Committee on the ACC with a veto over such decisions made by the Board. The ACC Act provides that whenever the Board determines that an ACC investigation or intelligence operation is a special investigation or a special intelligence operation (that is, makes a special determination), the Chair of the Board must give a copy of the determination to the IGC within three days (s 7C(5)). The IGC then has 30 days to request the Chair to give further information about the determination (s 9(2)-(6)). Within 30 days of making that request the IGC may, by resolution, revoke the special determination with effect from the date on which the CEO is notified of the revocation (s 9(7) and (8)).

The practical experience of the ACC, which supports the Chair in the performance of this function, has been that three days is a very short period and it is sometimes difficult to ensure that appropriate correspondence is signed by the Chair and reaches all members of the IGC within that period. In such a short period obstacles such as travel arrangements of the Chair, weekends and public holidays can make timely compliance difficult, especially where (as in out of session consideration by the Board) the timing of the decision cannot be pre-determined.

The ACC supports extension of the period for notification of the IGC to seven days, as proposed in item 8 of the Schedule. This will allow sufficient flexibility to ensure that the IGC can always receive notification within the statutory period. Since the revocation period does not start to run until the IGC has received notification and requests further information, the time available for the IGC to consider the issue is not affected. It is true that the maximum length of the cycle from the date of the determination to the last possible date on which the IGC can resolve to revoke the determination will be extended, but only from 63 to 67 days.

The ACC acknowledges that this is an argument based on administrative convenience but it submits that the proposed extension is not unreasonable in the circumstances and will not detract from achievement of the underlying legislative objective, that the IGC should receive prompt notification of a special determination and have the opportunity to revoke it before significant work has been undertaken.

Enhanced safeguards for issue of summonses and notices

Background

These amendments arise from recommendations made by the PJC-ACC in the report of its *Inquiry into the Australian Crime Commission Amendment Act 2007*.

The background to this matter is the decision of the Supreme Court of Victoria (Smith J) in the case of *ACC v Brereton* [2007] VSC 297 on 23 August 2007 and the subsequent enactment of the *Australian Crime Commission Amendment Act 2007* (the ACC Amendment Act).

In *Brereton* the defendant was charged with refusing to be sworn or make an affirmation as a witness at an ACC examination. In his defence he asserted that he had not been validly summoned and in support of this argument he sought production of the written record of the examiner's reasons for issuing the summons. The court ruled that he was entitled, subject to any claim for public interest immunity, to production of the record.

In the course of the judgment, Smith J expressed the view that, under s 28(1A) of the ACC Act, a summons could not be validly issued unless a document recording the examiner's reasons for issuing the summons was already in existence. Until then the ACC had understood that it was open to examiners to record their reasons after issuing a summons and examiners had acted accordingly.

This comment, taken together with the Court's ruling requiring production of the record of reasons, raised the prospect that large numbers of ACC summonses (and notices) might be found to be invalid on the grounds that reasons were not recorded until after their issue. This outcome would have had implications for some 30 ACC Act prosecutions then current and potentially for the use, in investigations, intelligence operations and prosecutions for a wide range of criminal offences, of evidence obtained directly or indirectly as a result of the issue of many summonses and notices since the establishment of the ACC.

The ACC doubted the correctness of the interpretation of s 28(1A) adopted in *Brereton* but leaving the matter to be resolved through the courts was likely to result in substantial disruption to the ACC's work. The urgency of the matter was compounded by the fact that dissolution of the Commonwealth Parliament was clearly imminent. The then Government decided to legislate to clarify the operation of subsection 28(1A) and to confirm the validity of existing summonses and notices by amendment of the ACC Act at the earliest opportunity. Passage of the ACC Amendment Act was completed by 20 September 2007.

Effect of the ACC Amendment Act

The ACC Amendment Act implemented three measures to address this issue.

First, it amended subsections 28(1A) and 29(1A) to provide expressly that reasons for issue of a summons or notice must be recorded before, at the time of, or as soon as practicable after issue.

Second, it introduced new subsections 28(8) and 29(5) to provide that non-compliance with certain provisions, namely:

- the time requirements in subsections 28(1A) and 29(1A);
- the requirement in s 28(2) to attach a copy of the relevant Board determination to a summons; and
- the discretion/requirement in s 29A(1) to include a notation prohibiting disclosure in a summons or notice;

would not affect the validity of a summons or notice.
Third, the ACC Amendment Act provided that no summons or notice issued before the commencement of the Amendment Act would be taken to be invalid merely because the reasons for issue were recorded after issue.

The Amendment Act also included some unrelated minor amendmentsto sections 28 and 29 to permit an examiner other than the one who issued a summons or notice to conduct the examination or receive the documents or things produced.

The PJC-ACC inquiry into the ACC Amendment Act

As there had been no opportunity to review the Bill before its passage the PJC established an inquiry into the ACC Amendment Act in early 2008. The report of the inquiry recommended:

- a tightening of procedures for issuing and recording summonses and notices to produce and corresponding amendments to the Act (including a requirement that reasons for issue of summonses and notices be recorded before issue and that non-compliance with this requirement would make the issue invalid) (Recommendations 1-3);
- some adjustment of the operation of notations to avoid inhibiting complaints to the Ombudsman (and possibly also the Minister) by recipients of summonses or notices (Recommendation 4);
- preservation of the summonses and notices validated by the ACC Amendment Act (Recommendation 5);
- an expedited procedure (possibly contempt proceedings) for dealing with non-compliant witnesses (recommendations 6 and 7);
- a legislated requirement for an independent review of the operation of the ACC Act at intervals of five years (Recommendation 8); and
- additional accountability requirements via the Ombudsman (Recommendations 9 and 10).

Effect of the Bill

The Bill implements most of these recommendations. Amendments giving effect to Recommendations 4, 6, 7 and 8 are dealt with elsewhere in this submission. Recommendations 1-3 and 5 are addressed by items 9-14 of the Schedule. The ACC understands the Government is still considering how best to give effect to the objectives of Recommendations 9 and 10.

The effect of the amendments at items 9-14 is that reasons for issue of a summons or notice must be recorded no later than at the time when the summons or notice is issued and that failure to comply with this requirement, or to attach a copy of the relevant determination to a summons, means the summons or notice is invalidly issued. These changes will not affect the validity of previously issued summonses.

The practice of ACC examiners has already been modified to comply with the proposed requirements. The ACC is satisfied it will be able to continue to operate on this basis.

There is one minor variation from the PJC-ACC's recommendations, in that the amendments would allow reasons to be recorded at the same time as issue of a summons or notice. The ACC considers this should avoid arid disputes about the precise time at which reasons were issued while ensuring that its practice meets the underlying objective of the PJC-ACC's recommendations, namely that reasons recorded should indisputably be those present in the mind of the examiner at the time of issue and not arguably tainted by knowledge subsequently acquired.

Expanded criminal offence—threats at examination

This amendment addresses a concern that has arisen in a recent ACC examination and was raised in the course of developing the contempt procedure. It was noted that, in addition to the non-compliance offences in s 30 and the false or misleading evidence offence in s 33, s 35 penalises obstructing or hindering an examiner or disrupting an examination. However, it is questionable whether a person who merely utters threats against the examiner or other persons present at an examination commits a breach of s 35.

The ACC considers that making threats ought clearly to be an offence and to be capable of being dealt with as a contempt. If a witness can make threats against an examiner or ACC staff with impunity, the authority of the examiner is severely undermined and the witness will tend to be emboldened to defy the examiner's authority further. The ACC therefore supports this amendment to make such threats a criminal offence.

Five-yearly review

This amendment arises from a recommendation of the PJC-ACC's *Inquiry into the Australian Crime Commission Amendment Act 2007* (Recommendation 8).

The effect of the amendment at item 22 of the Schedule will be that an independent review of the operation of the ACC Act will be conducted every five years after the commencement of the amendment, either by a person appointed by the Minister of by a Parliamentary Joint Committee. This provision will replace the now spent provision for a review of the operation of the Act after its first three years.

The ACC acknowledges that it is endowed with extraordinary powers to interfere with the rights of individuals in order to combat a major social evil, in the form of serious and organised crime, and that it is vitally important that these coercive powers are not abused. Accordingly, it accepts that from time to time its performance should be subject to review, to ensure that it is continuing to use the coercive powers, and to perform its functions more generally, in a responsible way, balancing its objectives in robustly addressing the threat of serious and organised crime with sensitivity to the genuine requirements of human rights in a democratic society.