



## Schedule 2

- 2.1 The purpose of Schedule 2 of the Crimes Legislation Amendment (Powers and Offences) Bill (the Bill) is to amend the *Australian Crime Commission Act 2002* (Cth) (the ACC Act) to improve how the Australian Crime Commission (ACC) can share and disclose information and material in its possession to combat serious and organised crime.

### Existing laws and practices

- 2.2 The ACC was established under the ACC Act as a statutory authority to combat serious and organised crime. It reports directly to the Minister for Home Affairs and Justice and is part of the Attorney-General's portfolio.
- 2.3 The ACC is governed by:
- the ACC Board;
  - the Minister for Home Affairs and Justice;
  - the Inter-Governmental Committee on the ACC; and
  - the Parliamentary Joint Committee on Law Enforcement.
- 2.4 The ACC conducts special operations and investigations against Australia's highest threats of serious and organised crime through:
- providing national strategic criminal intelligence assessments;
  - maintaining the nation's criminal intelligence holdings;
  - developing national responses to organised crime;

- developing partnerships, providing coordination and collaboration across the Commonwealth, States and Territories and the private sector; and
  - providing an independent view about the risk of serious and organised crime impacting Australia, domestically and abroad.
- 2.5 The ACC works with partners to disrupt, disable and dismantle serious and organised criminal syndicates. The agency seeks to harden the Australian environment against the threat of nationally significant crime through the development of prevention strategies and influencing policy and legislation at a Commonwealth, State and Territory level.
- 2.6 Currently, the Chair of the ACC Board is the only person who is authorised to provide information to the Minister administering the ACC Act and the Intergovernmental Committee on the ACC.
- 2.7 There are a range of circumstances where the ACC may disclose information that would normally be subject to the secrecy provisions in section 51 of the ACC Act. These circumstances do not include sharing information with Commonwealth Ministers other than the Minister administering the ACC Act, Members of Parliament or the private sector.
- 2.8 The ACC Act currently has no provision for the dissemination of information outside of government, other than through public meetings and bulletins released by the Board.
- 2.9 There is a perceived need for greater public-private partnerships in combating organised crime.

## **Proposed legislative amendments**

### **Powers of the Chief Executive Officer**

- 2.10 Proposed amendments to the ACC Act will allow the Chief Executive Officer (CEO) of the ACC, in addition to the Chair of the Board, to report on matters relating to the ACC's conduct in the performance of its functions.
- 2.11 Many of the amendments are as simple as adding the CEO after existing references to the Chair of the Board.

- 2.12 Amendments apply in relation to all information possessed by the ACC whether it already had the information or obtained it after the commencement of the amendments.

## Members of Parliament

- 2.13 The proposed amendments will allow the Chair or CEO to give information to a member of either House of the Commonwealth Parliament or a member of a State or Territory parliament if he or she considers that it is in the public interest to do so. An example of this would be the situation where the ACC would be able to brief a parliamentary committee that is conducting an inquiry on matters pertaining to an ACC investigation.<sup>1</sup>

## Information sharing

- 2.14 One purpose of the amendments is to make the sharing of information with Commonwealth, State and Territory and foreign and international bodies less complex.
- 2.15 The proposed amendments provide a definition of 'ACC information' into subsection 4(1) of the ACC Act, as being 'information that the ACC has in its possession.' It distinguishes information from a 'returnable item' (see Schedule 3) to ensure that there is a clear divide between how the ACC deals with ACC information and returnable items.
- 2.16 Through proposed amendments, the ACC will be able to share information with private sector bodies as well as government bodies where specific requirements have been met and for defined purposes.
- 2.17 The Explanatory Memorandum provides a detailed description of the term 'permissible purpose', setting out the reasons for which the ACC will be able to share information, distinguishing between Commonwealth, State, Territory and foreign and international bodies, and private sector bodies.
- 2.18 The definition of permissible purpose will also include any other purpose prescribed by the regulations. This is to ensure that if there is some other reason to share information, the ACC is able to seek prescription of the proposed new purpose in the regulations.

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<sup>1</sup> Crimes Legislation Amendment (Powers and Offences) Bill 2011 Explanatory Memorandum, p. 54.

## Government bodies

- 2.19 Currently, the ACC Act requires the CEO to provide evidence of an offence obtained in carrying out an operation or investigation to the appropriate Commonwealth, State or Territory law enforcement agency or Attorney-General.
- 2.20 Under the proposed legislation, the CEO would be able to disclose 'ACC information' but not information that was obtained in an examination if it would breach a non-publication direction made by an Examiner under subsection 25A(9).
- 2.21 The CEO would be able to share information if the following requirements are met:
- the CEO considers it appropriate to do so;
  - it is relevant to a permissible purpose; and
  - doing so would not be contrary to a rule of the Commonwealth, State or Territory that would otherwise apply.<sup>2</sup>

## Private sector bodies

- 2.22 The proposed legislation would allow the CEO to disclose 'ACC information' to private sector bodies subject to specific undertakings and conditions and only if it is necessary for a permissible purpose.
- 2.23 For the CEO to provide ACC information to a prescribed corporation, it is proposed that:
- the CEO must consider it appropriate;
  - the CEO must consider it necessary for a permissible purpose;
  - the body must have undertaken, in writing, not to use or further disclose information except in accordance with a written specification by the CEO permitting such further disclosure, or as required by a law of the Commonwealth, State or Territory;
  - the body has undertaken in writing to comply with any conditions specified by the CEO; and
  - disclosing the ACC information would not be contrary to a law of the Commonwealth, State or a Territory that would otherwise apply.<sup>3</sup>

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<sup>2</sup> Australian Crime Commission, *Submission 3*, p.14.

<sup>3</sup> Australian Crime Commission, *Submission 3*, p. 17.

## Issues raised in consultation

2.24 By far the most contentious aspect of Schedule 2 is the power awarded to the ACC to share information with the private sector. The ACC argues for the necessity of the amendments.

A significant part of the ACC's work in recent years (for example in relation to organised fraud and crime on the waterfront) has highlighted the need for law enforcement agencies, including the ACC, to operate in partnership with the private sector ... there is ... clearly a public interest in using criminal intelligence developed by the ACC to contribute to a reduction in the cost of fraud to the private sector by prevention and early detection.<sup>4</sup>

2.25 In particular, the ACC argues that the financial and insurance sectors could use the information to implement better risk management systems.<sup>5</sup>

2.26 The ACC supports its argument by noting that information sharing is a common practice in the United Kingdom and the United States, and is supported by the Commonwealth Organised Crime Strategic Framework. It asserts that without this information sharing power, 'it is not practicable to develop ... fully functional partnerships that would effectively serve ... public interest'.<sup>6</sup>

2.27 The ACC considers that the proposed amendments strike a sufficient balance between the rights of the individual and the needs of law enforcement agencies.<sup>7</sup> In its view, two adequate safeguards exist.

2.28 Firstly, the test of 'necessary to a permissible purpose' which applies for information sharing is 'deliberately higher than the test for providing information to government bodies'.<sup>8</sup>

2.29 Secondly, private bodies will be required to enter into Memorandums of Understanding that the body will not inappropriately use or further disclose the information.<sup>9</sup>

2.30 The ACC assured the Committee there will only be exchange of information where there is direct evidence of a criminal offence by a particular individual and the information will not identify the individual.

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4 Australian Crime Commission, *Submission 3*, p. 16.

5 Australian Crime Commission, *Submission 3*, p. 19.

6 Australian Crime Commission, *Submission 3*, p. 16.

7 Australian Crime Commission, *Submission 3*, p. 20.

8 Australian Crime Commission, *Submission 3*, p. 17.

9 Australian Crime Commission, *Submission 3*, p. 19.

The information will instead identify the criminal activity or the risks involved. This information would not be allowed to be used in relation to employment conditions and supervisors would not be informed.<sup>10</sup>

Indeed, such an outcome is not in the operational interests of the ACC: it could result in operationally sensitive information being prematurely disclosed to a criminal associate or in public legal proceedings.<sup>11</sup>

2.31 Moreover, before acting on such information, a private body 'must undertake its own inquiries ... [and] the ACC information is to be used only as a "lead".'<sup>12</sup>

2.32 Further, the ACC claims it is subject to 'robust governance and oversight'.<sup>13</sup> It is accountable to several bodies, including the Australian Commission for Law Enforcement Integrity, the Commonwealth Ombudsman and the Administrative Appeals Tribunal.<sup>14</sup>

2.33 However, reservations about these amendments were raised by other submitters. For example, the Law Council of Australia (the Law Council) argued for a stricter information sharing regime.<sup>15</sup> In particular, the Law Council found the 'permissible' test worrying.

... the expression of [a] number of these permissible purposes appears to go beyond the possibilities under the existing section 59 and to be expressed quite broadly.<sup>16</sup>

2.34 It expressed concerns that

... protecting public revenue, developing government policy and researching criminology ... appear to be expressed more broadly than necessary in the context of the type of information the ACC is likely to have in its possession.<sup>17</sup>

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10 Mr John Lawler, CEO, and Phillipa de Veau, Legal Services, Australian Crime Commission, *Committee Hansard*, Canberra, 10 February 2012, pp. 4-5.

11 Australian Crime Commission, *Submission 3A*, p. 7.

12 Australian Crime Commission, *Submission 3A*, pp. 7-8.

13 Australian Crime Commission, *Submission 3A*, p. 1.

14 Australian Crime Commission, *Submission 3A*, pp. 1-4.

15 Law Council of Australia, *Submission 1*, p. 7.

16 Law Council of Australia, *Submission 1*, p. 9.

17 Law Council of Australia, *Submission 1*, p. 10.

- 2.35 Given these concerns, the Law Council recommended that qualifiers be introduced:
- ... for example ‘protecting public revenue from threats posed by serious and organised crime’; ‘developing government policy relating to serious and organised crime’ and ‘researching criminology relating to serious and organised crime’.<sup>18</sup>
- 2.36 Similarly, the Rule of Law Institute (RLI) expressed concern regarding the proposed amendments around information sharing and claimed they could deride the presumption of innocence.<sup>19</sup>
- 2.37 The RLI was concerned that the sharing of information with the private sector would result in an employee being subject to adverse treatment due to their perceived involvement in criminal activities.<sup>20</sup>
- 2.38 It was particularly concerned about the lack of safeguards in the amendments to protect employees, and gave a simple example:
- ... [the employer] can be told, ‘I saw you mixing with the bikies’ or ‘I am telling you that you have an employee that mixes with the bikies’. What are you meant to do? Fire the guy? That is not fair and that is not right.<sup>21</sup>
- 2.39 The RLI drew the Committee’s attention to section 29A(5) of the *Australian Crimes Commission Act 2002* (Cth), which relates to the confidentiality of ACC examinations. The section provides that an examiner may give a direction that evidence obtained by the examination process ‘must not be published, or must not be published except in such manner, and to such persons, as the examiner specifies’.
- 2.40 Crucially, the examiner must give such a direction ‘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.’ The RLI suggested that in this way:
- The existing Act recognises that there can be a real danger to people if they are identified.<sup>22</sup>

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18 Law Council of Australia, *Submission 1*, p. 10.

19 Rule of Law Institute, *Submission 4*, p. 1.

20 Rule of Law Institute, *Submission 4*, pp. 2-3.

21 Robin Speed, CEO, Rule of Law Institute, *Committee Hansard*, Canberra, 10 February 2012, p. 25.

22 Robin Speed, CEO, Rule of Law Institute, *Committee Hansard*, Canberra, 10 February 2012, p. 25.

- 2.41 The RLI expressed dismay that similar protections were not applied to the proposed information sharing provisions.<sup>23</sup>
- 2.42 The Senate Scrutiny of Bills Committee examined the Bill. In relation to Schedule 2, that Committee noted the importance of the right to privacy and the significance of sharing personal information with the private sector.<sup>24</sup>
- 2.43 The Scrutiny of Bills Committee therefore sought the Minister's advice as to whether the provisions could be limited to apply only to more serious offences, such as those attracting a minimum period of imprisonment, for example, 12 months. It further drew Senators' attention to the provisions, as they could be considered to trespass unduly on personal rights and liberties.<sup>25</sup>

## Committee comment

- 2.44 The Committee supports amendment to enable the CEO, in addition to the Chair, to report on matters relating to the ACC. It is a sensible addition and will provide greater opportunities for reporting on ACC activities.
- 2.45 In relation to information sharing and disclosure, the Committee found that the Explanatory Memorandum was scant on detail with reference to the operation of amendments in Schedule 2, which is troubling given the gravity of the issues at stake and the need to protect individual rights no matter the seriousness of the crime under investigation. The Committee notes the detail provided in submissions and the concerns raised by submitters regarding parts of Schedule 2 of the Bill.
- 2.46 Further the Committee notes the concerns of the Senate Scrutiny of Bills Committee and the advice sought as to whether the provisions could be limited to serious offences.
- 2.47 The Committee questioned the ACC at length regarding the amendments proposed around disclosing information to private sector bodies, and the protections and redress which might be in place for individuals.
- 2.48 While the ACC assured the Committee that it would operate with integrity and the Memorandum of Understanding was thorough in

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23 Robin Speed, CEO, Rule of Law Institute, *Committee Hansard*, Canberra, 10 February 2012, p. 25.

24 Senate Scrutiny of Bills Committee, *Alert Digest No. 1*, 8 February 2012, p. 5.

25 Senate Scrutiny of Bills Committee, *Alert Digest No. 1*, 8 February 2012, p. 5.



specifying how information could not be used or disclosed, the Committee was not convinced of the adequacy of safeguards to avoid inadvertent or prejudicial use of disclosure of information. In the wake of a lack of safeguards, the Committee was also concerned about a lack of redress to the individual should information be disclosed or used inappropriately.

- 2.49 The Committee supports the capacity for information sharing. However, it is concerned that, as they stand, the measures proposed in the Bill are insufficient to protect the rights of the individual in, for example, adverse employment decisions.
- 2.50 Protections already exist in the ACC Act to protect individuals against the consequences of information disclosure if this information was obtained through the examination process.
- 2.51 The Committee is of the view that similar protections should apply to information obtained by a private company through the ACC.
- 2.52 Further, in Schedule 4 of the Bill (discussed in Chapter 4), it is proposed to insert similar safeguards into the legislation governing the Australian Law Enforcement Integrity Commission. Members of the general public subject to investigation should be accorded the same protections in regard to information disclosure as afforded to law enforcement officers.
- 2.53 While Memorandums of Understanding may set out the conditions controlling information sharing, the Committee is concerned that they may not actually be contractually enforceable and that sanctions may be too low to deter any breach. Additionally, the Committee considers it important that the most fundamental of protections against prejudicial disclosure should be enshrined in legislation – namely protection against disclosure which would prejudice the safety or reputation of a person, or prejudice their access to a fair trial.
- 2.54 These fundamental protections should be clearly stipulated in the Bill and could easily be achieved by inserting into Schedule 2 of the Bill wording similar to that setting out such protections in the ACC Act.

## **Recommendation 2**

- 2.55 **The Committee recommends the amendment of Item 27 in Schedule 2 of the Crimes Legislation Amendment (Powers and Offences) Bill 2011 to insert, in section 59 AB of the *Australian Crime Commission Act 2002* (Cth), similar protections and wording as that contained in section 25A(9) of the *Australian Crime Commission Act 2002* (Cth).**

**Recommendation 3**

2.56 The Committee recommends that the Attorney-General undertake an audit of investigative and coercive powers available to security and law enforcement agencies in order to identify the full scope of powers available to those agencies, with a view to:

- comprehending the extent to which an individual's right to privacy can be abrogated; and
- ascertaining whether recent or any further expansion of those powers is necessary or justified.

The audit report should be provided to the Attorney-General and to this Committee by 1 October 2012.