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JOINT COMMITTEE ON THE NATIONAL CRIME AUTHORITY

(Subcommittee)

Reference: Involvement of the National Crime Authority in controlled operations

MONDAY, 16 AUGUST 1999

SYDNEY

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JOINT COMMITTEE ON THE NATIONAL CRIME AUTHORITY

Monday, 16 August 1999

Members: Mr Nugent *(Chair)*, Senator George Campbell *(Deputy Chair)*, Senators Denman, Ferris, McGauran and Stott Despoja and Mr Edwards, Mr Hardgrave, Mr Kerr and Mr Somlyay

Senators and members in attendance: Senators George Campbell and Ferris and Mr Hardgrave and Mr Kerr

Terms of reference for the inquiry:

(a) the extent and manner in which the NCA engages in controlled operations;

(b) the appropriateness of the approvals process for the NCA's involvement in controlled operations;

(c) the civil liberties implications; and

(d) the adequacy of relevant national and state legislation in relation to the conduct of controlled operations by the NCA.

WITNESSES

Subcommittee met at 9.16 a.m.

BROOME, Mr John Harold, Chairperson, National Crime Authority

LAMB, Mr Peter John, General Manager, National Crime Authority

CHAIR—I declare open this first public hearing of the parliamentary Joint Committee on the National Crime Authority inquiry into the involvement of the NCA in controlled operations. The hearing today—and tomorrow in Brisbane—will be conducted by a subcommittee to which I have been appointed as chair. The committee chair, Mr Peter Nugent, is regrettably unable to be with us today because of another pressing commitment. I should also mention that Mr Edwards has telephoned to say that due to an operation to his shoulder he is not able to be with us this morning and sends his apologies.

Over the next two days, and in a third hearing scheduled to be conducted in Canberra on 27 August, we intend to take evidence from a range of experts on the topic of controlled operations. These experts include law enforcement agencies, police federations, civil liberties groups and academic commentators. It is hoped that we can present our report to the parliament in late October.

We are starting today's hearing with representatives of the National Crime Authority. I welcome its chairperson, Mr John Broome, and the General Manager of Operations, Mr Peter Lamb. I might point out that at this stage the NCA is also scheduled to appear as a final witness to the committee's inquiry, which will be held in Canberra on the 27th of this month, to enable the committee and the NCA to clarify any areas of doubt or contention that have arisen during the hearings.

As you know, Mr Broome, the subcommittee prefers all evidence to be given in public but you may at any time request that your evidence, part of your evidence or answers to specific questions to be given in camera and the subcommittee will consider any such request.

We have received your submission and it has already been published by the committee. Copies can be obtained by observers from the secretariat officer. Mr Broome, I now invite you to make an opening statement before we move to questions.

Mr Broome—Thank you. I will make just a few introductory comments, if I may. The authority certainly welcomes the inquiry as a valuable opportunity to consider the policy and practical issues related to controlled operations. It is, in our view, important that the parliament understands the issues involved and that the legislation provides a balanced and workable arrangement. The processes must ensure adequate accountability without unduly limiting the need for effective operations, particularly in the area of serious drug trafficking.

The current provisions of the Crimes Act reflect understandable concern in the light of the decision of the High Court in Ridgeway and the desire to limit controlled deliveries very significantly. It should be remembered, of course, that there were controlled deliveries of narcotic drugs conducted for many years prior to the High Court's decision which did not involve practices of the kind involved in Ridgeway itself.

What the legislation did was to restrict significantly the capacity to conduct controlled deliveries and controlled operations in a more broad sense. In the light of experience I believe it is appropriate to move some way towards a broader range of controlled operations. The present legislation is limited to the importation of drugs. Other kinds of controlled operations should also be authorised, and I am going to return to that in a moment. In particular, I think we need to look at the context of the possibility of controlled money laundering activities and other controlled operations of the kind that are recognised in New South Wales legislation, for example.

The submission that we have submitted to the committee sets out the authority's position. We clearly accept, and indeed we would argue for, appropriate legislative controls to ensure public confidence, not only in our activities but in those of other law enforcement agencies involved in such operations, but the legislation must be practical. There are problems with existing law which make it difficult to use in ways which do not necessarily add to accountability or oversight. New South Wales has already enacted significantly broader legislation, and we have experience of it, and there has already been a wide ranging review conducted by Mr Mervyn Finlay QC, who reported to the government some months ago.

I understand the committee has a copy of his report which is presently before the New South Wales government and under consideration by it. He has produced, in my view, a balanced analysis of the problems with the New South Wales act and his recommendations recognise the need for further amendment to that legislation. Indeed, that was the intention of providing, in the state act, for a formal review process after 12 months of experience of its operation. The New South Wales legislation, if it is amended as he proposes, would in my view provide an ideal model for Commonwealth legislation. It has the advantage of being tested and contains a number of features worthy of reproduction in the Commonwealth act.

One of the points which I think needs clarification is the question of what I might describe as unplanned activities by law enforcement agencies. The Commonwealth legislation, and the New South Wales legislation, works on the assumption that what is involved is the authorisation of a planned area of activity by law enforcement. Well, the world does not always work that way. In the course of activities conducted by law enforcement agencies, circumstances may arise where it is simply not appropriate or not possible to authorise, in the kinds of procedural ways which the act suggests, an operation using the procedures that the legislation lays down.

In the past the law has recognised this and provided for judicial discretion as to the admissibility of evidence. I think the difficulty which we face is that once the parliament decides to legislate, as it did in the Crimes Act amendments following Ridgeway, whatever was the parliamentary intention there is a very real likelihood that the courts will take the view that anything that is not specifically authorised is effectively not authorised. I believe there will be a strong judicial view that anything which falls outside the scope of that legislation should see any judicial discretion exercised against the admission of evidence which may be obtained in a way which, in the past, has been allowed to be admitted.

There is a real question, once the parliament puts its toe in the water, as it were, as to how far it needs to go to clearly identify, for the community and the courts, the kind of activity which it believes is appropriate and which, therefore, will be authorised. This has

been raised, particularly in the context of the New South Wales legislation, because it, unlike the Commonwealth act, seeks to deal with controlled operations more generally. It does not limit itself to narcotic importations in contravention of the Customs Act, and it seeks to provide a code in respect of controlled operations generally. Having done so, it raises the real question of whether any activity which may involve some unlawful behaviour by a police officer or other law enforcement agency is explicitly unauthorised. Therefore, there may well be a strong judicial presumption not to admit that evidence.

This can range over a range of activities. For example, every time a police officer is involved in a high-speed chase—and I do not want to go into the dos and don'ts of high speed chases—the police officer breaks the law. It happens regularly, it happens often in accordance with internal procedures, but there is at least an argument that there is unlawful behaviour involved. You can take that right through to the kind of situation which attracted the court's attention in Ridgeway where police officers were involved in the importation of narcotic drugs.

Somewhere in that continuum there is a point at which it is appropriate for the parliament to legislate to say this is the kind of activity we think should be controlled and authorised. One of the problems we face in New South Wales under the present law, and which we may well face if the Commonwealth act is extended to controlled operations as distinct from controlled drug deliveries, is where that line should be. And there will need to be, in my view, a very clear parliamentary intention that, by controlling what I might describe as the upper end of potential police illegal activity, the courts should not interpret that as preventing the admission of evidence obtained in that lower level of activity. For example, where a police officer decides to buy small quantities of drugs as part of an intelligence gathering operation, does not arrest the person concerned, is in possession of drugs themselves, technical offences may well be committed. Do we really want to say that, subsequently, when that intelligence may lead to an arrest of a person also involved in the activity, the evidence should be ruled inadmissible because there was some prior unlawful conduct? They are the kinds of issues that have to be addressed and thought about in terms of developing this kind of legislation.

The other point I want to mention briefly is the notion of controlled money laundering operations. There is some reference to this in the submissions which are before the subcommittee and certainly there is overseas experience where law enforcement agencies get involved in quite complex activities to identify those involved in money laundering. In Australia there has been concern expressed by a number of agencies about the fact that the present legislation—certainly the Commonwealth legislation—does not allow that kind of activity to be undertaken, and suggestions that the legislation should be expanded to enable controlled money laundering to occur.

There are a couple of issues involved in this. The first is the kinds of operations which ought to be able to be conducted. Do we want to enable Australian agencies to conduct the kinds of operations which we see in places like the US and Canada? In those jurisdictions, what effectively happens is that law enforcement agencies are able to establish what are almost businesses which operate money laundering activities, and hold themselves out as being able to do so for the purpose of identifying those who would seek to use these services. A secondary level of activity is where law enforcement officers, perhaps undercover

officers and so on, are working with criminals who, as a result of their criminal activity, seek to launder funds out of Australia. The question arises as to whether the involvement of those law enforcement officers involves the commission of offences and, if it does, whether that should be authorised so that relevant evidence can be obtained. There are some quite interesting complications in all of this. Once funds have actually entered the financial system, there are significant limitations on what can be done to reverse those transactions; that is, once the funds have moved from a branch of one bank to another bank, or externally, you cannot just step in and remove the funds because there is a whole range of guarantees provided through the financial system that will honour the order to pay, effectively. So one has to operate often at the start of the process rather than at the end.

The second question is: if you do allow these kinds of operations to occur, what kind of authorisation is indeed necessary, let alone appropriate? I think some of the analysis has in fact been quite incorrect. As a general rule, criminal offences involve a mental element—leave aside some specific strict liability offences such as importation, where the mere fact of the importation is all that is required. If a mental element is required, and a mental element is part, for example, of money laundering offences under Australian law, then if the law enforcement officers do not have the relevant intent to commit the offence, in my view there is no need to specifically authorise the activity because there is no possibility of an unlawful activity taking place. The difficulty is that, absent a controlled operations environment, there is always the risk that some courts in some places might take a different view of what the police officers' conduct amounts to and exclude the evidence in ways which effectively leave the prosecution with no room to appeal in the event that they are wrong. So we need to be very careful about the analysis. But, having said that, I think experience tells us that it is better to be sure rather than sorry and it is better for the parliament to specifically address these issues and decide what it thinks is appropriate and to legislate accordingly.

The problem of analysis that I have mentioned can be demonstrated in a couple of matters in which we have had some experience. In two decisions in Victoria, both of which would be well known to the committee, trial judges took the view that certain activities of the authority were unlawful. As a consequence, they then considered the question of whether the evidence obtained through that supposedly unlawful activity was admissible. In the first case, which was the matter involving the prosecution of Mr Elliott and others, the trial judge, Mr Justice Vincent, ruled that the authority did not have power under the reference under which it operated to collect certain evidence and therefore took the view, in exercising his discretion, that he would exclude all the evidence so obtained.

It mattered little that, of course, the Court of Appeal found that the trial judge had fundamentally misdirected himself as to the legal principles. I raise that simply because it illustrates that if you have issues of admissibility which depend on a judge's view of whether the agency concerned has acted unlawfully, then it is important that there be as little doubt as possible as to those issues. Therefore, the legislation needs to be quite clear.

In the other case, which involved Mr Justice Merkel—a case that is styled as A1 and A2 in the NCA—the judge decided that a reference was not valid and, as a result, a hearing could not be conducted. Again, that was overturned on appeal; and on the relevant points, as to the general legality of the reference, it was overturned unanimously by the full Federal Court. If that had been a trial, using evidence obtained through the authority's special

powers, it is more than likely, I think, that Mr Justice Merkel would have not admitted the evidence. That is speculative, but that is my view of the approach he took.

They are two simple examples of where, if you get it wrong at first instance, the consequences can be quite significant. That is why I believe it is very important that, in addressing this issue, the committee really does think about where it wants not only the authority but other agencies to go, and what the rules ought to be, and to express them as clearly as possible. That said, I think most of the other points we have made in the submission are fairly clear. We are certainly more than happy to answer the subcommittee's questions.

One final point I might mention, as perhaps a question worth reflecting on, is whether the committee thinks there ought to be some guidance provided to agencies, in the context of controlled narcotic deliveries, as to what size such deliveries might be permitted to be. Let me just postulate for a moment that you have a one- or two-kilo heroin shipment which is intercepted at the border by customs. A controlled delivery certificate is sought and issued to enable those drugs to proceed through the controlled delivery processes to their intended recipients for the purposes of obtaining admissible evidence against those people. In many cases what will take place is a substitution of the narcotic goods, at least most of them, and what is left is a small quantity sufficient to sustain, for example, a trafficking charge or so on.

If it is one or two kilos, and something does go wrong—that is, the operation is unsuccessful and the drugs are unfortunately lost from the law enforcement agencies—there will no doubt be criticism, but it is criticism which can be met by pointing out the level of planning which took place and so on. Let me stress that, in the kind of real world environment in which we operate, you cannot plan for every contingency, innocent third parties may get in the way, as it were, they may be placed at risk, and therefore on occasions the agencies have to take decisions which may see—and quite properly and obviously see—the lives of either the officers concerned or the public protected, rather than securing the drugs at all cost.

But what if the shipment involved 10 kilos of heroin, or 20 kilos? How courageous, to use Sir Humphrey's term, am I supposed to be? It is not always possible to do a substitution because of the nature of the way the goods are imported at the time and so on. If we let 50 kilos run and have a successful result, we would be heroes. However, if we let 50 kilos run and it was lost, we would be crucified. They are the kinds of judgments I have to make when we are deciding whether or not to issue certificates.

It would be of some assistance if the committee and the parliament would reflect upon some of those issues in the context of the risk management principles we are all urged to follow and tell me where they think the risk might best be managed. It is not anything other than a very genuine request to have that issue thought about, and I can assure you that those kinds of issues do arise in a very practical sense.

You have to be very careful in issuing certificates and make sure that we plan these things as well as it is possible to plan them. But one of the problems is that there are

absolutely no ironclad guarantees. They are the sorts of judgments that have to be made. So, with those thoughts, perhaps we can pass on to some questions.

CHAIR—Thank you, Mr Broome. One of the points you make in your submission that I do not believe you touched on in your introductory remarks was the request that we consider giving immunity to civilians. I wonder whether you could briefly tell us how you would see that operating. And given the constraints that you operate under, you might say how that could work in an operation that you might currently be involved in, perhaps something like Operation Panzer, the motorcycle gangs operation. Could you just take us through how you would see civilian immunity operating?

Mr Broome—All that is possible at present is that the coverage given by certificate will extend to officers of the agency itself. It is common in law enforcement for informants to be used in addition to undercover officers, covert surveillance and so on. Our concern is that in the cases where an informant who is not an officer of one of the agencies was involved, the protection provided by the certificate simply does not extend.

In drug related matters, the use of informants is a relatively common activity. But, from my perspective, it is very difficult. You have to think about this very carefully and decide whether you would authorise an operation in which there were civilians involved as informants, knowing that they could not be protected and knowing that they are therefore vulnerable, possibly, to prosecution, although one would normally expect in the circumstances that the DPP would certainly decide that a prosecution was inappropriate. But equally you have to think very carefully about an authorisation because the use of the informants in this way may give rise to challenges by a defence subsequently which could leave the prosecution at nought.

It seems to us that there is a case for saying that where there is the involvement of informants, that ought to be the subject of reflection in the material given to the person who issues the certificate, but in issuing the certificate certain protection should follow. As to their practical application, perhaps I might ask Peter to just mention briefly what he sees as some of those implications, and in the context of the matter you mentioned, whether that is possible or even desirable.

Let me say, just as a general point, that controlled operations are not something that you are going to do all of the time. A great number of considerations come into play. They are not some sort of panacea for law enforcement, far from it, but there will be opportunities where it is appropriate. Certainly it is not something which I think is an alternative to a whole range of other kinds of investigative techniques.

Mr Lamb—I would just like to add that, in the investigation of organised crime, informants are crucial. They are usually on the periphery, but at times they may well be entrenched in the central criminality. How you utilise them is one thing, and how you provide for their protection in terms of their involvement in the criminality is another.

To promote them to work for you means you have to take account of all the considerations before us here now, but just as importantly you have to take account of their personal welfare. Whilst these people may well be criminals themselves—they may be on

the periphery but at times they may be at the heart of things—they are the single biggest tool to elevate us to the major profit takers of organised crime. Therefore, the protection that is afforded law enforcement officers in the legislation should be in some way extended to cater for civilians.

CHAIR—I have one further question before I hand over to Senator Campbell. Looking through your submission I was intrigued to see the different aspects of state legislation. For example, in legislation in my own state of South Australia, and I quote from your submission at page 13, it says:

. . . undercover operations to be approved for the purpose of gathering evidence of 'serious criminal behaviour'

That criminal behaviour is not specified. The New South Wales legislation, under review, has another form of words. And in Queensland there is still no legislation concerning controlled operations.

As a federal agency working on a national issue, what sort of challenge does this present for you? I am thinking of the movement of drugs from, say, Adelaide to Brisbane or to somewhere in the north of New South Wales. You are going through a number of state jurisdictions there. Can either of you just briefly take us through the practical difficulties that arise there. If it started and finished in South Australia you have got a very broad range of opportunity, but if it finished in Queensland you have none at all.

Mr Lamb—It is an absolute nightmare.

CHAIR—I can understand that.

Mr Lamb—We are currently targeting interstate trafficking networks. Sydney is the hub of the heroin trade in this country. Whilst a lot of the heroin may not be imported into Sydney, it will come here to get brokered at the very least. Taking it out of Sydney to the other states and attacking that network is as important as the barrier itself. It is there that you learn about who the major profit takers are, you learn about the networks, you learn about the individuals and groups involved. But simply put, taking it from jurisdiction to jurisdiction is an absolute nightmare.

CHAIR—Just to clarify a point, if somebody was to be money laundering in South Australia, presumably under the state legislation there is an opportunity for you to become more involved in a controlled operation because it would fit 'serious criminal behaviour'. But if that money transferred electronically within a few minutes to New South Wales, or the other way around, your hands are tied.

Mr Lamb—Which regularly happens.

Mr Broome—Let me add a further complication. Money laundering as an offence is generally reflected in Commonwealth legislation, in the Proceeds of Crime Act, sections 81 and 82. Some of the states do have equivalent provisions, but the South Australian act does not apply in respect of Commonwealth offences. So while it may be possible to deal with the

trafficking of drugs or some other kind of unlawful activity in South Australia through a controlled operation, that will not give you coverage in respect of Commonwealth offences. The only Commonwealth legislation which relates to controlled activities is limited to narcotics offences under the Customs Act. So the problem we face is both the delineation between Commonwealth and state offences, and the jurisdictional dimension.

The committee will be well aware of one of my hobbyhorses—I have a few—which is the absence of compatible legislation in relation to devices such as listening devices. If you have a controlled delivery that has come in through, say, Sydney, but you are not sure where that delivery is going to end up, and if you want to place a listening device in the consignment, you may have to get approval under the Commonwealth Customs Act. You may have to get a controlled delivery certificate under the Commonwealth Crimes Act provisions. You may have to get a relevant certificate in respect of the New South Wales controlled operations legislation.

If the package is transported by air to Queensland, we have got the obvious problem that you just alluded to, Senator. If it is taken to another state, we may or may not have problems. If it goes to Victoria, controlled operations there can effectively be authorised by police officers of a certain rank. In any event, the admissibility of any evidence obtained through a listening device will still depend upon the availability of the relevant authorisation in the relevant jurisdiction.

So you may find yourself trying to leapfrog around the countryside in front of an aircraft to get hold of a judge who can issue you with the relevant approval for a listening device. In some states—New South Wales is one—if the listening device is not authorised by the legislation in that state, it is not even a question of the admissibility of the evidence being discretionary. It is barred by statute, unless a certificate is in place. So that is the kind of cohesive, national legislative framework in which we operate.

CHAIR—An interesting challenge.

Mr Broome—It is.

Senator GEORGE CAMPBELL—I have three questions. To follow on from that question that you answered, the first question is: what are the impediments to achieving conformity between the various state jurisdictions and the Commonwealth? The obvious one is, of course, that there is no uniform legislation, but there must be other issues which are preventing conformity being achieved. The second question is: is there an argument with respect to controlled operations for limiting or specifying the types of criminal activities under which controlled operations should be applied, or should it just be a broad-brush application in terms of whatever criminal activity happens to be engaged in at the time? The third question is: if you are going to extend the capacity of controlled operations across jurisdictions, is there an argument to have those controlled operations oversighted by a judicial panel?

Mr Broome—Let me take each of those in turn. Regarding the barriers to uniformity, the fact of the different legislation is obviously one. That is a product of, and is exacerbated by, the simple fact that, in different jurisdictions in Australia, the political consensus differs

dramatically. In Queensland there is still no capacity for state agencies to use telephone interception, despite the fact that there has been federal legislation for just on 25 years and that it works in most other jurisdictions. That is because the view has been taken in Queensland, by both sides of politics, that they are not prepared to legislate to enable Queensland authorities to exercise TI powers.

Senator GEORGE CAMPBELL—Is it simply a territorial thing?

Mr Broome—It is a combination of parochialism, narrow-mindedness, the delights of federation and any other reason. It just strikes me that this is one country. We basically subscribe to the same kinds of values across the country, yet in areas such as criminal law, which is fundamentally a state responsibility, we see huge differences across the country. They are differences which I simply do not understand. I understand it in a political science sense; I do not understand it in terms of what the country ought to expect. That is not to say that I want to see us go to a situation where law enforcement agencies have carte blanche—far from it. As I said in the comments that I made and as we said in our submission, it is very important that we have appropriate legislative frameworks in which we exercise our powers, responsibilities, accountability and so on.

Senator GEORGE CAMPBELL—I do not want to interrupt your train of thought, but what applies in Canada, for example? They have a very similar federal tax structure to ours. Do they have the same impediments?

Mr Broome—No, they do not because in Canada, under their constitutional framework—if my knowledge of Canada is remotely correct—criminal law is actually a federal responsibility, whereas here it is essentially a state responsibility. It is one of the products of history: they went one way and we went another. In my view, there are now a variety of ways in which the federal parliament could expand its activities into the areas of criminal law, particularly when one thinks about the use of powers in the areas of corporations, telecommunications and so on.

However, there is a range of issues as to why that is probably not going to appear in the short term, not the least of which is the undoubted cost of law enforcement and, therefore, the lack of desire of the federal government—of whatever persuasion—to become heavily involved. There really is that need for some degree of uniformity and a recognition across the country that all that our jurisdictional boundaries do is assist criminal activity across state borders. Effectively, we have these invisible barriers which prevent law enforcement from acting cohesively. The NCA is the only agency in the country which has a cross-jurisdictional capacity, and that is one of the real problems.

There is a range of issues there, but a lot of it relates to what is politically achievable in different jurisdictions at different times. Even when you get agreement, you sometimes get agreement at what I would describe as the lowest common denominator level rather than at the highest. We should set some national benchmarks in relation to some of this material. For those states who do not wish to meet that level or cannot for whatever reason, then so be it. But we should not drag everybody down to a level where, unless there is total agreement, something cannot take place. At least doing that would assist.

As for limiting the kinds of operations, I do not think anybody argues that there should be carte blanche in respect of controlled operations. Our legislation uses the concept of 'relevant criminal activity' to define the kind of activity which the parliaments believe the authority should be able to investigate. That is one framework which might be used in the Commonwealth act so that you have controlled operations in relation to the concept of relevant criminal activity—'serious offences' is another tag that might be used. That could be defined in terms of offences for which, for example, the penalty is imprisonment greater than three years—or something of that kind. You would delineate the seriousness of the offences to which these would apply. Having done so, it would also be useful for parliament to say quite explicitly that, in doing that, it is not ruling out what I would describe as the unplanned, incidental activities which I mentioned earlier. There is some room for that kind of parliamentary statement of intention. That is how I would limit it.

As to the third question of whether there should be some sort of judicial oversight, we have judicial oversight in respect of telephone interceptions and listening devices. In one sense, I personally have no difficulty whatsoever with judicial officers exercising the kind of discretion that I have to exercise under the controlled operations legislation as it currently applies. But if you do that—because you are extending this to an activity that might take place over weeks or months, which involves a whole complex range of issues and which involves management responsibility—then the question you have to address is whether that is an appropriate function to be given to judges.

The High Court would seem to be saying, not quite yet but getting very close to it, that it is not a function which can be constitutionally given to federal judges. It could be given to state judges, but for 20 years the High Court has been moving away from what I would describe as the high point of Hilton v. Wells of saying judges could exercise these powers personally to now saying that there is a real question mark about judges exercising such powers at all. So you have got a real question of, if not judges, who would do it?

Members of the Administrative Appeals Tribunal currently exercise telephone interception warrant powers and so on but fundamentally, when you look at the nature of the issues that have to be taken into account, it is not just the installation of a listening device. It is not just the placing on a telephone service of an interception. I have to accept fairly broad responsibilities for what goes on under that controlled operation and I think you really then would be putting a judicial officer—using that term widely—into a situation where greater considerations are being brought to bear than perhaps is the case in the more narrow circumstances where we have that familiar model.

As I say, if that is what people think is appropriate, the kind of justification that comes to me can easily go to a judicial officer. But there are questions of availability and there are questions of appropriateness which mean that I do not think it is a straightforward question.

Senator GEORGE CAMPBELL—I was not so much looking at it from the point of view of having someone there on a day-to-day basis oversighting an operation. I was thinking more from the point of view of this nonconformity between the states and the potential to use a judicial panel made up of people from the various states to actually overcome some of those impediments and also to perhaps lay down some broad guidelines as to how a controlled operation would function when you make the application to have it.

Mr Broome—I would hate to have to get a panel of judges together to make an application, particularly from across jurisdictions. It is hard enough getting judges on short notice for those cases where warrants are currently obtained. Let me say, having said that, that the people concerned often make themselves available at very short notice and in very difficult circumstances. They really do a fantastic job but there are only a limited number of people available. In Sydney, for example, I think there are four people who are able to give listening device and telephone interception warrants from the AAT. That means that every week one of those is on call effectively 24 hours a day. That is, I think, a big ask quite frankly of individuals in those sorts of circumstances.

As to laying down broader questions of principle, I have a different view of that. I think that is appropriately a role for the parliament, not for a panel of judges. If you want to tell us what the rules should be, put them into a piece of legislation, because that is where we should get the appropriate guidance about what is expected of us. If you need to have guidelines, they could be incorporated in regulations, as is, in fact, the case in New South Wales.

I do not think you will have much dissent to the proposition that, within the broad statutory framework, guidelines are also appropriate. We also have our own internal procedures which seek to control these matters appropriately and I think all of the agencies would find that kind of framework something with which they are used to working anyway.

Senator GEORGE CAMPBELL—I understand the point you make about the parliament setting the guidelines. I suppose I was looking at the point of view of trying to build in some flexibility, because no two operations I presume are exactly alike and it would require different applications, I suppose, in different circumstances. I take the point you make about the impediment that may create in itself trying to get the availability of people.

Mr Broome—There is a quote from the Attorney's second reading speech—I think it is in our submission; it may be in one of the others—where he makes the point about the fact that certificates were intended to be reviewable by the courts. One of the reasons, if you have that kind of process, that you are forced to put people like me in the position of signing the certificates, rather than judges, is that you simply will not get the judges to appear before the courts to justify the decisions that they have made. It would be quite inappropriate to do so. That is the price of accountability I am afraid: the chance of getting subpoenaed.

CHAIR—That seems fair enough. Mr Broome, I have a couple of issues that I would like you to respond to. I am aware that you are coming back at the end of our evidence-taking to comment on things. The Law Society of New South Wales are giving evidence later today, but I am intrigued by a couple of statements they have made. Their submission suggests that their opposition to any changes—and, indeed, to the changes recommended as a result of the New South Wales review—is based on a number of arguments. Their first point is that not one application by any agency authority for a certificate has been refused, and it is common for more than one certificate to be issued in relation to any investigation. Do you have a comment on that?

Presumably, because of the constraints that you now operate under, you do not apply for applications if you know they are going to be refused. I wonder if you or Mr Lamb might also like to comment on the second point in their submission which says:

> Rather than channelling substantial resources into operations, for example, to purchase and supply illegal goods, funds could be better expended on increasing the support to the Police Service and the Commissions. This would enable law enforcement officers to carry out more extensive operations of detection and surveillance, leading to the apprehension and prosecution of the principal offenders.

I would have thought that controlled operations were part of that process. Mr Lamb, I am just wondering if, as a police officer, you might like to comment on it. Mr Broome may also like to comment.

Mr Lamb—In very simple terms, yes, it is. They are one and the same thing. I cannot see how they can differentiate them. If they are suggesting that the funds be allocated to law enforcement to do surveillance, to use methodologies that are employed in the investigation of that form of criminality, then, to put it simply, controlled operations are very much a part of today's package of investigative tools.

CHAIR—I should say that those points are made in relation to their submission on the New South Wales review and not in relation to us. I am sure they apply because, in their letter to us, they are continuing their opposition.

Mr Broome—I may have this wrong, but the letter which is incorporated in the material which the committee has published is in fact a letter dated 1 September 1997. I think that was actually a submission made by the Law Society Criminal Law Committee in relation to what was then the bill before the New South Wales parliament, which has since been in operation, reviewed, and the government is now considering its changes. The Law Society does not seem to have actually made specific comments in relation to the Commonwealth legislation other than to make reference in its comments to the New South Wales Minister for Police.

CHAIR—In a short letter which is dated 7 June.

Mr Broome—Can I comment on the two issues about not rejecting applications and also the question of the number of certificates issued in respect of the same operation. I think it is fair to say that applications are not going to be made unless those concerned (a) believe it is appropriate and (b) believe there is a reasonable chance that the person involved is going to approve it. So far as our organisation is concerned—Mr Lamb is perhaps in a better position to comment on this than I am—we know what is needed before an application is going to be considered, let alone approved. What is required to comply with the statutory requirements is a very full statement of what is known about the operation, which sometimes will not be a lot at all, and I will probably ask a series of questions if there is anything in the application which causes me any concern whatsoever. Yes, there is in fact a significant standard in place, so far as the NCA is concerned. I cannot speak for other agencies.

There are two reasons as to why there are often a number of certificates issued in respect of the same operation. One is that the present provisions allow the certificate to operate for only 30 days. The second is that, out of an abundance of caution, certificates are often

obtained at a stage in a possible operation which may well be premature in many respects—premature because it is the result of intelligence that something is being contemplated and because, at this early stage, we may not even be aware of the kinds of details which will subsequently come to light.

The DPP took the view when this legislation came into force that it was preferable to seek and obtain certificates very early on in the piece so there was no question subsequently that there may have been some involvement of some law enforcement officer which was not the subject of a certificate.

There is a bit of a catch-22 in that: you have to have sufficient information to enable you to at least make a sensible decision under the act. At the same time, the DPP says, 'Issue early and protect yourself in that way.' Obviously as time progresses more information will come to light, and it may be that in the subsequent issuing of certificates in respect of the same operation greater detail is available and more information is put into place. Just to make the obvious point: if you are bringing cocaine from South America via a vessel, depending on the kind of vessel used and so on it may well take some months from when the initial intelligence of the operation comes to hand to when the product might end up on Australian shores. So you may go through one, two or three certificates in that time frame.

While others I know have argued for an extension of the time—and we certainly believe that, say, three months would be appropriate—if one of the ways that people can feel more comfortable and confident that there is an appropriate degree of oversight is to keep the time frame at a month, that is something we could certainly live with, although I think you can make a very reasonable case for, say, a three-month time frame.

CHAIR—Do you have any comments you would like to make in relation to retrospective certificates? I do no believe we have touched on that.

Mr Broome—Obviously, as a matter of preference, you would not want to have retrospective certificates. What the New South Wales legislation does is to recognise that we live in a world in which these kinds of activities can at best be planned but cannot be controlled absolutely. So there is a provision, for example, for retrospective authorisation of conduct which goes outside the previously agreed parameters. I think that is an appropriate course where something unforeseen has happened. In the absence of being able to extend that retrospective approval, the conduct would remain unapproved and that would have consequences for the evidence collected.

On the other hand, inevitably the power to approve retrospectively is going to have some limitations. If I were the person considering the application, I would have to think about whether it was something I would have approved if I had known about it; whether it would have been appropriate to approve it prospectively; and, because it was retrospective, whether there were at least some implied constraints on whether I could really refuse because, having obtained the evidence, I may be faced with the consequences if I did not do so.

I think it raises some quite complex issues, but it is the way the New South Wales legislation has reflected an understanding of the kind of work which is involved in these issues. If I can say so with respect, I think it is the difference between the New South Wales

legislation and the Commonwealth legislation that the New South Wales legislation has much more in its provisions to reflect reality than is the case in respect of the Commonwealth act.

CHAIR—There is no doubt that the community is increasingly concerned about the incidence of drugs in Australia and the associated money trails. Can you assure the committee that, if these powers were to be extended, you would have greater opportunity and perhaps greater success in working in this particularly difficult area?

Mr Broome—Guarantees are a hard thing to give.

CHAIR—Perhaps an assurance?

Mr Broome—Certainly there are currently activities which we simply cannot take part in because of the limitation of the Commonwealth legislation that, if the state act operated in respect of Commonwealth offences, would be open to us. Yes, there are lost opportunities. That is quite clear. Would we have more success? Yes, there would be a commensurate increase in our capacity to detect and deter significant criminal activity. Can you put quantifying elements on that? No, you cannot. It is fair to say that there would be a significant increase in our capacity. Post Ridgeway a lot of law enforcement agencies probably stopped engaging in activities which had been regarded as routine and proper until the dust settled.

Ridgeway is a bad case making bad law. The circumstances there were unusual. The High Court's decision in relation to particular facts is perhaps not surprising. The difficulty with Ridgeway was that some of the observations the court made raised questions about activities that would not go as far as occurred in Ridgeway. There is some evidence which I would prefer to give to the committee in private rather than in public about the extent to which even the New South Wales legislation has had an effect on the conduct of controlled operations in this state.

Suffice to say, there is a suggestion that there has been a significant reduction in the number of operations since the New South Wales act came into force because it is effectively a code. A great deal of that effect was unintended. I do not believe it is what the state parliament thought would happen but what has happened—because it is a safety first approach—is that there has been quite restrictive legal advice given to agencies that, since the New South Wales act came into effect, anything which comes within its description which is not authorised should not take place. That gets back to my point about the planned and unplanned kind of activities. You will find that there is significant evidence that it has had a very significant effect on the conduct of controlled operations in New South Wales and one which I think has gone further than it was intended to.

Some would say it is a very good thing. I would say that what is necessary is to get a sense of balance and for the parliaments to understand what it is they wish to control and circumscribe, and to appropriately do so, and which activities they think should be able to be left within the discretion of those involved in law enforcement, who of course will then have to convince judges on the day that the evidence should be admitted if indeed there was some unlawful activity involved.

Senator GEORGE CAMPBELL—I have one question on that point and you may or may not be able to answer it in the public hearing, Mr Broome, but can you give us an example? I think I understand the principle between planned and non-planned but, in the context in which you are talking where there may be a necessity for unplanned activities to occur, are they associated with planned or controlled operations or is it something that absolutely comes out of the blue?

Mr Broome—Peter can perhaps give his operational experiences much better than I can. In the course of perhaps conducting an investigation into alleged criminal activity, circumstances might arise where, particularly if you have got undercover officers involved, they did not expect or assume that particular criminal activity would take place at a particular time. But, because they are on the periphery of something, all of a sudden there is a phone call which says, 'Meet at such and such a place. We are going to do so-and-so.' There is not the luxury of going off and getting a certificate. You either take part in it and see where it leads, you pull out and, to use the vernacular, blow your cover or you arrive and hope for the best that you will not actually be involved in some unlawful activity.

In the absence of a certificate, the problem may well be that you are left with the real dilemma about whether you continue the undercover operation or whether you terminate it. That is the kind of thing that can arise in an unplanned way.

There is some suggestion that, where undercover officers have been engaged on the periphery of unlawful activity, say for the purposes of gaining intelligence and so on, they will now try, because of concerns about the consequences to a subsequent prosecution, to effectively not engage in conduct which has been routinely exercised. It was the subject of advice from the then New South Wales Solicitor-General that it was perfectly appropriate and fell within the kinds of discretions that police officers have used, which predated the New South Wales legislation, which now those police officers believe they cannot engage in. It was the unintended consequence. It was never intended—if you read the parliamentary debates and if you talk to the people involved—that the consequence of passing this legislation would effectively put a brake on a whole range of normal, covert, law enforcement activities. That seems to be what has happened.

Mr KERR—I am not exactly certain how much I missed because of my plane leaving Tasmania late today. However, there are a couple of questions I have in relation to this submission. One I am particularly interested in is the breadth of protection that should be provided. You have mentioned that it should extend to civilians under certain circumstances. I am not sure whether you have taken people through this previously. If you have not, it would be useful for me to—

Mr Broome—We have, but very briefly, Mr Kerr. What we have suggested is that, where you have got, for example, civilians who are informants and who are involved in an operation, they ought to be capable of being covered by the scope of the certificate. It is simply that in many drug operations you will have informants involved, and at present they are the ones who are left most vulnerable in three ways. Firstly, they are often the people on the ground. Secondly, they do not get any protection under the legislation. Thirdly, it makes potentially the prosecution more vulnerable because you have got their involvement, which

will remain unlawful, and therefore give rise to a negative exercise of the Bunning and Cross discretion.

Mr KERR—What about the counter-argument, that in a sense a person who must be working inevitably on the shady side of society, being in the position to be an informant, once so immunised basically can play both sides against the middle with no fear of prosecution?

Mr Broome—We are only talking about immunity which would flow from the activities which are covered by the certificate.

Mr KERR—Which may be a significant drug deal.

Mr Broome—Yes, which may be a significant drug deal. I understand the point you are making. If the community does not want to use informants then we ought to have a very detailed and very important debate about the use of informants.

Mr KERR—I am not suggesting we do not, but at the moment the protection that an informant gains is usually an undertaking by the authority or some other person that they would recommend that no proceedings were taken against them. In the absence of some extraordinary circumstance, that is usually a sufficient undertaking. I think it would be a perverse outcome if a prosecutor ever sought to proceed in relation to such a circumstance. I think it would be virtually impossible to secure a conviction in those circumstances were they to do so.

So the whole sense of absurdity in a process would go if you actually did give such an undertaking. Provided it was recorded in an appropriate way and not denied as having been given, that seems to me to cover that circumstance, broadly. But with complete immunity, which would then not be capable of being withdrawn if some malpractice occurred, I am not certain whether the community really is ready for that one.

Mr Broome—I recognise the risks, but the purpose of the immunity is twofold: it is to protect those who are involved in the operation from any potential prosecution for the unlawful acts which they commit, and it is done for the purpose of ensuring that the subsequent evidence which is obtained cannot be challenged on the basis of the unlawful behaviour.

So, if you leave the informant vulnerable, you leave the evidence vulnerable. That is the trade-off. You have to rely, firstly, on those who issue the certificates sufficiently circumscribing, if they think it is appropriate, the conduct of the informants. Secondly, none of those who issue certificates are in a position to actually grant the immunities. We can make a recommendation and in the fullness of time that would be considered by a DPP, but after the event.

So, while you can make the promise that you will ask, you cannot guarantee delivery. That, of course, leaves the informant in a fairly vulnerable position. It may well be that vulnerability is the best way to ensure that they do not misbehave. We are trading off a

number of issues here and one of them is whether there can be a successful challenge to the admissibility of evidence that may have been obtained.

Mr KERR—How often has the admissibility of evidence been thrown out because of the illegal conduct of an informant?

Mr Broome—It does not usually get that far because if that is the case then the prosecution is usually dropped. How often does that happen? I can think of quite recent examples where it has happened.

Mr KERR—Was that because of the illegal behaviour of a third party not associated with the police force? Is it not covered by the Ridgeway—

Mr Broome—It may involve disclosure of the informant's activities. That is usually the reason why the prosecution does not proceed.

Mr KERR—Absolutely, but that would not be affected by what you are proposing?

Mr Broome—It depends on where in the process. Suppose you have an informant who has been used on a number of occasions. At some stage it will become increasingly less viable to use informants. If they are the last person standing there tends to be a certain conclusion that can be reached.

Let us assume that you have used an informant on a number of occasions and been able to protect them, but in relation to perhaps what may have been building up to the major job, the large importation or whatever, if they are not protected and if they cannot get immunity then their involvement may be disclosed in the course of the prosecution. You perhaps have decided, and so perhaps have they, that they cannot be used again, but they are still left in the vulnerable position that they could be charged with some offence.

What I am suggesting is that if we have prior knowledge of that involvement, if it is appropriate to indemnify an undercover officer, then it is no less appropriate to indemnify the behaviour of the informant. Bear in mind that in the case of the informant, in a case such as that, whatever their antecedents might be, in this particular job, because they are informing, there may well be some questions about whether the behaviour they are engaged in is criminal at all. But they are looking for a guarantee. They are saying, 'Unless you can assure me I am not vulnerable, I do not want to go ahead.' That is the sort of trade-off that you are involved in.

Mr KERR—I guess so. It is an interesting trade-off you are inviting us to make.

Mr Broome—As somebody who came to this activity from other places and as Peter will testify, we have had some interesting debates about these kind of issues, about how far it is appropriate to go; when to use informants; what the constraints are.

Mr KERR—I certainly imagine that these are not uncomplex—

Mr Broome—No.

Mr KERR—You do obviously have to use informants. Two questions then arise. What happens if that informant really is playing you off against others, perhaps is quite happy to trade in some bad guys but wants to play another game with a third set of bad guys?

Mr Lamb—That has happened.

Mr KERR—I am sure it has.

Mr Lamb—And I am sure it will happen again. We would have to do everything we could to ensure that we were close enough to the informant, that we had management practices in place that reviewed his activities, his involvement. Indeed, we now have all that—that is there. Of course, you cannot be with someone 24 hours a day, listening, watching their activities; but, with all the other tools that we have and with all the other mechanisms and management processes we have today, informants are much more under the microscope than they ever were. But what you suggest can, of course, happen.

Mr KERR—On the trade that the authority is asking us to make, the difficulty I have with it, at first sight, is that when a sworn law enforcement officer or somebody directly in their employ—I am not including here in the term 'civilian' somebody who has been brought in to be part of the operational side but the sort of insider informant that you are speaking of—is actually dealing with that, you cannot operate necessarily on the presumption that the people are applying their minds towards this activity with the same intention of cleaning up the streets, as it were, or acting with good intention. There may be a whole range of subsidiary motivations, none of which may necessarily be all that pleasant.

The fear I would have, and I think the community might have, is that a decision by an investigator or an investigating agency keen to put certain people behind bars might be doing deals with the devil which are not revealed in all their detail. Unlike the prosecutorial situation, where the decision to exclude somebody from prosecution is made after the event and in the knowledge of the whole of the activity, it is made at a very early stage when the keenness for the investigation to proceed may lead people to perhaps overreach what might normally be thought of as the existing rules.

Mr Broome—My answer to that is that in this case we are still talking about a certificate issued, in the case of the NCA, by a member of the authority. In the case of the other agencies, it will be a commissioner, a deputy commissioner, assistant commissioner of the AFP and so on. I think there are built into those sorts of processes plenty of checks and balances that will deter the overenthusiastic investigator. It has got be an overenthusiastic chairperson of the NCA or member of the NCA. Yes, that problem, I suppose, can arise. But I think I could say, certainly for myself, with the benefit of the experience I have had, that if you were going to extend this immunity to informants, you would want to know a great deal about what we know about them, what we know about the circumstances of the particular operation and so on because, at the end of the day, if it goes wrong, I am going to wear it—and probably wear it very publicly.

That is a fairly significant and appropriate counterbalance to those considerations. I am not going to give somebody carte blanche in a way that could prove to be quite inappropriate, unless I am satisfied that is something I should do in all the circumstances.

Mr KERR—I hear the argument. I will reflect on it. There were a couple of other points that I was interested in. One was the restriction suggested on the reporting to the parliament. When this legislation was put in place, the underlying thematic was that, save to the extent that you could point out to the Attorney that there was a proper reason for non-disclosure, the matter should be fully disclosed. There was an extensive power given to you to explain why any information would endanger somebody or prejudice the prosecution or investigation.

The submission says, 'We may have an inadvertent prejudicial effect on the prosecution and, therefore, we should not provide the parliament with information.' It does seem to me to be a pretty bold call. Just giving statistical information in relation to this stuff does not satisfy the public policy objective that was first behind this. What is the argument for a different public policy outcome?

Mr Broome—I think there are two issues. The first is the level of information that should go to the minister who administers the legislation. I do not have any trouble whatsoever giving the relevant minister a great deal of detail about the circumstances that gave rise to this issue of a certificate and what has transpired subsequently. A framework document is presently used to report these certificates to the parliament. One of the difficulties is that, if you wish to include more information in those documents rather than less, then you have the potential difficulty of their publication at a time which may be prejudicial to a prosecution—and this almost occurred—which may be two or three or whatever years after the certificate has been issued. Equally, you may find that information which is of relevance to enable you to make judgments about whether the certificates were properly issued might also have the potential to disclose, even some years after the event, the source of information that you had.

I would prefer a system in which there could be graded disclosure, for example, to a committee such as this, rather than a certificate process which, by simply even disclosing when certain matters came to attention, has the potential to prejudice people who may still be providing information. As this committee knows, I am more than happy to explain to the committee as much as possible what we do.

One of the problems is that we have a variety of versions of the documentation that float around. I write a letter to the Attorney-General or the Minister for Justice and Customs giving quite specific details about a certificate. Then we provide a report which ends up with the department. That is a summation of that. It is what becomes the document to be tabled. If those reports are tabled without further consultation, something which may not be in any way prejudicial after a trial has been completed because, for example, evidence has been given, may be quite prejudicial beforehand.

Mr KERR—Without wishing to interrupt you, isn't that the framework that is presently in section 15T? Essentially, it gives a minimum requirement for reporting. It encourages you to be more generous in your reporting than that minimum requirement to the Attorney-General or the Minister for Justice and Customs. I welcome and acknowledge fully the reporting you have made to this committee and the number of operational matters which came to public conclusion just a little while ago in Melbourne, which you discussed with this committee very frankly and openly. Obviously, that level of trust applies there.

Subsection 4 basically gives you the power to exclude anything from disclosure in the parliament until some later date—for example, at the conclusion of a prosecution. I know it must be a bit of a nuisance having to look through these reports and decide that which is not appropriate for public disclosure in the parliament. It must be a nuisance.

Mr Broome—No, it is not a nuisance.

Mr KERR—I am sure it is a nuisance.

Mr Broome—You have to be asked—that is the problem.

Mr KERR—Well, you could—

CHAIR—Mr Kerr, I make the point that we are now half an hour over time and Mr Broome and Mr Lamb will be back at the end of the taking of evidence, so perhaps we could explore this aspect of the publication of the reports at that time.

Mr KERR—I am sorry, my whole body clock is thrown out by the late start—I was up at five o'clock this morning.

CHAIR—We do understand. Thank you, Mr Broome and Mr Lamb, for your evidence. We look forward to perhaps expanding on Mr Kerr's point at a later time. Thank you very much.

[10.38 a.m.]

ANDERSON, Dr Tim, Secretary, New South Wales Council for Civil Liberties

CHAIR—Welcome, Dr Anderson. I appreciate your patience. We shall try to catch up. The subcommittee prefers all evidence to be given in public but you may at any time request that your evidence, part of your evidence or answers to any specific questions be given in camera—that is, in private—and the subcommittee will consider any such request. I understand that you have now prepared a submission. Is it the wish of the subcommittee that this submission be published? There being no objection, it is so ordered. Thank you for your time, Dr Anderson. Would you like to make an opening statement before we proceed to questions?

Dr Anderson—Thank you. I would like to say a few words, particularly in view of the fact that I have had the opportunity to sit in on the NCA's submission to the committee. That has helped put me a little more in the picture about what is going on.

I would like to raise some very broad issues about controlled operations legislation and models which we have had serious problems with in state and federal arenas. Frankly, I am quite alarmed to sit in on a hearing which, over the course of an hour and a half, discusses the powers of a government agency—in the broadest sense of government—where no reference is made to the fact that these powers may indeed have implications for the rights and responsibilities of citizens. I think it is a rather radical step that the parliaments around Australia—not all parliaments, but a number of parliaments—have made in these areas.

The argument is broadly, as the head of the NCA has outlined to you, that there is a fear of a threat from the courts, whether it is the High Court or state courts, to the administrative efficiency of operations, that that threat needs to be overcome, and that that threat will be overcome by going to the parliament and arguing that it is the parliament's role, through this committee, to deliver to that executive agency the powers that the agency wants. The controlled operations models of course go well beyond Ridgeway.

We have particular problems with the way in which the Ridgeway principle has been dealt with in the federal legislation. But, in formally authorising criminality, as well as breaches of privacy, there is a substantial change from former models we have had where there was an accepted model over a number of years that someone went to a senior judicial officer to get a warrant for a breach of privacy, for example, let alone for an act of criminality.

Now that door has been opened in a sense, the arguments coming from the executive agency are to universalise the extension of that executive power such that now that, for example, we can engage in drug trafficking, we want to be able to do other things as well and we want our informants to be able to do it as well. All of the problems that arise, apart from the problems that you have discussed of the lack of uniformity between states, with respect, are not going to be resolved in the course of looking at this legislation. Additional problems and questions are posed about judicial oversight and what people are authorised to do—these sorts of things—and the question that Mr Kerr raised about the problems of

immunities before the facts, as opposed to a previous regime, which was indemnities after the fact when the full circumstances could be considered.

We are extremely alarmed at this notion of immunities before the fact, where in effect a green card is given to people. We have had experience in this state—it has been very close to my personal experience sometimes, too—where police have given, it was called, the green light to both themselves and criminals to engage in criminal activity, which included drug trafficking, murder and robberies. We know that de facto that occurred. We had a royal commission over three years in the state which drew attention to that. In my view, whatever the operation of the act which was passed in this state has been—the Law Enforcement (Controlled Operations) Act, which is a separate act in this state as opposed to the federal one, where it became part of the Crimes Act—and Mr Broome has said that it has put some breaks on existing activities, it is a very unfortunate precedent. It is an act that went through with very little debate in the state parliament.

Simply put, the police in a post royal commission circumstance asked for more powers and the parliament and both major parties gave it to them. There was very little debate about it. It has the potential consequences of authorising any form of criminality by law enforcement officers in this state. There is a provision in the state act—I go into this a little bit because I know that the NCA argument is to a fair degree that they would like to see the Commonwealth model expanded along the lines of the New South Wales model—to not allow retrospective murder in the New South Wales act. But if you discount that, there is really no bar to the level of criminality that can be engaged in once a matter is deemed to be a controlled operation in the sense that people cannot be prosecuted.

Regarding the murder provision, we might note that there has not been—in my memory; certainly not in the last 30 years—a prosecution of a New South Wales police officer for murder when a killing was carried out in the course of an official activity, as opposed to domestic violence or something of that nature. Nevertheless, formally this enormous power has been passed over and does pose a large range of potential problems down the track—a great threat to the integrity of the system of criminal justice, which was pointed to in the Ridgeway case. I draw your attention to one little quote from former Chief Justice Mason in the Ridgeway case:

> Circumstances can arise in which the need to discourage unlawful conduct on the part of the enforcement officers and to preserve the integrity of the administration of criminal justice outweighs the public interest in a conviction of those guilty of crime.

In my view, the Commonwealth act does not incorporate such a principle. This is part of the problem of the parliament having taken over the role of the courts in that respect. The parliament, in a way, now has taken on itself a responsibility to see that that model works and that that model would have the same protection for citizens' rights and responsibilities built into it, such as that provision I pointed out from Chief Justice Mason.

There are additional problems in that the parliament is not in a position to supervise particular activities in the way that the court would when it comes to looking at the total balance of circumstances in a particular case. So in setting ground rules, in codifying, if you like, the sorts of principles that the courts would supervise, the parliament is at a great

disadvantage, whatever degree of informing parliamentary committees it may have. They are some general observations.

We are seeing the attrition of a legal system which has depended on a common law system for defining rights and responsibilities. That argument has been brought to the fore whenever the issue of a bill of rights has been raised. We do not have a bill of rights in this country. One of the arguments that has been put up to block the last initiative—it was something like 15 years ago—has been to say that we have a system of courts which put in place those sorts of protections. If the parliament is now going to codify those sorts of things and codify executive powers and deliver substantial powers to the executive arms of government, then the parliament really has to have a very careful look at the codification of rights and responsibilities.

CHAIR—I ask you to respond to a comment that I think was made by Mr Lamb in his evidence where he described controlled operations as part of valuable tools of trade in the operation, particularly in relation to the detection of drugs, drug dealers and the money involved there. If we were to agree, as you say under dot point 1, that 'such operations should be prohibited', what would you say to Mr Lamb's comment that these valuable tools of trade should be set aside?

Dr Anderson—I am sure that he is quite right that they are valuable tools of trade. The point I tried to make before is that many things are done in the name of administrative convenience. It may be that you can arrest more people for drug offences by giving greater powers to an executive arm of government. There are implications in that, necessarily, for people's rights and responsibilities.

I was speaking to a man last week who had been released from gaol after having served a long sentence for drug trafficking. He was approached by someone he discovered was an informant who offered to sell him a large amount of drugs at a very cheap price. He discovered that that person was wired up with a bugging device—an attempt at entrapment, clearly. That is the sort of operation, at ground level, at the pointy end of policing, which is going on as a result of controlled operations activities. Who knows whether it was the New South Wales police or the federal police?

CHAIR—Was this post his release from prison?

Dr Anderson—Yes, post his release. He told me about it last week. It was several weeks ago. Those sorts of things have expanded, we can expect, as a result of controlled operations type legislation. You may arrest more people that way but whether that is really what is intended in the name of the law against drugs or attempts to diminish drug use in the community or whatever is another question. I agree with the Law Society's view on this that there is a distinction, contrary to what Mr Lamb said, between detection and surveillance and the setting up of operations by which it is intended to ensnare people and increase arrest rates. The better view in New South Wales police certainly is that effective policing is not about increased arrest and prosecution rates. It is about dealing with social problems; so it is social conflicts.

CHAIR—You might find yourself in the interesting position of supporting the Queensland position, where there is no legislation on controlled operations. Would you like to comment on, for example, South Australia, which has very broad powers in relation to this, and tell us what you think the ideal legislation will be in Queensland?

Dr Anderson—I think Tasmania has very broad, similar legislation to the New South Wales model, which is the one I am most familiar with. It is a model that we abhor and that we see there is no need for.

Having said that, we do not have major problems, in principle, with police engaging in using aliases or false identities for the sake of surveillance and detection and those sorts of things. But you authorise police to traffic in large amounts of heroin, for example, and they come to you and argue that they are in a difficult position. They want to know whether they should be really dealing with 50 kilos or one kilo. All of a sudden the risks of failure have increased and the risks of their responsibility have increased. As I said, this is one of the consequences of delivering that increased power to an executive agency. New problems such as that will arise.

We did not see a need for this legislation in the first place. If there was a problem with Ridgeway—and we do not accept that there was—and if the parliament thought that it was necessary to codify the way in which some forms of necessary illegality were carried out, we think that the protections of Ridgeway should have been codified at the same time. We think the worst model possible is one which allows generalised in-advance immunities of unspecified criminal activity or specified criminal activities.

CHAIR—In other words, South Australia's?

Dr Anderson—Apparently. Yes, I think it seems to be almost as wide as New South Wales, if not as wide, and Tasmania.

CHAIR—At this point I might to go Senator Campbell, the deputy chair. Thank you.

Senator GEORGE CAMPBELL—Dr Anderson, are you essentially arguing that there is no room for controlled operations under any circumstances or are you arguing that there perhaps is room for controlled operations with certain limiting guidelines on how they are used?

Dr Anderson—It depends on what we mean by controlled operations. My understanding of controlled operations has been focused on the types of things that are authorised under them. Controlled operations have been carried on for ages and the point was made in discussion earlier—I think Mr Broome raised it—that what has been relied on has been the common law approach that there is an intent in every crime. If the intent is lacking, then the person is not going to be prosecuted or, alternatively, the circumstances will be weighed up after the fact and indemnities will be issued after the fact.

What we are concerned about in these models of controlled operations, in the Commonwealth to a limited degree and in the state models that we have mentioned to a much wider degree, is that the power is passed across to executive agencies to authorise

serious criminal behaviour and it is done in advance without knowledge of the circumstances, so the person has a green light as opposed to the person's actions being assessed after the event or being subject to some independent scrutiny after the event.

We have an executive officer of government, head of a secretive agency, who is now relied on to make those absolutely fundamentally critical decisions and the parliament is saying, 'We are going to trust this person's decision,' rather than having people subject to a law—it is one of these old-fashioned concepts of people being equal before the law, whether they are a government agent or not—and the circumstances being independently scrutinised after the event.

Senator GEORGE CAMPBELL—I thought he was actually arguing for the standardisation of the law across the states and nationally so that there was uniform application of it.

Dr Anderson—I agree with what he said about setting a benchmark and not reverting to the lowest common denominator but, with respect, I think that Mr Broome's view of the lowest common denominator was one which gave agencies such as his less room to move, rather than lowest common denominator in terms of the way in which protections of citizens' rights and responsibilities are set out.

Senator GEORGE CAMPBELL—That may be an assumption on your part of what he meant by that. Do you have any alternative views about how these types of operations can be managed that would make them acceptable?

Dr Anderson—The starting point of myself and, if I can be presumptuous, also the Law Society of New South Wales is that there was not a need for this sort of power. Given the parliament has given this sort of power to an agency such as the NCA, there is a responsibility on the parliament to codify the protections the courts would have otherwise put in. I do not see the courts as a threat to their operations in the way the NCA does. The NCA has advanced to you a very powerful argument this morning that the courts are a threat to their operations, and they want their powers extended on this legislation. I do not see that same sort of threat; I see it as an essential protection.

One of the particular problems, perhaps to be more responsive to where you are getting at with this legislation, is, for example, that in section 15I of the Commonwealth Crimes Act—and I have mentioned this in the last paragraph under my point 3—does not provide an immunity for an officer unless certain circumstances have been met. In other words, effectively it is the entrapment provision which says that, if you set out to entrap someone, you will not be immune from the consequences of your actions. Nevertheless, such an operation does not mean that the evidence would be disallowed as a matter of public policy in court if that evidence were used. So what we are saying there is that, if you are going to set this up to protect your law enforcement officers doing the sorts of things they have been doing for years and years and you say, 'This is not on and we're not authorising you to do this; yet, if you do it, there may be some consequences to you but there will be no consequences to the prosecution'—

Mr KERR—That is not true. It simply puts it back to the non-legislative form. It puts you back to what the common law was. There may well be powerful arguments where, despite the illegality or the wrongful conduct of the investigating officer, which we would wish to condemn, nonetheless, if some massive criminal wrong has been done, you would not want that person to walk free simply because some dopey investigator set up a situation where they were walked out at the scale of this that would have been admissible previously.

Dr Anderson—Isn't that precisely what Ridgeway said?

Mr KERR—No.

Dr Anderson—And 15X says that the evidence is going to be admissible in any case.

Mr KERR—No, it does not say that. It takes you back to where you were pre-Ridgeway.

Dr Anderson—My understanding of it is that it may be inadequate.

Mr KERR—I am just trying to clarify this. The Ridgeway act comes in to guarantee the admissibility, basically, of evidence that applies where these procedures have been put in place. If you step outside it, because of entrapment or something of that nature, then you go back to the pre-Ridgeway situation. The courts come back in and exercise whatever discretion they would have—

Dr Anderson—So you are saying that 15X is subject to 15I in that sense—that 15X is intended to overcome that principle in Ridgeway which says that, on public policy grounds, the evidence may not be admissible. You are saying that, if they go outside the model there, 15X does not—

Mr KERR—Whatever the common law would have been. The ordinary provisions of the Commonwealth Evidence Act, as it applies, giving you discretions of the courts in relation to illegality comes back in.

Dr Anderson—I have to admit that I read 15X differently; I may be wrong. I read it as overriding Ridgeway in that sense.

Mr KERR—I have a couple of points in relation to your submission. One is the point about the approvals process. On its face, it is a perfectly logical proposition to put up, but you may or may not be aware that the High Court has expressed reservations about vesting the power to issue warrants in a judicial body. So you recommend that it go to a judicial body, and plainly now I think there is only a handful of Federal Court judges who are willing to exercise that power, given some comments in the High Court in relation to that. They make the point that separation of judicial and administrative functions should be greater than it has been hitherto. It seems to me to be a bit of a counsel of despair to urge upon us the giving of it back to the courts, when the courts have said that, really, they do not want it and, in the main, will not exercise it.

Dr Anderson—It is not the main point of what I am saying: give it back to the courts. That is particularly so when, as I have tried to point out before, you have now moved into a situation where the parliament is overtly authorising serious criminality. I am never for a moment suggesting you give that power to the courts to authorise criminality. What I am saying is that the essence of this problem that the parliament has created is about arbitrary executive power. It has been vested in an executive body. The executive body that is exercising that power is determining when it will be used. There is no effective independent oversight. The warrant system, such as it was—and whatever problems may have arisen with separation of powers since then—was something whereby there at least was a system with some form of accountability. I think it is true that probably, apart from the separation of powers issue, it is dubious whether there really was accountability in that system.

Mr KERR—I was going to raise with you what I thought to be a fairly naive approach as to the oversight that was allegedly exercised by the courts. The courts were never vested with that authority and never purported to be.

Dr Anderson—And rarely refused it.

Mr KERR—Even to the extent of once issuing a warrant. There was no oversight as to its implementation or how it was carried through.

Dr Anderson—There was in the sense that there was a warrant which the court would look at later on and it would disallow evidence if the warrant had been breached.

Mr KERR—That applies to any lawful authority granted by any person. If your actions exceed that granted by a certificate or warrant or whatever, that is reviewable.

Dr Anderson—But the warrants were very specific things. Search warrants, for example, are far more specific than controlled operation certificates. I have not seen a controlled operation certificate. My understanding is that the types of ones that are indigent to the New South Wales legislation appear to be extremely broad. Search warrants, in my experience, have been very specific sorts of things. This is quite significant because, if we are talking about scrutiny of the use of executive power, the issue of specificity and generality become absolutely critical. This is why, whatever the mechanisms in place—whether it is a member of the AFP or any other independent agency—it becomes critical.

We in the New South Wales Council for Civil Liberties do not say that you can never breach someone's privacy, for example. We say there should be reasonable grounds for doing so. There are different mechanisms you can put in place to determine what reasonable grounds are. There is a range of things.

Mr KERR—I understand your criticism of the New South Wales provisions. But if you look at 15N, the provisions of the Commonwealth legislation, the form and contents of the certificate are very detailed.

Dr Anderson—Yes, it is certainly much more constrained than the New South Wales model. There is no doubt about that. You are being asked to go in the other direction at the moment and with powerful arguments that anomalies are there in the current system. In a

sense, you have changed the model and now you have a lot of anomalies with the model. The New South Wales model has all the logic of going down that road, but it has a whole new set of problems and dangers.

Mr KERR—Coming back to the fundamental public policy issue you raise, which is a threshold question, how do you address the situation where the reason controlled operations are usually sought is not because they want to seize the drug, when they can seize the drug anywhere, but is rather an attempt to isolate not the low-level couriers but the people further up the food chain? I do not think there is any dispute from law enforcement that you can seize as much raw material as you like. What they argue is that you get the low-level operatives rather than the high-level operatives.

I am wondering what your argument is, in terms of public policy, if that would really remove probably the only effective tool that exists to undertake that. That seems to be the trade-off, the balance. Your argument is perhaps that it is too high a price for our society to pay to have people's liberties potentially infringed. On the other hand, to take your earlier example, if somebody who has been in gaol for some time for heavy drug dealing comes up and says, 'I can offer you 14 kilograms of heroin' most people would not regard it as a particularly evil thing that a person who was still in the business and was willing to trade 14 kilos of heroin got stung.

Dr Anderson—What is the point? You can arrest a person and put them back in gaol. You can create scenarios and it looks good on your statistics and your annual report looks better. You have not done anything about the drug problem. Underlying this, of course, we have to remember that police operations in this country do not fundamentally affect the price of heroin—to take heroin as an example. We know that police operations are—

CHAIR—It is a broader argument.

Mr KERR—I know, but I have asked him to engage in this broader argument to some extent. I think it is a fair point that you are arguing that essentially, no matter how effective your law enforcement is, you are not going to affect the amount of heroin on the streets.

Dr Anderson—Can I add one thing, Mr Kerr? A consequence of that is also that, because policing is necessarily targeted and fairly marginal, there will be no end to the arguments you will receive from enforcement agencies as to the power and resources they will want to pursue this problem. And they will be right in that respect.

Mr KERR—I am wondering what your reaction is. Let us put it this way. There are millions of little bunnies out there on the street carrying glassine bags of heroin and offering a person so much a hit. You can clean up a whole bunch of those every afternoon if you want to. I accept probably your proposition that even if you go after the high levels of the food chain—given the volume of the supply and the diversity and the demand and the profitability in this trade—you are unlikely to make a huge impact.

If we are engaged in law enforcement and are seeking to deal with people as criminals for the importation and distribution of this stuff, then presumably most people would argue—and I accept—that going for the Mr Bigs is a better attempt to try and target the evil

that that has been designed to attack. If your law enforcement really lends itself only to dealing with the little fish, that does not seem to me to be a particularly good outcome.

I wonder how you address that, because it seems to me that to get to the people that the National Crime Authority is trying to target—the recent arrests, for example, in Melbourne and the allegations that are made against the so-called Mr Yellow-Jacket and others of that kind—requires sophisticated surveillance, use of informants and use of a whole range of investigative techniques that would not be available under the model you put forward and so we would still be trying to clean up the little fellows in the street. We could get bagloads of them.

Dr Anderson—I am frankly of the view that the sorts of middle ranking people that are being arrested now are not hugely different in principle to the ones that were being arrested 20 years ago. It may be that there are some more arrests. As I said, I am prepared to accept that these agencies will come to the parliament and ask for more power and more resources to arrest more of the middle ranking people, and they will do it. But they will seriously corrode the rights and responsibilities of citizens in the course of extending those powers, without acknowledging that. Typically, administrators do not acknowledge that there are consequences of their own extended powers and their legitimised criminality. They do not acknowledge that there are consequences for people's rights in that sort of process. We still have that same drug problem to deal with—that intractable problem—at the end of the day.

It is fairly safe to say you could expand the resources of the police force in this state, for example, fivefold and we would have more people in gaol, we would have more people arrested and we would also have a very similar crime rate. We would have some types of criminal activity such as robbery which are associated with institutionalisation aggravated. We know that by looking at the US. We can see what law enforcement can do with the drug problem. Most of these powers, certainly at the NCA level, are being argued on the basis of that. There are serious strategic problems with going down this route.

CHAIR—Thanks, Mr Kerr. Thank you very much, Mr Anderson. I am pleased that you were able to sit in on our previous witnesses and feel rewarded for the extra half an hour you had to wait.

Dr Anderson—Thank you for inviting me to do so.

CHAIR—Thank you very much for appearing today.

[11.12 a.m.]

BRADLEY, Mr Phillip Alexander, Commissioner, New South Wales Crime Commission

CHAIR—Welcome. Mr Bradley, I am not aware of you having appeared before the NCA committee previously—certainly not since I have been a member of the committee. So I welcome you particularly on this occasion. The media has been advised that the subcommittee has resolved that no photographs of Mr Bradley should be taken. Mr Bradley, the subcommittee does prefer that all evidence be given in public but you may at any time request that any part of your evidence or the answer to a specific question be given in camera—that is, in private—and the subcommittee will consider any such request. We have received your submission which has been published by the committee. I now invite you to make an opening statement before we move to questions.

Mr Bradley—I do not really have an opening statement to make. The proposition which I put in the submission was that I thought that the notion of controlled operations was effective and workable, and that the National Crime Authority, given its position in the Commonwealth and state law enforcement areas, should have resort to such powers.

CHAIR—I noticed you listening attentively to Dr Anderson, our previous witness. Would you like to make any comment on the position that he was putting, particularly in relation to answers to questions from Mr Kerr?

Mr Bradley—As to whether the grant of additional powers or additional resources would be effective—that was the part that I heard most of—I think he is right. Essentially, the capacity to arrest criminals is a mathematical thing. The more resources you throw at it, the more you will arrest. The effectiveness of that in terms of drugs is, of course, a fairly open question. However, from the point of view of law enforcement, it is the case that the legislation says—and in my case in particular—we should arrest serious offenders, giving priority to drug matters. If it is necessary to apply more resources and more powers to do that more effectively, then, subject to the usual constraints, I think that those resources should be applied. Clearly, we cannot continue to throw more and more resources at it. There must be a point at which it becomes ineffective, or inefficient at least, or more inefficient perhaps. It is a balancing act.

The thing about controlled operations legislation, though, is that it, in my view, simply seeks to authorise that which is a normal, reasonable, logical form of investigative technique, particularly in the sorts of areas in which we and the NCA work. I do not think it is sensible to think that you can have a significant impact on organised criminals, those who do it as a business and for profit on a day-to-day basis, unless you in some way immerse yourself in what they are doing. To be reactive all of the time is simply not effective. In drug cases, for example, where there are no victims in the usual sense, it is difficult to penetrate the environment, difficult to collect the evidence. Therefore, you need to resort to techniques such as those which are authorised by the controlled operations legislation in New South Wales.

CHAIR—What do you say to the NCA's proposition that they have put in their submission that this immunity be extended to civilians, and also that it be extended retrospectively? Do you have any comment to make on that?

Mr Bradley—If they are saying that there should be the capacity to retrospectively indemnify people, including civilians, for unlawful acts, I do not have too much trouble with that because it is presently the sort of thing that is done by the Attorney-General in this state on the advice of the DPP. To retrospectively authorise illegal acts has some problems, firstly because it is a more general licence than that which is contemplated by the act; and because it would need to be, as Mervyn Finlay said, something that is very carefully thought through and publicly debated. To say even to police that it is permissible to do things which are illegal, provided you come along after the event and get a tick for it, has some problems.

There are lots of discretionary powers in the courts now in relation to things which were illegal but were not the subject of an authority. One of the problems with the authority arrangements in New South Wales is that there is a degree of uncertainty about what does and does not require authority, but there would be a higher degree of uncertainty if there was retrospectivity. I should also say that, as Mervyn Finlay also reported, there is a limit to the understanding of the way the act works and there is a need to educate police in particular. If there was a general perception that you could get approval after the event for things which were otherwise illegal, that could work some mischief in society.

CHAIR—Does it surprise you that the Law Society of New South Wales is opposed to an extension of the NCA's powers in this regard?

Mr Bradley—No, I am not surprised. The Law Society would be concerned about the intrusions on the privacy and liberties of individuals and the encroachment of law enforcement through the execution of special powers which are at least not traditional. I think there is also, on the part of the Law Society and some others, a perception that these things are done in a way that is a bit willy-nilly. In other words, a policeman comes along to a commissioner or a deputy commissioner and says, 'May I go out and buy some drugs, please, Sir?' and he says, 'Yes, that is okay, son, off you go.' It does not really work like that.

The fact that people quote the statistics to indicate that 'authorities have not been refused', or that, in the case of telephone interception, they have been saying for years that 'few warrants are declined by the court and now the AAT', does not really reflect what happens. In fact, in the Federal Police arena, for example, they have to go through a number of internal approval stages before they get anywhere near the judicial process or the administrative process exercised by a court or the AAT. It is not something that is done lightly. That is just one of the misapprehensions that often apply where people have not had exposure to the practical application of those things.

CHAIR—The Law Society do make the point that they have had very little practical exposure to controlled operations on a federal basis. But one of the other points they make in their argument is that there have never been any applications by any agency or authority turned down. I notice that you have conducted 23 controlled operations in this first year of the operation of the act. I am just wondering whether you have had any turned down—

whether 23 is a 100 per cent successful strike rate; whether you work with the NCA on these issues; and whether you would like to make any comment on the AUSTRAC proposition that money laundering be included in the NCA's increased powers in this area.

Mr Bradley—You might have to remind me of the last one. Going through those things, firstly, the numbers that we do are not indicative of the numbers that we are involved in. The Crime Commission is a very small organisation. It does almost nothing except in partnership with other agencies—mainly the New South Wales police, increasingly the NCA, but also the ICAC, AFP, PIC and other agencies. Therefore, we would be participating in investigations where there are controlled operations authorities in place, although I would not have issued that authority because, if a task force is established under our act, it consists mainly of New South Wales police. If they are going to be involved in illegal activity, then they should supervise it. Therefore, the officer conducting it should be approved by the commissioner or the deputy commissioner. The small number that we do reflects the fact that we have no field operatives except accountants and people like that who are involved in confiscation, money laundering and that sort of thing.

CHAIR—Is there a 100 per cent strike rate?

Mr Bradley—The process that applies in our case—again, because we are small—is that, if it is to be conducted by an officer of my agency, that officer or his supervisor will come to me and say, 'This is what is proposed; what do you think?' and I will say, 'We're not going to be in that,' or, 'We're going to be in that.' If we are not going to be in it, the document is prepared and often settled by me, in the sense of, 'I do not like the way this operation is forming; we are not going to be in it.' If the documents go through the discussion process, it will get to the point where my view about whether it should go on or not would be well known, and it will be likely to be approved. In every case, it has been.

When it gets to the formal stage, the thing I quibble with is the drafting, and the approval process is something that is well advanced before the formal stage of the documentation arrives. In the police environment, I suspect that the deputy commissioner would not know much about it until the documents arrive. I would suspect there would therefore be quasi-approval processes occurring at a level below him—at the superintendent or assistant commissioner level, or something like that.

CHAIR—What about AUSTRAC?

Mr Bradley—Money laundering is one of the things we pay far too little attention to. Most of the people we are interested in are in it for money. That money usually turns up in the form of cash, and it is usually their desire to get that money into the banking system so that they can use it like the rest of us do. AUSTRAC has an important role to play in that, although it is essentially a monitoring role.

Agencies like mine and the NCA need to be proactive in that field, and I have mooted with them and others some proactive measures which would more effectively take out money launderers. For instance, we have recently been involved—again, in a fairly small way—in buying gold from bullion dealers who are breaking the rules in terms of reporting cash transactions. We got burnt in the gold market, I should tell you. But there needs to be more

of that sort of thing. You need to be in the marketplace for black money, and you cannot effectively do that in all cases where the actions you are involved in are illegal unless you have some authority to do so—for example, holding yourself out as being prepared to launder money.

If you set up in a very passive way a bullion dealing outlet, for example, then you are likely to have people come to you and say, 'Can I buy large amounts of gold for cash and can you take care of the cash?' In that situation, you may be involved in a couple of illegal acts. It seems to me that the sorts of things you are doing are less, lesser in the Ridgeway sense, than the sorts of things that the people that need to buy the gold are doing or may have been involved in, and it would be an important introduction to some criminal acts, especially the predicate offences which precede the need to dispose of the black money. And, yes, I think there is a lot of scope for doing more in the money laundering area.

CHAIR—Thank you very much.

Mr KERR—Earlier, the New South Wales Council of Civil Liberties argued that there was no case for controlled operation powers, but specifically criticised the New South Wales legislation as too general in its application, and made two allegations. One is that the terms of any authorisation are too broad and that they cannot be tested against what is done. The second is that there is no restraint over the kind of offences which could be the subject of a controlled operation. I am just wondering whether you have any response to those two points.

Mr Bradley—I think the controlled operations legislation is a bit too restrictive in the way it permits operations to be conducted. My concern is—and we have had instances of this, though not under this legislation—that when it becomes known what the limitations are of what investigators can do, there will be testing of those investigators to see whether they need to run away and get a new authority. A few years ago we were involved in a lot of operations which were designed to change the rules. For example, it was always the case that if you went to a drug purchase you would show the money and hang on to it until the drugs arrived. One of the tests that the criminals always used was to say, 'Unless you allow us to take some or all of the money away, entrust us with it, then we are not going to deliver the drugs because we have not dealt with you before, or your credentials are at the ounce level and not at the kilogram level.' So we did what has now become known as 'running and burning'—in other words, allowing large amounts of money to go into the night and, in some cases, not seeking to recover it, so that we would move to a higher level.

Dozens and dozens of serious offenders were arrested in the course of those operations. It was well known at the gaol after a while that the rules had changed, and they were looking about for other ways in which to test operations. That is a fairly simplistic example, I know. But the way in which the legislation is drafted suggests, at least to some, that you need specific targets and specific types of offences.

Mr KERR—This is Commonwealth or state?

Mr Bradley—The state—I have very limited familiarity with the Commonwealth scheme. You could expect then, and it happens anyway, that people, especially those who

are in a—and I hesitate to use the expression—deep cover situation—in other words, people who are basically associating with criminals on the basis that they are criminals themselves and are trying to get some trust—are likely to be given jobs to do that will be of escalating degrees of seriousness. For example: 'Deliver this envelope to Billy Bloggs, it has got a lot of money in it, make sure you do not lose it,' that sort of thing—

Mr KERR—The two-hands scenario.

Mr Bradley—We have used those sorts of techniques ourselves in order to qualify people and qualify our own people. It is not known what you might be expected to do, what test might be given to you as you go along in the course of immersing yourself in a particular group. I think it was in the *Donnie Brasco* movie where the undercover policeman was with a group of criminals and they killed a person in his presence. While that has not happened, as far as I know, in New South Wales, there would be situations which would arise where, if you were acting responsibly, you would attempt to stop that sort of serious crime from occurring. In doing so, you would put your own life at risk—you may die as a consequence.

While that type of case would arise only rarely, there are cases where people, with whom undercover operatives associate, want to do things which are extremely dangerous, such as armed hold-ups and things like that. It is a situation where the operative would be obliged to withdraw, and have the people apprehended in some way or other, or to disclose his role or something. Obviously, participation in armed hold-ups and that sort of thing cannot be authorised by the act—nor should they be—but there will be tests given to an undercover operative in the course of developing that person as a criminal associate, which will involve crimes. At the moment, I favour the position that the control operations legislation should be as specific as possible as to what can and cannot be authorised and that the things you are incidentally engaged in should probably be the subject of the usual rules about the application of judicial discretion.

These things need to be worked through; these are early days. I had a hand in making submissions as to the terms of the first act and in relation to the recommended amendments. Whilst I do not agree with everything that Mervyn Finlay said, it is clearly a developing process and there is a balancing act to be applied. That is one of the difficulties: how you have an authority against which you can measure the conduct of those who are authorised in a proper, accountable way which permits people to have sufficient scope to be able to engage with others in criminal activity in order to gather the evidence and intelligence that we really need. What was their second point?

Senator GEORGE CAMPBELL—The second point that was being made concerned the breadth of the activities you are referring to.

Mr Bradley—There is a problem with breadth, as well. There should not be authority to do harm, in a physical sense, to individuals. The limitations at that end are obvious and sensible. The problem with the act—at least, as it is applied—is that it is used for very low-level activity, which, in my view, should not require this level of authority. A good example is the undercover police who hang about Canley Vale and Cabramatta railway stations with a fist full of dollars. Someone will come up to them and offer to sell them

heroin. There will be an exchange of drugs and money and then they will be apprehended. That is a normal form of policing, whether you regard it as effective or not. The majority of people would think that it is a sensible way of trying to limit an activity which is, firstly, illegal and, secondly, some would say, very undesirable. They would say that it is undesirable to have heroin on the market at the railway station or in the precincts of the railway station.

It is the sort of thing that should be capable of being authorised at a local level—I hesitate to use the words 'low-level', because there are reasonably senior officers available at local area commands who can say, 'These sorts of operations are approved and should be conducted subject to guidelines.' The difficulty there is that police take the view that they need a controlled operations authority authorised at the deputy commissioner level. They tend to do it far more sparingly than they might otherwise do it, and the effectiveness of it is thereby significantly limited.

Mr KERR—Is that a manifestation of what John Broome put to us: that people are actually more conservative in relation to these things than they need to be? The traditional purchase and sting operation for somebody who is on the street offering drugs would not have come under the Ridgeway proposition, and probably does not need authorisation.

Mr Bradley—It does not come under Ridgeway, I think—I never have thought it did—but I do think it is caught by the controlled operations legislation. The other thing about the Cabramatta situation is that it is such a general sort of operation that it is probably not capable of being authorised because you are just basically saying, 'Do drug buy on Cabramatta station.'

I do not think that Ridgeway ever contemplated that evidence gathered by these sorts of methods should be inadmissible, but the act would seem to make it necessary to have an authority. There are two things to say about that. Firstly, police do not like to act without an authority where there is provision for them to do so with an authority, otherwise there would be misconduct provisions and things like that. Secondly, there is a view abroad that if you have a chance to get an authority, applying a Bunning v. Cross type approach to things, and you do not get one, then the evidence ought to be inadmissible.

Mr KERR—There is sometimes an unintended, inadvertent consequence of human activity, isn't there?

Mr Bradley—Yes. I do not blame people for being conservative about the rules in that regard. It is true that there have been lots of examples where people have been less than conservative about the rules in the execution of search warrants and things like that.

There needs to be levels of authority. For example, you could have the completely passive level involving sitting around in the bar at a hotel where drugs are known to be dealt and waiting to have an offer made. You could have the slightly less passive level where undercover operatives go into environments and ask, 'Does anyone know where I can score?', or, 'Does anyone know where I can get on?', or whatever the expression is. The levels could go right through to the situation where you are actively involved in a criminal enterprise as one of the partners, if not the promoter or the principal. At that end of the scale

there has to be some very strict authorities. Again, there needs to be strict guidelines as well, more than simply codes of conduct.

At the other end there should be levels of authority which are less intimidating and less restrictive and therefore less likely to discourage normal policing, low-level sting operations if you like. Even things like trespass to a vehicle for the purpose of the installation of a listening device or tracking device should be capable of being authorised. Many of them are not authorised because of the state of the electronic surveillance legislation in New South Wales.

If you wanted to conduct effective surveillance on an experienced criminal, it is extremely difficult to do that by traditional means—following them around in cars and things like that. It is very easy to beat that sort of surveillance. It is also very resource intensive, whereas a tracking system, providing the tracking device is not detected, is just about unbeatable. You can do it from the office on a computer screen and you are not likely to disclose your interest in the target. But it is not possible to trespass on a vehicle at the moment simply for the purpose of installing a tracking device. I do not want to give you the details of that in public but there are severe limits on what can be done. Strictly speaking, the controlled operations legislation could probably operate to overcome that, but I do not think it was intended to.

Mr KERR—But it could, obviously.

Mr Bradley—Yes.

Mr KERR—What about the Finlay report? You mentioned that. What is its status? Has it been published? Is it available?

Mr Bradley—I understand it has been published. I think it was tabled.

Mr KERR—What do you understand is going to emerge from that? What is the process?

Mr Bradley—There is a draft cabinet minute in existence, as I understand it. I am not at liberty to say what the government's likely response to the report will be, or what is in the draft cabinet minute. In fact, the views that I am expressing at the moment are not ministerial views, they are my own, based on the experience I have had with the legislation.

The recommendations of Finlay are fairly consistent with those of the government agencies which contributed to the review process. I have some difficulties about the levels of authority. I think it is inhibiting at a level where it should not be. I also have some views about the complexity of the documentation. My recommendation that there be a pro forma in a schedule to the act or regulations has been picked up.

The documentation, as it is used at the moment, having been drafted by lawyers within agencies like mine, is unduly complicated. Little things which can be overlooked in the administrative process can result in the Ombudsman writing in her annual report that we have breached the rules in some way or other, which is not a desirable outcome. I do not

want to have people such as the Ombudsman saying that I cannot comply with an act, that I keep getting things wrong. But, because of the complexity in the administrative process, there are always little things which are left out or left in.

The biggest problem that we have in this area is that we cannot get people to use fresh documentation every time. They tend to use the one that they used for the last one and modify it. You might find you will get a wrong paragraph or something like that in there and that will give you a problem. I think everyone who has got a word processor experiences those sorts of problems, but they should not happen.

Mr KERR—What is the process for supervision of the system in New South Wales? The Ombudsman obviously has a direct capacity to investigate any allegations of police misconduct, and it applies to your authority also.

Mr Bradley—Yes.

Mr KERR—Is there a formal reporting obligation to the parliament for the grant of these authorities?

Mr Bradley—Yes.

Mr KERR—What form does that take?

Mr Bradley—An application comes to me as an authorising person, and that is usually supported by an operational plan and some associated documents. After the authority is issued we have to notify the Ombudsman within 21 days. There also has to be a report of the outcome of the operation as well, and that has to go to the Ombudsman.

The Ombudsman then comes to the office and physically inspects all of the applications. That is something that we can at times be a bit uneasy about. Some of our operations are extremely confidential. The most confidential things we do are things that involve informers and undercover operatives in the field. They are sometimes operations which might only be known to two or three people. Despite that we will have people from the Ombudsman's office coming in to inspect them, sometimes when they are still current.

The Ombudsman has been very reasonable about that. She will nominate the Deputy Ombudsman as the person who inspects matters which we nominate as being extremely confidential. She has not ruled out the possibility that there will be cases where they will not actually inspect the application. We have just made representations in each case where we think there is a high degree of confidentiality. They have inspected every single one. I do not have too much difficulty with that when it has been done by one person. She then reports to parliament. She has done one report. I think she might be up to a second report.

The things we get wrong are the things that I mentioned. I would not say that they are insubstantial, but they are not part of the substantive part of the application or the authority. The sorts of things we get wrong are counting the wrong number of participants; a wrong date, because someone has left the date of a previous application off the current one; or being over time. Even though we have a manual that operates in our office and a checklist

that has to be approved, with dates down each side of when certain things have to be done—as with listening devices and other things we report under—we are sometimes out of time just through administrative oversight.

Senator GEORGE CAMPBELL—It seems that one of the issues here is the difficulty of drawing the line in the sand, so to speak, on all of these activities. The NCA raised the question of unplanned activities. What happens under the New South Wales act? I think unplanned activities are defined as things that occur incidental to what is a planned or a controlled operation—the things that happen out of the blue, the unexpected. In the circumstances you were talking about earlier the officer or a particular person may be put in a position of inadvertently breaching the law as part of the operation and then having to make choices abt whether to abort the whole thing or to go along with it—whether to carry out the bank robbery, et cetera. What are the provisions under the New South Wales act in dealing with that type of situation?

Mr Bradley—There is provision for variations, and they can be achieved very quickly. There are some problems with the act that we found as we applied it, such as getting a new applicant and a new person to conduct the operation where circumstances change. For example, if I take the simple case of drug purchasing again, you may have a situation where a person initially offers to sell drugs to an informer who introduces an undercover operative and then the undercover operative or the person conducting the operation changes or is interstate when the thing is going to happen. Little things like that can happen.

We do not have a lot of experience of unplanned activities—that is, the Crime Commission personally. I have authorised operations where the game plan has changed, and then I have simply issued a new authority rather than go through the variation process because the variation is probably more cumbersome than a new authority. That has been taken care of in the recommendations of the Finlay review.

Senator GEORGE CAMPBELL—Do they happen in retrospective form?

Mr Bradley—No, they currently happen through the variation occurring prior to the instance. There would be much more experience of that in the New South Wales police environment, where undercover operations are a day-to-day thing authorised by the New South Wales Police Service, not by me.

Senator GEORGE CAMPBELL—Is there a codification of the powers, of the way in which officers can operate in these operations?

Mr Bradley—There is a distinction between civilians and law enforcement participants, and there is a distinction between law enforcement participants and the officer who has the conduct of the operation. In my case, I can only authorise officers of my agency—at least that is the view we take in relation to that particular section—and the deputy commissioner can only authorise officers of his organisation to conduct. But you can have participants from various places. For example, we have people from Victoria and Brisbane, and we have civilians and others who participate, but only my officers conduct. And then there are certain obligations on the conductor, including the fact that there is an obligation to debrief the

participant, to explain what the rules are and to get an undertaking from that person that they understand and will conform with the rules. There is a code of conduct as well.

Senator GEORGE CAMPBELL—For the officer?

Mr Bradley—Yes.

Senator GEORGE CAMPBELL—Is there any independent oversight mechanism of the way in which the act operates?

Mr Bradley—There is the Ombudsman and there is also the court if a prosecution results. If the conduct were thought to be outside the authority then it would fall within the common law rules. There is oversight to that extent. In other words, if someone purported to be acting pursuant to an authority and was in fact acting outside the authority, that would be tested in the course of a prosecution.

The Ombudsman has very wide authority to look at all of the documents, to inspect closely what has been done and to look at the reports of the conduct. The Ombudsman is reliant upon what is reported rather than what in fact occurred to the extent that there may be a discrepancy. If an officer were minded to tell lies about what happened in the report, the Ombudsman would not be alerted to that unless he or she had some other source of information. Where that would be likely to arise, I would suggest, would be in the prosecution process.

Senator GEORGE CAMPBELL—Presumably there is a committee of the New South Wales parliament which has oversight of the authority.

Mr Bradley—No.

Senator GEORGE CAMPBELL—Is there no similar body to this to advise at a state level?

Mr Bradley—No, not for control operations. A number of agencies can conduct them in New South Wales and, if the Finlay recommendations go through, there will be a lot more, including the NCA, Customs and the AFP.

Mr KERR—There was an earlier discussion about the civilian issue. What degree of protection is given for civilian participation in a control operation in New South Wales?

Mr Bradley—It is not called an indemnity, but there is a provision which says that the person is not acting unlawfully if they are acting in accordance with an authority. A briefing process occurs where the conductor of the operation has to personally get undertakings from the civilian as to conforming with the authority and not doing the things which the act says you cannot do, such as encouraging people to do things which they would not otherwise have done.

Mr KERR—I assume this usually covers informants and other people who are otherwise participants in a criminal environment.

Mr Bradley—Yes. Not always—there are often civilians who assist in operations who are not part of the criminal milieu, but most informers are a part of it. Most of our informers are people who have been arrested by us, arrested as a consequence of something we have done or arrested by someone else and have come to us seeking some sort of assistance.

Mr KERR—Has there been much analysis of the impact this has had? In the past, it has been retrospective—in other words, the DPP has decided not to proceed in relation to various matters because of recommendations given by investigating authorities in relation to their participation. Has this changed the relationship between informants and investigative agencies? If so, in what way?

Mr Bradley—I am not aware of it having had much impact on whether the DPP has made decisions about whether to prosecute an informer who would have been caught up in an illegal act but for the authority. It must have occurred. We are obliged, under the New South Wales legislation, to report the existence of authorities where evidence has been gathered as a consequence of an authority. It has probably injected more formality into the relationship. This is something that has been going on for a long time. The investigator-informer relationship has been too casual in the past. There has been not enough reporting of associations, and there has been not enough care exercised in how the relationship develops, what is disclosed to informers and a range of things. Some of the instances of corruption—for example, those we saw at the royal commission—I think came out of that. I think all of the royal commission problems were supervision problems, and supervision is necessary with informer relationships.

In the New South Wales Police Service, for example, part of the development has been that there is an informant management plan which is very complex—some would say unduly complex—and probably inhibits relationships a bit. But the obligation to brief the informer, to obtain undertakings and to report that that has been done is probably a positive thing. I think the relationship would have changed to that extent. But what you are doing is now pursuant to some legislation, not pursuant to some easygoing arrangement that we have developed in a pub somewhere. That is probably a good thing.

At the Crime Commission, when we enlist informers to do particular things, we often have a very formal process, usually involving a hearing, whereby the informer is told a number of things, including, 'Don't step over the line. If you do, you'll be in the same position as any other criminal, and don't cause people to commit crimes'—those sorts of things. I think that that sort of formality is positive.

CHAIR—Can I ask you, in a purely practical way, what happens in any controlled operations that you are running right up on the border when you are very likely dealing with the movement of perhaps people or products, shall we say, into Queensland?

Mr Bradley—It arises reasonably often. In the case of drugs, quite often because Sydney is a centre for drug distribution and importation—even if it does not come through the port at Sydney, it is usually controlled from Sydney; substantial drug importation, that is—therefore, distribution often occurs beyond New South Wales. Sometimes operations might be launched whereby the informer travels to Sydney from interstate for the purposes of a controlled operation and that causes problems with debriefings and things like that. As you

say, there are others where the operation extends beyond the state. We have also had experience of that with things like listening devices.

CHAIR—So what do you do?

Mr Bradley—We usually recruit the Criminal Justice Commission or, more recently, the Queensland Crime Commission, or someone to help out, or the NCA, which has a presence in most states. That usually does not present a problem.

CHAIR—What about the fact that there is no controlled operation legislation in Queensland?

Mr Bradley—The operations which we do with other jurisdictions are completely controlled by the agency from that other jurisdiction. So if they think that they can do something lawfully, and provided we did not take a contrary view and thought they were doing something illegal, then we would be guided by them. That has always been the case with listening devices where the rules are more liberal, or less restrictive, in Queensland.

CHAIR—These are issues we will be pursuing tomorrow when we take evidence in Queensland.

Mr Bradley—Right.

CHAIR—So I was interested to get the south of the border view beforehand. Thank you very much indeed, Mr Bradley. Your evidence has been very interesting this morning and I am very grateful to you for giving us so much time.

Mr Bradley—Thank you for the opportunity.

[12.07 p.m.]

ALEXANDER, Mr Peter John, President, Police Federation of Australia

COLLINS, Mr Terry, Chief Executive Officer, Police Federation of Australia

CHAIR—Welcome. Gentlemen, the subcommittee prefers that all evidence be given in public but if at any time any of my colleagues or myself asks a question which you would prefer to answer in camera—that is, in private—please make a request and the subcommittee will take that into account. We have received your submission and that has been published by the committee. I invite either of you to make a short opening statement and then we will move to our questions.

Mr Collins—As the Police Federation of Australia, we have the coverage of all 42,000 sworn police officers in Australia and, as their national representative body, it is our major submission that the protection that these officers should have should be the maximum level of protection and it should be consistent across all jurisdictions.

To that extent, the NCA can only provide limited protection for sworn officers working for the NCA, all of whom are either members of the federal jurisdiction or state police bodies. The alternative is that they simply do not have enough powers as claimed by the NCA to perform their functions satisfactorily. So our primary submission is that we are looking for protection. We have looked at the protection existing in other jurisdictions for controlled operations and we note that New South Wales does have what we consider to be the widest level of protection. We also note that the Queensland jurisdiction has no such legislative protection and, as I read the Queensland Crime Commission's submission, they are suggesting that they follow the New South Wales legislation.

If that is to occur, then that is a good first step to what we would say should be a national approach. In other words, we are seeking the maximum or the widest level of protection for controlled operations and uniformity. However that might be achieved, possibly by mutual recognition but preferably by consensus and common legislation, we would support that which gave it. That is our primary position.

As to the efficiency of operations of the NCA, we see no reason not to support it—that is the ability to issue their own certificates—but that is more properly an administrative matter and something that we will not take any further, concentrating solely or primarily on the protection of the members working under controlled operations.

CHAIR—Thank you, Mr Collins. Mr Alexander, did you want to add anything?

Mr Alexander—I think Mr Collins has put it succinctly. Of course, we are very interested to see that police across the country, who now find themselves working within the National Crime Authority legislation, have that generic protection. Traditional arguments about the state borders and all that sort of thing apart, we now have our members working together as Australians doing Australian work—if I can use that expression—and we think it

is important that the legislation reflects that so that our people are given the appropriate protection.

CHAIR—I am interested in your comments about the New South Wales legislation. Since 1995, I think, my home state, South Australia, has had very wide interpretation. I quote here from the National Crime Authority's submission:

> The Criminal Law (Undercover Operations) Act of 1995 permits undercover operations to be approved for the purpose of gathering evidence of 'serious criminal behaviour' which includes an indictable offence.

That seems a fairly wide power to me. I suppose it occurs to me that when South Australian police officers find themselves working for the National Crime Authority, they must find it quite frustrating to have to go back to a much narrower interpretation, as they do. I am wondering how your federation might feel about the introduction of this immunity for civilians—that is, police informers. Do you have a position on that?

Mr Collins—We do cover non-sworn personnel of the Australian Federal Police. They are our members and, where they would be involved in such controlled operations, then obviously we have the same concern and seek the same level of protection as we would for any of our members. I can only speak on their behalf because other non-sworn people, not our members, really are not our area of responsibility. I suppose as an observer of the situation, you would assume that equality should exist for all people under those circumstances but, as the federation on behalf of our members, for the non-sworn in the Australian Federal Police, definitely.

Mr Alexander—Does your question pick up the informant who is going to actively participate?

CHAIR—And I think Mr Lamb said this morning in the NCA evidence that these people were an important part of the tools of trade of a policeman.

Mr Alexander—Yes, and looking back on 22 years of CIB experience, I think you are right. I think there has been that involvement by the informant quite often but I do not think there has been a lot of attempts to legislate to pick it up. I think it is fair to say we have not got a view, because there has not been a matter we have had to concern ourselves with. You have raised it and I think it is certainly worthy of your consideration. I think there will be the case in the future. Something will happen in the future where the involvement of the police with the informant will become the issue, so I think that it is good that you are picking up on that issue. I do not think we are in a position to give you much help on it, as we speak.

CHAIR—What about in a personal sense during your years of working as a detective? Would you have found very many situations—and I am only speaking by way of principles here—where perhaps your work could have been speeded up or made more effective as a result of recognition for some informants who may have been unwilling to expose themselves without the protection of the law in an undercover operation?

Mr Alexander—I think the status of the informant has never been really discussed and analysed as it should have been. Perhaps I can use a quick anecdote about the recent murder of a young woman in Victoria who gave evidence in a South Australian murder trial 18 months ago, involving bikies, where she very courageously gave the evidence that put her husband behind bars for a double murder. She was shot while she slept alongside her six-year-old son only a few months ago. I think that case perhaps highlights the role of informants and the protection of informants as something requiring attention by our parliaments and by our politicians. I spoke to the police officers only recently involved in that matter who had to deal with that woman who had the courage to give evidence. It just struck me when you made that point about the status of an informant. I am not just talking witness protection; I am talking the involvement of people in this. I think we have not done enough about it.

CHAIR—She is, of course, a very tragic example. In a practical sense, what happens when you have police officers in, say, New South Wales working in an undercover way and they want to involve Queensland police who do not have the protection that New South Wales now offers in an undercover legislative framework? Are there practical difficulties there? Or do you find that the Queensland police rely on being able to argue, if necessary, that their operations were legal in the strict sense of the word? Does it expose them to more personal danger as a result of the lack of legislation in Queensland?

Mr Alexander—Just arising from your question, it may be of some value to you to realise that, while they are working as NCA operatives, they are all under their own different disciplinary codes.

CHAIR—That is why I asked the question.

Mr Alexander—So you are obviously right across that. I find it fascinating and a worry that police from, say, Queensland and New South Wales, to use your example, could do the identical operation and yet one or the other could be in breach of their disciplinary codes. We say to our people working in these jurisdictions that we need to have more discussion about that so that when they are working for the federal government, if I can use that expression, there is no doubt about what they can and cannot do, about what is expected of them, et cetera. That is a real concern, and your example is a real one.

Senator GEORGE CAMPBELL—Is that why you support uniform national legislation in this area?

Mr Alexander—Yes.

Mr Collins—Absolutely.

Senator GEORGE CAMPBELL—Are there any other factors in why you support uniform legislation, other than this contradictory position that people find themselves in?

Mr Alexander—Speaking perhaps not from the industrial point of view specifically, I just do not think it is professional for our country to have a National Crime Authority that picks up all of the different state jurisdictions and members of state forces who are not

working in a generic scenario. I do not think that is right, as we evolve in law enforcement in this country. I am getting on my hobbyhorse here. The Constitution is just totally silent on policing, it is a colony scenario, and here we are now talking with you people about things which are not even picked up by the Constitution. Policing was left to the states and territories.

Senator GEORGE CAMPBELL—In your experience as a police officer, to what extent are state boundaries used as a mechanism by the criminal world to frustrate law enforcement?

Mr Alexander—I think there is plenty of good case law on the extradition proceedings, but the reality is that, whilst the criminals are not constrained by boundaries, extradition proceedings have to take place and what is legal in one state may not necessarily be legal in the other state.

Senator GEORGE CAMPBELL—But do they quite consciously use the state boundaries?

Mr Alexander—Yes, there have been examples of that. Without getting too controversial, perhaps the South Australian attitude to Indian hemp is, as we speak, different to that in other parts of Australia. Criminals have a network. They are aware that there are—if I can use the expression—more lenient provisions for the use of Indian hemp in South Australia, and there are plenty of examples of criminals from the eastern states utilising the South Australian legislation. That is one example that comes to mind. There are others, but that is one that screams at us. Forget your views on the drug; in different parts of Australia, you are treated differently in terms of breaches of the law in relation to it. The criminals are right across that, for sure.

Senator GEORGE CAMPBELL—Do you think there ought to be limitations in the legislation in terms of the type of criminal activity that can be pursued under controlled operations or should it be capable of being used in a wide variety of criminal activities?

Mr Collins—Our submission is that it should be as wide as possible. The New South Wales legislation covers, as I understand the wording, any criminal offence. If that is what New South Wales works under, then New South Wales officers working with Queensland police and perhaps with the Federal Police in a joint operation would have different levels of coverage. The Federal Police are restricted now to drug trafficking as it affects the Customs Act, as I understand it. Therefore, if they are in a joint operation with New South Wales, they will rely on the New South Wales certificate, which has that widest possible interpretation.

It seems to me to be illogical to give legislation less than what they are achieving, albeit with some difficulty, through the use of the New South Wales certificate or being covered by the New South Wales certificate. In other words, if the NCA have legislation now that is less than New South Wales and they need it, then they will continue to seek the certificate from New South Wales and operate under that. Therefore, why wouldn't you bring the NCA legislation—hopefully, Queensland's—as a blueprint, if you will, for all state legislation? Then that gives us our maximum protection, we would argue.

Senator GEORGE CAMPBELL—But there is an argument from civil libertarians about the legislation being too broad and the application of it being too broad in terms of the implications for the public generally in the way in which the law is used.

Mr Collins—But you still have your process of achieving a certificate. If that is their concern, then let them argue that the warrant, or whatever it is they are seeking, be specific and what have you. But I would not restrict them from what they can seek because of fears of civil liberties. The widest possible range of applications still has to go through a process. So I would distinguish between giving the widest possible powers and, as you are saying, making them stick to a process so as not to breach civil liberties.

Mr Alexander—I can see the frustration, too, of a less than definitive wording—for example, serious crime, major crime; even talking about indictable offences, then we will have these minor indictable offences that are in some jurisdictions—and there are arguments regularly about that. Whatever is the final result, it is so important, I would argue, that it needs to be definitive.

Senator GEORGE CAMPBELL—But the issue is whether or not you can codify it.

Mr Alexander—Yes, that is right.

Senator GEORGE CAMPBELL—Where it is clearly understandable—

Mr Alexander—Yes.

Senator GEORGE CAMPBELL—where it can be applied and where it cannot be applied.

Mr Collins—I guess the rhetorical question is: why would you want to restrict a certificate for a controlled operation if it can be justified. It seems to me to put up an unnecessary barrier, and that seems to be the approach that New South Wales has taken. I think South Australia attempted to do the same thing, although the wording of 'serious criminal behaviour' probably gives leave for argument, as Peter Alexander said, about what is serious and what is more serious. So we are looking for protection, the widest possible. But, taking Senator Campbell's comments, do not distinguish that from the process which gives you your protection of civil liberties.

Senator GEORGE CAMPBELL—What about unplanned activities? The NCA referred this morning to unplanned activities where there are unforeseen consequences out of controlled operations which are not planned and not taken into account. What do you do in those circumstances? They may entail the operative getting involved in criminal activity that was not envisaged when the operation was planned.

Mr Collins—That is the situation now. In fact, it is made worse now because the NCA certificate is so narrow. There is no answer to that, except to say that by widening the certificate, or widening the protection for the controlled operation, there is less likelihood of that happening. You cannot prescribe what is going to happen under such controlled operations. You are in a very fluid situation and things can happen that could put you

outside it, but that happens now. What we think the New South Wales legislation does is decrease the possibility of that happening by widening the brief, if you will. But if things go outside that, again, it is no different to what you have now. That is the environment people live in. That is where they use their discretion and what have you, and pull back or do not pull back, and suffer the consequences. That is still what professional policing is about.

Mr Alexander—We have a real concern about our members doing anything that has not got the support of legislation. Whilst we admire the entrepreneur, we worry for them—if that makes any sense at all. At the end of the day, they are people who then find themselves coming to us with their problems. What they do on behalf of the Commonwealth government or the state government or their jurisdiction might be extremely noble, but we do not want them being exposed. The reality is that there is litigation now in this country against police officers that was not there several years ago—there is an increase in that. So our concern would be that there should not be too much opportunity for people to move outside of what is prescribed. Having said that, I know that there are circumstances, the greater good, the public interest—

CHAIR—What do you say to the civil libertarians' argument in relation to retrospectivity being given to certificates for controlled operations? They are very strongly opposed to it. I think you might have been here, Mr Collins, when that evidence was given this morning.

Mr Collins—No.

CHAIR—The New South Wales Council for Civil Liberties is very strongly opposed to this in principle. They are particularly opposed to approval being given to a certificate of operation after the event, to retrospectivity. Do you have any comment to make on that?

Mr Collins—If you do not have that facility then you increase the risk to the professional police officer of being in jeopardy. I can understand the civil liberties people saying the ends justify the means and you protect yourself for something that might have been unlawful. I do not want to get into a debate about the noble clause. I guess it gets back to the process of the issuing of the certificate. Was it foreseeable? Was it done in good faith? Who issues the certificate? What control is on that person or group of persons? Basically, is it a legitimate thing to do? The law is not a precise thing. Criminal activity and the detection of it is not a precise science and so you need this flexibility.

That discretion from the person or persons issuing the certificate is probably no different to the professional discretion that police use in the job. You have to have an ability to do it. It provides as much of a benefit as it provides the risk of corruption. I get back then to the process. Let us not confuse the process with the widest possible protection.

Mr HARDGRAVE—Mr Alexander said before, talking about entrepreneurs, that you simply cannot move outside the legislation. That is the way the system works. You do not set the laws, you enforce them and then others judge you. It comes down to a couple of things in my mind. One is whether or not the criminal code is standard across Australia. I think Mr Kerr would be well aware, as the present Attorney-General, Mr Williams, is well aware, of the disparate set of laws that govern this federation that we have. The problems

that imposes for police is something that you have already put here this morning. So we are back to the paper trail. We are back to making sure that all of these decisions for controlled operations are set in some sort of paper trail.

Mr Alexander—That's right. Having been around since the 1960s, I have to say that too many things were left to custom and practice. There was the view, 'It will all be okay on the day,' or, 'We are relying on a judgment.' Sometimes it was a 100-year-old judgment. I am talking about stolen property coming in and it is at the central police station. Do the police wait until the receiver picks it up and then make an arrest, or do they confiscate the property so that an offence cannot take place? All of those old arguments from 30 years ago are still in my mind. They are not definitive enough as we go into this modern society and as we pick up these problems across the country. All I am saying is that it needs to be as definitive as possible. But, having said that, there has to be support for the people delivering the result, and also the protection of them.

Mr HARDGRAVE—In regard to the way our criminal codes vary across the country, what sort of difficulty is there for police officers not becoming entrepreneurs by the use of their discretion?

Mr Alexander—We are all great, retrospectively. I do not know about that in the legislative sense. The Ridgeway case brought that home, did it not, right across our country? I arrested Ridgeway years before; I know the man. It was interesting when it happened. The point I make is that it took Ridgeway's case before people got serious in a government sense. I think, to some degree, that is what you are doing now. We are very pleased that you are doing it, but a lot of these things have not been analysed by police forces. Police officers have been left to make decisions in the public interest or whatever. I believe it is time for the legislation to be more definitive.

Mr HARDGRAVE—So our laws also need to be more definitive as a result.

Mr Alexander—Absolutely.

Mr HARDGRAVE—I am not a lawyer, but I am concerned about seemingly organised entrapment being one of the consequences of controlled operations—some sort of offence that was never going to take place until the police actually initiated it versus a genuine call from the community for people to get tougher on cracking down on all the roots, branches, threads and sinews of crime in this country. So there is this kind of balancing act: which way do you go; which way do you find in favour of? Having said all of that, where do controlled operations fit in? Do they become the basis of key evidence in putting someone before a judge and jury for trial and then potentially behind bars, or does it simply become complementary evidence—in other words, something that just seals the deal?

Mr Alexander—I find it very interesting what you are saying because, again, it brings back that history of police entrapment that we had in the 1930s and the 1940s, where the police officer would drink the beer in the pub after hours and then he would charge the publican with supplying him, or he would make the bet on the Randwick races and then he would charge the bookie at the end of the day. We encouraged police officers to break the law, didn't we, to get the evidence?

Now we say to them, 'Set yourself up to buy the heroin.' All I am saying is that we need to analyse all these things. I think entrapment is a big part of what you just said. I have some real fears at times about entrapment. A few years ago there was the famous American case of the big car magnate, DeLorean, where it was alleged that the police went a little too entrepreneurial in the way they got this man to engage in criminal activity. Again, we have to be definitive about what we want our law enforcement to do and what we do not want them to do.

Mr HARDGRAVE—What I am getting at is that I do not think anybody in the community would want to see somebody who was not a law-breaker suddenly breaking a law because the police had initiated, if you like, one half of the offence. With the right paper trail, would you be satisfied that sort of circumstance would not occur and, if it did, would it be fair and reasonable to impose large penalties on those who perpetrated that within the police services?

Mr Alexander—It seems to me that this is a very fundamental thing that needs to be addressed before we proceed to further legislation. We need to know exactly what we expect of our police and what is considered 'reasonable'—if I can use that well-used word. We do have fear of the worst scenario, which I think you are alluding to. It is possible.

Mr HARDGRAVE—I hate to do extremes on anything, but I guess if we are in the business of trying to get some sensible legislation, some sensible statutes on the criminal code and whatever else to make those sorts of things exist—in other words, to back police on behalf of the community in their tasks—then we would like to know that there is also going to be some imposition of a great penalty upon anybody who crosses over the line and abuses that trust, that right, that extra tool that they have.

Mr Alexander—That is right. There are some examples of police officers in Australia and in New Zealand who have got involved in the use of heroin when they were working as undercover operatives. That is just not on from where we sit. We do not want our people being exposed to anything. I am not talking about the rot, but it is a fact. We actually have litigation, as we speak, and a duty of care by employers—all those sorts of things run out of this. I do not believe we have analysed these things enough, and I think it is important that this committee in particular starts addressing those issues and that we do not do it with the benefit of hindsight. So I would use those examples of where we have had undercover police go beyond what anyone would think was reasonable. Do we really want our law enforcement people breaking the law for the greater good?

Mr KERR—But this a point that the Chairman of the National Crime Authority—I think it was the Chairman of the National Crime Authority—brought home very effectively today. He said, 'Look, once criminal syndicates know where the lines are, then they impose a test that involves that line.' For example, he made the case that it used to be the case that money would never be handed over until the drugs were secured because of the accountability rules. So wise criminals, suspecting a sting, would say, 'Well, we want at least some of the money as a token', and then, of course, policing practices changed and they allowed some money to be handed over and sometimes just thrown away in order to secure the ultimate outcome. Criminals will impose tests on undercover operatives all the time, and those tests will vary enormously.

So I guess that comes back to the point that Senator Campbell raised. Do you want a retrospective provision to deal with things that occurred when a new test was put in the way? On the other hand, where do you draw the line in terms of the interface between the citizen and the police? In other words, do we accept that if someone is trying to investigate some pretty heavy crowd they will go along and stand by as they bash somebody up to extort money, or commit arson, or kill somebody? Where do you draw this line? These are serious questions.

Mr Alexander—My word they are.

Mr KERR—You raised the occupational health and safety issue. If you are an undercover operative and you are in an area where heroin is being used—I do not think the use of heroin is necessary, but maybe if you claimed a history of being a user—you are going to have to demonstrate you use at some stage. These are difficult calls. There are no rules of occupational health and safety I think that would cover, in anticipation, what you might do in an undercover situation when somebody puts one of these tests on you.

I am puzzled by the best way to respond to these things. I am not attracted to a retrospective sign-off that just gives the agency the power to say, 'Well, no offence has ever been committed', because we know that some agencies in the past have overstepped the line. I think that what you say is that some discretion is going to be used all the time. I think the New South Wales Crime Commissioner basically said that he is still pretty relaxed about leaving that to the DPP. In other words, if it is reasonable, if it was necessary at the time, if it was a reasonable exercise of judgment, no-one would ever prosecute. But that still does not answer your point where you say you want a clear set of guidelines.

Senator GEORGE CAMPBELL—Because it is very hard to find out where you draw the line in the sand.

Mr Alexander—Exactly, and I have got to say that, being an old traditionalist, I believe the parliaments have to have more say in this. It should not be left for individual police or jurisdictions. If they work on behalf of governments and governments work on behalf of the people, then I really believe that needs to be there. I do not think we should have too much scope for people to go that next step no matter how noble they believe it is or how proper they think it is. I think parliament has to make a decision about what they want their police to do, or their law enforcement.

Senator GEORGE CAMPBELL—So are you saying that, to the extent that it is possible or feasible, the parliament should codify the types of activities?

Mr Alexander—Yes.

Senator GEORGE CAMPBELL—But you are still always going to get that set of circumstances, aren't you, when someone under cover is involved in activities and when other activities will occur? What do they do in those circumstances, and how do you protect them?

Mr KERR—Sometimes withdrawing is more dangerous than going along—'Sorry, we are just going to go out and do this piece of crime', and you say, 'Oh, no, no, sorry; I feel a bit ill.' They might start to get a bit suspicious.

Mr Alexander—That is right.

Mr HARDGRAVE—Mr Alexander, I will take a different viewpoint to see how we go on this. Codifying rights will always restrict rights. So if you codify the activities of a police officer to a certain, 'You can do this, this and this,' then the second they do that, that and that, they are in breach. So what I am submitting to you is that, rather than codifying types of activities, it is perhaps still a better and hopefully sensible judgment of a DPP, or whatever, to review the paper trail, the evidence of this activity: 'I, today, was subjected to a test and stood by and watched someone being bashed. My judgment, despite trying to talk them out of it, was that to arrest the perpetrators would have jeopardised a bigger fish.' In other words, if there were a paper trail like that, apart from everything else it is evidence, but it is also, I would have thought, a clear statement of activity that is going to be then judged one way or the other by a sensible person, whereas if you were to say, 'You can do this, this and this but you cannot stand by and watch someone bashed', then someone is in breach of a codified set of guidelines.

CHAIR—That is what the South Australian reflection is.

Mr Alexander—Yes, but Mr Collins and I come from organisations that look after the people. We are in the people business. We look after the actual people who do these things.

Mr HARDGRAVE—We are, too.

Mr Alexander—So we unashamedly want to put these points to you. For example, in South Australia police officers are indemnified when they do all sorts of things if they act honestly—that is the legislation as we speak—the word 'honestly'. Quite often we get police who are not indemnified because someone has determined, in the assessment phase, that that was not reasonable or honest. I do not know how honesty can come into how much force you use to arrest someone, for example. I would have thought 'reasonable' might have been a better word for that, but the word in South Australia is 'honestly'. I just use that as an example.

We are regularly now having police officers not being indemnified, and that varies from state to state. I know I am looking for that prescription, I know I am looking for the perfect result, and you are telling me that the real world is that we are not going to get that set of words. I think that is Senator Campbell's point, and he is quite right. But we should do our very best, I think, so that our people know what governments expect of them, what their employer expects of them and what is reasonable. That is all. I think there should be an attempt to get the very best possible result because we get frustrated as we see more and more of our people leaving themselves vulnerable and not always being indemnified, even though they are acting—

Mr KERR—That is a very interesting point. I was going to ask a question about how many people had actually been exposed to criminal liability in these grey areas because my

suspicion is that there are very few, but you have raised the issue of civil liability. Is that what you are talking about?

Mr Alexander—Absolutely.

Mr KERR—And presumably claims when an officer becomes injured or something of that kind, an argument by the state that they have exceeded what they were lawfully entitled to do—contributory negligence and all those sorts of arguments?

Mr Alexander—Absolutely. And then, of course, the employer—the state government or agency—saying, 'We can't act for you because you are now the subject of something and it would be a conflict of interest for us if we act for you.'

Mr KERR—To the best of my knowledge—and I may be wrong and you may have some instances—there is no instance where a police officer, acting in circumstances that you and I would regard as reasonable—and I am not talking about Roger Rogerson or something like that—even where it was arguably proper, that a police officer has been put on trial for a criminal offence?

Mr Alexander—As a result of taking action in these circumstances?

Mr KERR—Yes.

Mr Alexander—No, but we are getting more and more civil litigation running out of that, and it is probably important that we inform you of that, that there is a definite trend there for civil litigation, and that is in every state of Australia as we speak. There is a real trend that way; sort of proactive legal proceedings that often take place before the criminal matter has been dealt with, or run at the same time. We are concerned about that, too. And, of course, your legislation gives us challenges to meet that because, if the government of the day or the Attorney-General of the day or whoever decides that was not honest or reasonable, then the individual is left really to come to the Police Association or to fund their own defence, whether it be civil or whatever.

Mr KERR—I do not think the Commonwealth legislation leaves that open, but it does leave the question of whether or not somebody was trying to entrap. It says that the protection does not apply if the action was, I think, provoked by the law enforcement officer and would not have happened but for that provocation. There are two tests. I suppose there is a grey area left there because quite frequently the police will do something to initiate a contact but they will say it would have happened anyway because this fellow is out there in the marketplace regularly dealing in drugs. But again I do not know of any instance where the protection given by the act is likely to be withdrawn because of that. I am not sure whether you are aware of that.

Mr Alexander—Do you mean in a criminal sense as opposed to a civil sense?

Mr KERR—Yes. Commonwealth legislation indemnifies the law enforcement officer, and I presume for civil liability also.

Mr Alexander—For example, in South Australia it does not cover civil at all. Returning to Senator Ferris's example of a Queensland police officer working with a New South Wales police officer, they do not all come to the task force or the NCA secondment—

CHAIR—With equal status.

Mr Alexander—with equal status. That all needs to be discussed and—

CHAIR—Clarified.

Mr Alexander—clarified by our federal politicians because we have a real concern. We do not want, for example, to have to look at these matters when people do find themselves—

CHAIR—You could have a situation where the most qualified person to join a task force for a particular operation might be a Queenslander, but because of the way in which he is tied to the lack of the state jurisdiction, he would be better off not bringing those skills to the task force because the New South Wales and South Australian police who are on the NCA do have that cover.

Mr Alexander—Exactly.

CHAIR—You could easily find a diminution of the skill base that was available simply because of this lack of clarity.

Mr Collins—Or lack of uniformity.

CHAIR—Yes, lack of uniformity.

Mr HARDGRAVE—We are in a country where, since federation almost 100 years ago, we still have not been able to get an improvement to the system. There are something like 13 different fire jacket requirements if you are running a train across the various railway lines. There are seven different signalling systems on Australia's national railways. If we cannot fix up those things within our agreements between the states, we have to create some urgency. I want you to help me on the urgency side of this. How important is it to get these sorts of matters clarified and fixed up? How is it affecting policing in the late 20th century?

Mr Alexander—That is exactly right. Perhaps the best example, as we speak, are the bikie wars, as they are calling them, across three or four states now. Obviously, the bikies have certainly realised that legislation varies from state to state and a whole range of things. I think it is important that it is addressed sooner rather than later. I believe that we should not wait for the cases to go through the courts and those questions be asked then. There needs to be greater liaison between the federal and state governments in the way police task forces are used and all of the different ramifications for the operatives from the different forces.

Mr HARDGRAVE—Would it be your view, based on your experience and knowledge from your membership, that criminals are actually hiding their activities behind the skirt of this particular inexactitude, as far as legislation is concerned?

Mr Alexander—I am sure there is some of that. But the reality is, and I have to say it, and you know it, that police forces have been very state orientated. The imaginary state borders in this country have become a farce. I have been held up trying to extradite criminals from one part of the country to another for all sorts of reasons that in the United Kingdom would not be a problem. I use that as an example. Yet in Australia we have to extradite people. That is federal legislation, the Service and Execution of Process Act, but there have still been legislative difficulties quite often from state to state.

Senator GEORGE CAMPBELL—It is a bit of an irony that in an era when we are talking about complementary international laws and regulations to do with the drug issue that we cannot even get it at a national level.

Mr Alexander—Exactly. I remember being in London a few years ago with some people from Scotland Yard. The Scottish blokes with us that day said that if they saw a criminal in London they could put him in the car and drive him back to Edinburgh. But if I was in Melbourne I could not drive him back to Sydney. Australia has got that interesting, very localised problem. The criminal has gone beyond that.

Mr KERR—Of course, the federation was a state based organisation until only a few years ago, so you have started to articulate policing as a national issue for the first time.

Mr Alexander—Yes.

Mr Collins—And that only took us 10 years. Picking up Mr Hardgraves's point, some of the police have been their own colonial police force for the best part of 150 years. But what is happening now, I guess, is I am distinguishing between national uniformity and federal legislation. People tend to think that you need federal legislation to get national uniformity. What the police jurisdictions are doing with much emphasis from the police federation—in fact we are leading it—is requiring national competencies and national qualifications. In some jurisdictions there is talk about registration. These are all state prerogatives, but they are coming together and getting a national theme, if you will. I think that what we are looking at here is federal legislation being enacted on a national stage. You are looking at what is the highest common denominator, rather than the lowest. Like the national competencies and everything else, if you get two that recognise each other and then a third, you have a blueprint with which the others will catch up and adopt in time, whether it is professional registration of policing, national competencies, mobility or controlled operations. That is why, given the movement from Queensland to look at New South Wales and this opportunity for the NCA to look at New South Wales—not because it is New South Wales, but because it seems to be the widest—then we say, 'Good, let that be the national model.' South Australia only has to remove the word 'serious'. They are then on the national model and, in due course, it will change and the rising tide lifts all boats.

Mr HARDGRAVE—You have just described how the federation of states is supposed to work.

Mr Collins—As I say, it only took us 10 years within the police associations and federation to get it together. We are still discussing it.

Mr Alexander—It is important to realise that the police cultures reflect those state problems. You know better than we do how that works. All of a sudden we have got police from every jurisdiction working on task forces together. It is crying out for that uniformity because the criminal now is a very mobile person. They can commit a crime in Sydney in the morning and be in Perth in the afternoon. They can actually commit a conspiracy on a telephone that involves all of those state jurisdictions. They can organise on a telephone in one state a murder in another state. Surely the time has come for us to realise that we have to have the appropriate legislation to pick up on that. It is not 100 years ago where they had to get on a horse and ride for several days.

I may have inadvertently made one mistake talking to Mr Kerr. I mentioned litigation. In South Australia they are covered for civil action. Of course, they are never covered for criminal action.

Mr KERR—They are not covered for criminal action?

Mr Alexander—No, in terms of indemnification. I might have said that the other way round. They are covered if they have acted honestly for any civil reason, but, of course, they are not covered for breaking the law at all. That indemnification in the Police Act would need to be re-examined, if legislation like this became a reality or extended. I am talking the indemnification side of it, rather than just worrying about the operational side of it and what is good to catch the criminal. There needs to be that indemnification aspect looked at in each state and federally. I do not think that that has been raised at all by any of the authorities.

CHAIR—Not at this point, but this is the opening of the evidence this morning. That is probably a reasonably appropriate point at which to leave this, unless there are any further questions. I thank you, Mr Alexander and Mr Collins, for your evidence this morning. It has been very interesting. The dimensions that you have raised are complementary to earlier evidence we have received this morning. Thank you very much indeed for making the journey from South Australia.

Proceedings suspended from 12.54 p.m. to 1.45 p.m.

MONTANO, Ms Elizabeth Maria, Director, Australian Transaction Reports and Analysis Centre

PINNER, Mr Graham Charles, Deputy Director, Money Laundering Targeting, Australian Transaction Reports and Analysis Centre

CHAIR—I welcome the representatives of AUSTRAC, the Australian Transaction Reports and Analysis Centre, and particularly welcome Ms Elizabeth Montano, AUSTRAC's Director, and Mr Graham Pinner, Deputy Director, Money Laundering Targeting.

As you are aware, Ms Montano, the subcommittee prefers all evidence to be given in public, but if the answer to any question is such that you would like to give it in private—that is, in camera—please ask and we will consider your request. We have received your submission and it has already been published. I now invite you or Mr Pinner to make an opening statement and we will then move to questions.

Ms Montano—Thank you for the opportunity to speak to you today. We have the very simple comment to make that through our international work and contacts we obviously see and study the way in which money laundering and serious crime and major tax evasion are handled in a number of jurisdictions, and the various tools that are used across those jurisdictions. Whilst one must always take into account the differences in circumstances, the different economies, the different cultures, nonetheless there are some things which seem to be very good, at least from the point of view of considering whether they are appropriate for use in the Australian context. Controlled deliveries, in a wider sense, is certainly one of them.

We, in our submission, pointed out the recommendation in the Financial Action Task Force's 40 recommendations which refers specifically to controlled delivery. That is because in the international money laundering community, that is seen to be a very useful tool. It is not a tool that can be used every day, nor should it be, but it is a tool which can certainly assist amongst others in dealing with the proceeds of crime.

It is not only drugs and nuclear fissionable materials and all those sorts of things that are valuable and can be the subject of controlled deliveries. Money itself, particularly in our work, is seen to be a very useful commodity to be passed around in suitcases. It still does happen, by the way, and we have a big trend in that at the moment in our analysis. There is a lot of cash moving. It is not a cashless society, nor is it going towards being a cashless society. There is still a lot of money moving, and a lot of money moving in very suspicious ways.

In terms of currency, it is certainly a very big issue. We think it should be at least considered as to whether there should be controlled delivery in relation to funds, as well as other appropriate materials.

Having said that, I should make the comment that we have no operational experience with controlled deliveries. We are an intelligence agency only. But it is from that sort of

almost—dare I say it—policy perspective that we have looked at the issue and we think it is certainly something that requires consideration.

CHAIR—Could I draw to your attention 3.1 in your submission where you make the statement:

> Over the past decade there has been an increasing appreciation in law enforcement circles (both domestic and international) that the financial transactions associated with major crime can often be the key to detecting and apprehending members of the senior echelons of criminal groups.

Would you have any examples that you could talk to us about, in the broad, where you believe the current legislation has hampered the apprehending of criminals because the NCA has been operating in a relatively narrow area in relation to this particular issue?

Ms Montano—We do not have any particular examples we can draw from on the grounds that we obviously come into the picture in a very ancillary way. We have anecdotal intelligence regarding the opportunities that may have arisen for some of the law enforcement agencies to participate, particularly in some international operations, where the Australian authorities have been unable to assist and have had to turn away their counterparts on the basis that they could not actually do the controlled deliveries in relation to, for example, money. That is very anecdotal. Certainly other agencies, I am sure, could be far more specific and candid than we can. We hear about it in general terms.

CHAIR—We have also tried to get our minds around the different state jurisdictions here where, for example, New South Wales has got reasonably broad references in relation to this and Queensland has no legislation at all. In working with each of the state jurisdictions, do you find this inhibits your operations at all? Are you aware of comments made by people you are liaising with that the current situation is very frustrating to them?

Ms Montano—It certainly does not inhibit our operations. It may well inhibit the effectiveness of some of the information we pass on. But that can be affected for a whole range of reasons. Certainly, we do not have any specific cases where, for example, the Queensland police in providing us with their regular feedback reports have said, 'We would have like to have done a controlled delivery but we can't.' It is not the way the environment works. If there is a tool, then people find the opportunity to use it and it will be there in their general strategy setting.

In relation to New South Wales, the fact that they have a wide range of things, not only about controlled deliveries, but, for example, their confiscation laws, a whole range of things, means they can be very flexible in the way in which they undertake their operations. That is quite evident in the results they achieve, particularly in relation to moneys confiscated and the number of matters they bring before the courts.

It is part of an overall environment. Certainly, the more tools that are available and that can be used with imagination, under proper circumstances the better the results they get. But we do not get feedback in relation to, 'If we had this then we would be able to do something else.' This is probably a tool which would take some time for some agencies to get used to dealing with properly because it is not something they have ever been able to do before in that sort of sense.

CHAIR—I will just ask one further question and then I will pass over to my colleagues. Concerning the Limbeck reference, you are advocating that that should be adopted here. Can you just give us a little more background about the Limbeck reference?

Ms Montano—I will, briefly, and then my colleague who was around when Limbeck was created might be able to comment, as were other people, certainly members of the committee. The philosophy behind Limbeck is that you follow the money to find what it is that has produced the money. If that is a philosophy that is considered to be sensible, and we actually think it is, then it is something that can be applied in relation to a number of tools, including this, particularly where matters move very quickly.

The financial sector is a wonderful instrument. It allows amazingly quick transfers of funds. It allows criminals to do some terrific things. For the law enforcement agencies, in working out their strategies about how they are going to actually proceed with an investigation, the range of tools available to them is very important. It is important in terms of how fast they can react to what is going on. How fast can they intercept? How fast can they watch? How fast can the people who are under cover do things? How fast can they react? What can they do without having to go back to base? All those sorts of things are very important.

If Limbeck is all about 'Let's help people to be flexible and react as quickly and effectively as they can,' then this is something that needs to be considered. It needs to be considered very carefully I have to say, I am not talking about carte blanche. It is certainly something to look at.

CHAIR—Thank you. Mr Kerr, that might be an appropriate spot for you to take up the questions.

Mr KERR—Not really. I am persuaded by the case to extend the opportunity for controlled operations to money laundering. I am not certain about how more broadly but I think that makes sense.

To simply place this in some sort of context, what are the opportunities that you are now engaged in internationally? Money laundering is not just a domestic arrangement. You presumably have and continue to develop more effective international relationships since I ceased to have anything to do with the work of the agency. I assume that some of the things that are not permissible in this country are permissible in other jurisdictions. Is there any history of your engaging in collective operations internationally?

Ms Montano—The extent of our international interactions, of course, is in relation to information sharing. In relation to a number of agencies that we share information with, they are parts of national systems where controlled delivery of funds, which may be the proceeds of crime, is certainly part of the environment they work in.

We have not been specifically involved in any operations like that. Having said that, it is not very hard to think about how it could arise. Operation Cathedral, Operation Wonderland—depending upon which part of the operation you are talking about—which was the international paedophilia ring, was not special because of that subject, but it was an

international organisation and could have been dealing in anything. In addition to the illegal product that was being traded, had those people also been working in relation to proceeds of crime, say, as well as handing over other kinds of material, if they were also dealing in cash and you were trying to intercept them and to work out how you might get involved in that—certainly there have been a number of cases where law enforcement officers around the world have participated in some of those things to try to gather intelligence—then having the ability to conduct controlled deliveries in relation to the money as well as the product which produced the money would certainly have been a very useful thing. But we do not have any direct experience. I think, for the Commonwealth agencies, this is a bit of supposition to a certain extent simply because it has not been available. Can I ask the committee if they would hear Mr Pinner, who has some experience of the agency's activities before I joined the agency.

Mr Pinner—Prior to the Ridgeway case some years ago, there were instances where we were approached by primary investigative agencies in relation to cooperation with their international counterparts. We were asked by those agencies to establish relations with Australian banks, to facilitate the movement of funds through accounts which could be watched, to monitor the transactions that were generated through our reporting mechanisms and to hold that information for the primary agencies that were investigating. We were to facilitate the movement and we were also to try to keep that information from being picked up by other agencies because it might have an impact upon the agency that was conducting that kind of operation. But, of course, that activity ceased when the Ridgeway decision was handed down.

Mr KERR—That was a fairly conservative response to the Ridgeway decision, I would have though. But, nonetheless, it occurred.

Mr Pinner—Yes, as I understand it.

Mr KERR—There is a small reference in paragraph 5.3 to the Limbeck reference and to the challenges before Justices Merkel and Vincent. What does that refer to?

Ms Montano—That reference must be in relation to an earlier submission, not in this submission in relation to controlled deliveries.

CHAIR—It is in the general submission that was made to the previous reference on the National Crime Authority.

Ms Montano—I think the problem with Limbeck was just a technical legal issue: it was not drafted widely enough to deal with the activities and the answer, according those judges, was no. That is a question of redrafting appropriately, presuming that the policy position is taken that it should be.

Mr Pinner—As I understand it, those questions over the references related to some legal challenges that were mounted generally to NCA references as a result of activities undertaken against outlaw motorcycle gangs. Whilst those legal challenges were to be heard, there was some doubt about the way that references had been drafted. My understanding is that

those references, including Limbeck, were revisited in the light of those decisions to correct any problems that might have been there.

Mr KERR—So there is no difficulty anticipated now in terms of that reference?

Mr Pinner—As I understand it, no.

Mr KERR—This particular submission has got a very narrow remit and I think it speaks for itself. It is really a question of whether you do it or not and whether you think it is a wise extension or one which is not warranted. It may well be that it is subsumed within the larger issue which is whether we extend it to all offences under Commonwealth law. That is the more general issue which has been raised and this is one instance of a specific matter which we would have to address if we are not persuaded by that case.

Ms Montano—The only other comment we would make is that we undertook some inquiries in the last week or so in relation to some of our international counterparts as to who had this power and how often was it used. Certainly there was a range of countries which have controlled delivery in relation to money laundering, for example the United States, Belgium and the Netherlands. They are used in all jurisdictions, some more than others. It is not necessarily a power that is used every day, nor should it be. Obviously you have got to have the appropriate circumstances. It is considered to be a very useful tool amongst a range of tools.

Mr HARDGRAVE—I will just show my understanding of the real world by saying that I actually thought that we were having controlled deliveries of funds as a matter of course but I probably base that knowledge more on Hollywood than on a good understanding of the legal system. In that regard could you just elaborate on recommendation 36 of the FATF report?

Ms Montano—Stings are alive and well in Hollywood. The Financial Action Task Force is the international standards setting body in relation to anti-money laundering systems. The 40 recommendations are a set of recommendations that group has made to all its member countries, of which Australia was a founding member and is still considered a leading member, in relation to the measures that should be in place to show that your system is hostile to money laundering. There is a range of recommendations. They cover legal, law enforcement and financial matters.

Mr HARDGRAVE—But with regards to the controlled delivery of funds, what sort of circumstances or criminal activities may be used to follow a money trail when you are dealing, as you said in your opening comments, with a very cash society or subsociety?

Ms Montano—The particular recommendation goes to promoting controlled deliveries as a valid and effective investigative technique. It is interpreted in different ways in different countries. Some countries use controlled delivery of funds for things which are, for example, undercover operations, where they set up bogus financial institutions and wait for bad people to come in and give them their money. I think that is not what is being spoken of here.

Mr HARDGRAVE—I can understand how one follows a transaction generated over a computer. I can understand that there are dollars in a column and electronically it is transferred somewhere else, but how do you actually—

Ms Montano—And that is not a controlled delivery; that is monitoring.

Mr HARDGRAVE—True but how do you actually then ascertain that a lump of cash has been deposited somewhere. Is it as Hollywood portrays it, keeping a record of serial numbers and marked bills? Is there some sort of system like that? What is the process?

Ms Montano—The financial institutions have an obligation to report to AUSTRAC cash transactions of $10,000 and more.

Mr HARDGRAVE—Is that down to serial numbers of the money?

Ms Montano—They will not do that but what they will have is a combination of things. They will have the teller's notation that they took that amount in cash. They will have the usual security requirements such as video cameras and if the teller thinks that it is suspicious, then they will also lodge a suspect transaction report. Often, as has been the case quite recently, they will actually keep those physical funds aside so that they can be tested.

Mr HARDGRAVE—So we do not have a situation where a law enforcement officer parts with, say, $10,000 in cash—to use your figure. Records of the currency serial numbers are kept when the cash is lodged in alleged perpetrator X's account, and we know that it has actually been as a result of a controlled operation down the line. Do we have anything like that occurring?

Ms Montano—They do not do controlled deliveries now, so they do not do it.

Mr HARDGRAVE—Is nothing like that occurring? Would it be handy to have?

Ms Montano—Having said that, if it were determined that there should be controlled deliveries in relation to this, you would obviously want to be very careful about how you did it. You would want to do things like checks of serial numbers to make sure that all the funds went from A to B, that no-one pocketed them along the way and that there was, in fact, a clear evidence trail from one activity to the other.

Mr HARDGRAVE—So the paper trail is as important as the money trail in that regard?

Ms Montano—Yes. I suppose in that sense they are probably interchangeable terms—the paper and the money.

Mr HARDGRAVE—Sure.

Ms Montano—Another instance of when they would obviously want to be briefed would be if the actual funds being handed over were crucial to a prosecution. The other thing they would need to do to stop any evidence being tainted is make sure of there being a clear line between the funds they think are the proceeds and the banking activities. Lately, those funds

have often enough been found to be tainted with a trace of cocaine or heroin because they have been dealt with in the same physical surroundings as the actual drugs. So there are a number of cases where money can actually be linked physically to the prohibited import.

Mr HARDGRAVE—Likewise, Fred at the corner store, who picked up a tainted $50 note as a result of an innocent transaction—someone buying a packet of smokes between picking up the money and depositing it—does not want to go to gaol.

Ms Montano—Indeed. In fact, there is a fair bit of evidence, particularly from the United States. They thought they would test money at random and found an alarming proportion of it had traces of cocaine on it.

Mr HARDGRAVE—I am told that there is not one US note that does not have traces. I have got one in my pocket, and I think we subjected it to a test at another institution at an earlier date.

Ms Montano—Yes, I think we have all done that party trick!

Mr HARDGRAVE—Does the difference in the rules governing controlled operations from state to state affect your activities insofar as you prejudge the point at which you pass information on, or do you simply pass the information on, whether it is in New South Wales, South Australia, Queensland, the NCA or wherever?

Ms Montano—We pass the information on. What tools they have for investigating what that information means does not affect how we interact with the agencies, although it may well affect the kind of outcome they get and how much use they can make of the information.

Mr HARDGRAVE—Given that there may be greater restriction in one state versus another of the use of that information—in other words, the quantity or the quality of the outcome—the likelihood of being able to use the information in the most effective way would vary from state to state. Would you then back it up, duplicate the information and send it to somebody else as well so that a couple of states are looking at it?

Ms Montano—When we find something that could be of interest to a range of agencies, we will often disseminate it to all of them. We obviously do it in such a way that they can coordinate any investigation they do and know not to wander in on someone else's investigation.

Mr HARDGRAVE—If something were happening in Brisbane, and knowing, say, Queensland law not to be as good as New South Wales law, would you pass information on to the National Crime Authority so that they can also monitor what is going on?

Ms Montano—We know that happens among agencies. They do it quite readily and they do it very often. I am sure you have been briefed on the 'Let's give it to New South Wales because they can do something about it' stance. We disseminate it to whom it should be disseminated to.

Mr HARDGRAVE—Thank you very much.

Mr KERR—One of the areas where, presumably, you would want to have the capacity to undertake controlled operations is in the black financial sector. You have mentioned that there are reporting obligations on the banks. Now a number of other people, including lawyers, who would otherwise be making financial transactions that could go unreported, have reporting obligations. You mentioned that quite a number of non-licensed financial institutions are operating in Australia. How are they presently being attacked?

Ms Montano—In a range of ways. For a start, the Financial Transaction Reports Act requires remittance dealers to report. That is the theory. In practice, it is sometimes very difficult to determine who is a remittance dealer.

There are a number of ways in which they come to our attention. The mainstream financial institutions themselves can often detect who are remittance dealers because of the way in which deposits are made to their accounts and so forth. They can report that to us and they do. Often when they say, 'We think you are a remittance dealer', they will obviously close up shop and move to the next bank. Whether closing the accounts actually works is questionable, but we get reports of those.

The other ways in which we find out about them is that law enforcement agencies will tell us that they think the body which they are investigating for some other reason is also remitting funds. Often it is in combination with other activities—for example, jewellers dealing in bullion and large cash. So they will be doing a combination of things. Per se, jewellers are not obliged to report, but if they are bullion dealers they are. It is often a question of fact, so we have a small team which goes and looks at those particular enterprises. We will say, 'We think you are a remittance dealer; you should report'. The reply will be, 'No we're not', and all of a sudden all the transactions are gone, or there will be a range of things that happen.

We have actually just received funds in this year's budget to start a program called High Risk Cash Dealers, which will mean we will have more people out looking for that sort of thing and more interaction with the law enforcement agencies. We have a couple of things running right at the moment with some agencies who have referred some particular people to us, so that we can do the regulatory aspects of their activity as well as their looking at the law enforcement issues. We are trying to look at them from a number of angles. Certainly, that is a big problem. Remittance and underground bankers, particularly in some ethnic groups, are very big problems.

Mr KERR—The underground banking still goes on, doesn't it—traditional banking?

Ms Montano—Yes, and that can be done in a number of ways. You can have the remittance dealers who will actually use the standard financial system. They will do a netting of transactions between people in their group, but they will in fact use the financial system to move value, as opposed to the real underground bankers where none of it ever touches the normal financial sector. It is all done by set-offs and the ploy: 'We'll send you something at the end of the month', or, 'We'll just arrange for obligations to be met in other ways.' There is a range of things, and they are not very easy to find, particularly for small agencies.

Mr KERR—Are they where you are focusing this submission about controlled operations, or do I misunderstand?

Ms Montano—No, I think they are just one of the groups where, if the law enforcement agencies had this tool, they may well be using it in relation to investigating those sorts of underground bankers and their role in the general money laundering chain. They would not necessarily be the perpetrators of the crime that generated the funds, but they are certainly the financial advisers, the financial intermediaries, who are just as essential to the success of the operation. So it is a slightly different angle, but often finding financial intermediaries first leads back to their customers and the criminal activity. We have been involved in a number of cases that started off as regulatory issues but actually end up having wider connotations, because the regulatory thing started off suspicions and led to underlying activity being found.

Mr KERR—In relation to those issues, I suppose the Ridgeway issue does not arise, does it, because there is nothing illegal about punting $20,000 into one of these accounts if they do not report it? You have not acted in a way which is illegal. If law enforcement wanted to chase these down—

Ms Montano—They do not need controlled deliveries for that.

Mr KERR—They do not need controlled operations at all in relation to those issues.

Ms Montano—No. It depends how actively they want to get involved in the activities of the underground bankers. That is a questionable area.

Mr KERR—And how far up the tree they want to chase it from the front to a mastermind, I suppose.

Ms Montano—Yes.

Mr KERR—Are there any other so-called loopholes at the moment? The issue you raised in previous reports was that of financial transactions by lawyers, which I think has been addressed by legislation. Are there any other issues? You have raised this issue; are there any other issues?

Ms Montano—We have a constant lookout for ways in which the Financial Transaction Reports Act is being evaded. Technically, that is not correct; it is not evasion if you are not covered. It is the way in which there are loopholes—activities that are just not reportable. There is a range of them. It is a question, really, of how many reporting obligations you want to put on your financial sector and the other groups that are susceptible. In some countries, there is a very wide range of entities that have to report transactions. Having said that, in some of those places those professions or groups of people are seen to be very active in a financial intermediary role. That is not necessarily strongly evidenced in Australia in relation to a number of those groups.

The obligations we impose on cash dealers are actually greater in Australia than in some other jurisdictions. In many jurisdictions where there is an obligation on virtually anyone

who provides any financial services to report, it is to report only suspicious transactions. They do not have to report cash; they do not have to report international transfers. So you really do have to take a balanced view as to what you want your people to report, and you need to have some fairly good evidence before you impose those obligations on yet another group. Having said that, we have done some work on the subject, and there are some who perhaps warrant a bit more attention. By and large, I think it is a very reasonable collection system—the kinds of information we need—particularly the combination of the cash, the international transfers and the suspect transactions. You actually get very good pictures of a range of things that are happening at the same time, and that makes it very useful for our analytical programs.

CHAIR—Thank you very much. As usual, your evidence is always very interesting, and I look forward to meeting you again under different circumstances on the Internet gambling inquiry.

[2.19 p.m.]

NYMAN, Professor Trevor Alan, Spokesman on Criminal Law, Law Society of NSW

CHAIR—Welcome. I understand that you are a member of the Criminal Law Committee of the Law Society of NSW. Is that correct?

Prof. Nyman—That is right, Senator.

CHAIR—Thank you for giving us your time today. The subcommittee prefers that all evidence be given in public, but if at any time you wish to answer a question we have asked you in camera—that is, in private—please say so, and the subcommittee will consider that request. We have received the society's submission, which has been published already by the committee. I now invite you to make an opening statement, and then we will proceed to questions.

Prof. Nyman—Thank you. The Law Society of NSW is a society of solicitors of something in excess of 15,000 members, many of whom are employed by directorates of public prosecutions or otherwise are involved in government type employment. The views of the society broadly reflect the different types of interests that various solicitors have, but the society, in its attitude towards controlled operations generally, and the extension of the power to conduct controlled operations in particular being given to the NCA, has a strong view. If I could make a series of points one by one, the society's position might become clear.

The first point is that the society sees your role as the parliamentary joint committee on the NCA as monitoring its operations and ensuring that a proper balance is maintained between the rights of the individual Australian citizen, on the one hand, and the desire of organisations like the NCA understandably to enlarge their own powers.

The second point the Law Society wishes to make is that the last two decades of federal legislation have significantly eroded the rights of private citizens to privacy and to their ordinary civil rights, and the legislation has significantly strengthened the powers of the Australian Federal Police and the NCA, the two major law enforcement bodies which have been created by federal legislation. The Law Society says that it is time for parliament to pause in this extension of police powers.

The third point the Law Society wishes to make is that controlled operations legislation is dangerous law, specifically because it enables what would otherwise be a crime to be perfectly lawful, and such legislation forbids the prosecution of the individuals who are involved in the operation from committing a serious offence against Commonwealth or state law, or both.

The fourth point we wish to make is that it is a matter of fundamental principle that law enforcement authorities should exercise the powers they have with resourcefulness, rather than constantly seeking wider powers which further restrict the rights of Australian citizens.

The fifth point is: the authority for the commencement of a controlled operation is obtained by any law enforcement organisation, ex parte—I mean, in the absence of any person speaking against the granting of the authority. Most applications, consequently, will be granted. The dangers of permitting what would otherwise be a serious crime cannot be overstated. It is truly granting a licence to break the law. There have been numerous examples where such approval has been granted in the past and lives have been lost, injuries created, public money wasted, stings have taken place and drugs have slipped out of police custody into the hands of criminals.

The sixth, and penultimate, point I wish to make on behalf of the Law Society is that legislation of the sort that is contemplated causes damage to the fabric of morality or to the principles of abiding by the law, firstly to the police and secondly to the public. All of us in the room are experienced with the state of affairs that, whilst the law says one thing, many members of the public believe the opposite. It happens in the courts, particularly in circumstances such as drug enforcement. The police, the magistrate, other people in the courtroom, may have been using marijuana, yet the laws prohibiting the use of marijuana must be enforced. The damage that this type of legislation does within the police cannot be overstated. Its flow-on effect must inevitably come to the public. If some persons are permitted to commit crimes with impunity, why can't I? Why can't he? Why can't my son?

The seventh, and last, point that the Law Society wishes to make is that the functions of the NCA are set forth in section 11 of the NCA Act. I know that you are all very familiar with this, but they are very simple functions really, consisting of the collection and analysis of criminal information and intelligence, and the dissemination of it to the people who ought to be involved in Australia in policing our laws. The NCA has a limited investigative role itself for crimes of a particular kind or with an interstate flavour. Finally, the role of the NCA is to coordinate operations in which it, or state and territory and federal police forces are involved. These functions, the Law Society says, do not lend themselves to the deliberate organisation and commission of fresh crimes. That summarises the points that I wish to make.

CHAIR—Thank you, Professor Nyman. I believe you were sitting here for most of the evidence that was given this afternoon by AUSTRAC in which they were arguing for powers to enable the National Crime Authority to expand its operations to take into account money laundering. Do you also have opposition to that position?

Prof. Nyman—Absolutely. I did not hear a word that was said this afternoon that persuaded me at all that the delivery of cash by a person who is sworn to uphold the law would be justified. The AUSTRAC role is a limited role in the assistance of real law enforcement personnel and, absent any written submission that would have given me further guidance, I saw nothing that suggested to me that members of AUSTRAC or law enforcement personnel ought to be encouraged to do what would otherwise be a breach of the law.

CHAIR—Professor Nyman, what about the position of police informers, who are not police, obviously? Those people, as admitted by Mr Lamb this morning and I think also by Mr Broome, now play a very valuable role in the apprehension of criminals. Sometimes they are criminals themselves; sometimes they are not. They are currently operating in a very

grey world which I think Mr Alexander covered on behalf of the Police Federation of Australia. What would your view be on how they should be protected? Presuming we were to accept your proposition that we do not expand the police powers, those people would be operating in an unprotected way. What view would you have about how their protection should be secured?

Prof. Nyman—The role of informers is a longstanding role, and it is a role which has always lived in the shadows of the law. That is really where it belongs. Criminals are the last people that should be encouraged to commit crimes by the expansion of this type of legislation. To allow them to operate as criminals, with the blessing of the law, is one of the most serious examples of what the Law Society is arguing against. It is actually encouraging criminals to continue with criminal activity under the aegis and encouragement of law enforcement authorities.

Mr KERR—Really, you are making an argument against all undercover work, aren't you? How could a police force ever undertake any undercover operation without either what was assumed to apply previously—that is, that such evidence was admissible, absent a particularly strong public interest case to suggest it ought not be—or the kind of post-Ridgeway decision that parliaments around Australia have enacted.

Prof. Nyman—Mr Kerr, it has been going on for many years, as we both know. The intelligence gathering capacity of this sort of operation is undoubted, but the extent to which it can support a conviction is another matter.

Mr KERR—Let us take a simple example. The other day a fellow pleaded guilty. He had been charged previously with the NCA bombing. An undercover operative, a police officer, was introduced to that person and subsequently, as a result of recordings of the dealings, there was a plea of guilty and now that fellow is spending 12 years in jail. I think it was an amphetamines sting. I do not know what you would have us do in circumstances like that: just say, 'You cannot have an undercover operation; you cannot have your police doing anything other than wearing their caps and showing their badges as they ask for cooperation?' I think it is a totally unrealistic view of the world.

Prof. Nyman—I am sorry you see it that way, Mr Kerr. But that is the Law Society position on the subject, for the reasons I have outlined to you.

Mr KERR—Does it not surprise you, then, that it has not persuaded any government—either national or state—that New South Wales has a much more liberal approach to this than that which applies in relation to the National Crime Authority, for example? Your advocacy has not been persuasive in your own state.

Prof. Nyman—That is right.

Mr KERR—And in fact the laws here are much more liberal in relation to the capacity of the police to undertake a wide range of activities. Indeed the only state not yet applying such laws is Queensland, and I understand they are going to proceed in that direction in the future. Why would this be if it is possible to operate?

Prof. Nyman—Perhaps it is worth considering this: there is a police lobby, which you have seen around this table during the period that you have been conducting this inquiry, which is highly organised and which seeks the extension of police powers at every turn. I believe that they have a shelf from which arguments for extension of this sort of legislation are ready to be brought down to present before a committee such as yours. Organisations like the Law Society, which endeavour to have a balanced point of view, are whistling in the dark against this sort of a lobby. I just ask you to listen carefully, though.

Mr HARDGRAVE—Could you concede though, that, in the views of people in society, there seems to be a perception, in fact, I submit a reality, that the balance that you talked about—the rights of individuals, the needs for law enforcement tools—that needs to be struck, is tipped in favour of criminals and criminal activities?

Prof. Nyman—I certainly do not concede that for a moment. The Law Society's view is the opposite of that. What I have tried to say to you is that, at every turn, parliaments have been asked for more powers to be given to law enforcement authorities, and parliaments have agreed to do so.

Mr HARDGRAVE—What about the rights of individuals? That is what people would ask you. What about the rights of individuals who are victims of crime and who then see alleged perpetrators who become agreed perpetrators, who are sentenced, who, if you like, are punished for the crime, perhaps then go and repeat it? People have a dissatisfaction with the way that law courts deal with a lot of matters these days and are very concerned by the organised elements of criminal activity allowing a few of the outer skins of the onion to get targeted and sentenced while they themselves are literally getting away with this, reorganising and going on and doing something else. Would you agree that if a legal system does not meet the aspirations of the society that it is supposed to support, the system itself starts to fall into disrepute in the eyes of the general community?

Prof. Nyman—No, I do not believe that. What I do believe is what I have told you about the erosion of public morality by this sort of legislation. I certainly acknowledge that the victims lobby is a very strong lobby and has the ear of every politician in Australia.

Mr HARDGRAVE—Do you believe, though, that it is reasonable that people should put a strong view that society is better served by standards being enforced in the highest possible way and that some of the ends may justify the means as far as police controlled operation activities are concerned?

Prof. Nyman—Speaking personally, if I may, I have never been persuaded that the end justifies the means. I was taught as a child that that was not the case, and I have learned as a lawyer that it is not the case. But this is certainly the sort of legislation that argues that the end justifies the means. It lies on the heads of parliamentarians to decide whether you are going to be persuaded by that sort of reasoning, which many people reject.

Mr HARDGRAVE—I have one last point on that. Would you think that perhaps the police lobby and the victims lobby generally are finding that the laws of the land, as they have stood—and you say that over the last 20 years there has been an extension of police powers—are simply a response to police and the public trying to keep up with criminals who

always seem to be—to use the old saying—one step ahead of the law, who always seem to anticipate, best of all, ways around the laws, and that that has a moral repugnance to people in the general society?

Prof. Nyman—Could I just answer you this way. In my short time in the legal profession, the federal parliament introduced legitimised phone tapping. It was to be confined to a very small area of law enforcement where only the investigation of the most serious crimes could be assisted by that tool. It is now an industry.

Mr HARDGRAVE—All right. That stands as an example to us.

Prof. Nyman—There are countless phones at this moment which are being monitored by electronic devices that do not even need an individual to be listening in at any time.

Mr KERR—But there aren't countless phones. There are counted phones; they are counted and reported to the parliaments of this country on a routine basis.

Mr HARDGRAVE—There is a paper trail on all of those.

Mr KERR—There is a very clear paper trail. I was interested in your earlier submission about people dying and all sorts of terrible things happening as a result of controlled operations. Can you give us the facts of any instance where there has been a controlled operation authorised under these laws where those things have occurred?

Prof. Nyman—The growing of marijuana in the ACT.

Mr KERR—Under a controlled operation.

Prof. Nyman—An unauthorised controlled operation.

Mr KERR—Let us go back one step. It has always been the case that law enforcement has used both undercover operations and controlled operations, but hitherto it was believed to be unnecessary to have a legislative framework. To some extent, that may have given rise to the potentiality of some abuse, but all the advice that was to the Attorney-General's Department at the time, pre Ridgeway, was that the finding of the kind that was made would not occur. The best advice that goes to government can be wrong—and so it proved. Have you any instance, since certificate for controlled operations has been brought in and brought under these kinds of schemes, where such evil as you have indicated is associated with these operations has occurred?

Prof. Nyman—Not since the New South Wales legislation, no.

Mr KERR—Or the Commonwealth legislation, or the South Australian legislation, or the Tasmanian legislation?

Prof. Nyman—No. Mind you, we do not get a lot of statistics.

Mr KERR—You get reports to the parliament which you never got before.

Prof. Nyman—We do not get statistics on the operations that do not become public.

Mr KERR—You do in the Commonwealth scheme. You may wish to advocate that more widely.

Prof. Nyman—Certainly we will.

Mr KERR—Isn't it a case of accepting the reality that these kinds of operations will be seen as appropriate in some circumstances, and always have been, and of deciding what is the appropriate framework for them? The law societies never objected to their existence prior to Ridgeway. I do not remember any advocacy previous to that. All the texts in relation to law enforcement at the time when I went through university accepted this as an issue that was governed by the discretionary exclusionary principles.

Prof. Nyman—That is as far as admissibility of evidence is concerned, yes. But there were never any circumstances where police were permitted to break the law under controlled operations pre the legislation that followed Ridgeway.

Mr KERR—But in every undercover operation the police break the law. How can you have an undercover operation where the police do not break the law? Is your case seriously that there should be no undercover operations? If it isn't, can you tell me how you would do it?

Prof. Nyman—Mr Kerr, you are not really saying that every undercover operation breaks the law?

Mr KERR—Yes.

Prof. Nyman—I am sorry, I join issue with you about that.

Mr KERR—Tell me how you can have an undercover operation where you do not seek to infiltrate a criminal organisation and at least participate in the planning of some illegal activity, therefore becoming at least an accessory before the fact to some crime.

Prof. Nyman—You are talking about an undercover operation where crimes are actually taking place. There are countless undercover operations where there is no crime committed, where the police officer simply masquerades as being a crook and mixes in the pub.

Mr KERR—And pays for drugs, which is illegal.

Prof. Nyman—Certainly now you are getting into breaking the law.

Mr KERR—Well, what do they do?

Prof. Nyman—There are plenty of undercover operations where police do not break the law.

Mr KERR—Describe one.

Prof. Nyman—Mixing, in order to obtain intelligence, with people who are known to be criminals. The police officer is paid to wear non-uniform clothing and pretend to be a crook. All he is doing is gaining intelligence. That is an undercover operation—you know that.

Mr KERR—I do not call that an operation at all. What is the operation? That is called drinking in a bar.

Prof. Nyman—It is an intelligence gathering operation, and it has been going on since long before you and I came into it.

Mr KERR—All right. Now you are drinking in a bar and someone says, 'We are thinking of doing a job.' What do you do? Do you engage in that and pretend to be part of it so that you learn more about it? If you do, aren't you notionally being an accessory before the commission of a crime?

Prof. Nyman—In the circumstance that you are talking about it may occur, but of course there is no conspiracy unless the person is a real party.

Mr KERR—Under all of this, the party is not a real party. It has always been dealt with in the past by a prosecutorial decision not to prosecute. There is a whole range of reasons why you would not. The assumption is that the courts would allow as admissible evidence except if there is a public policy reason not to make it inadmissible. Ridgeway changed that.

Prof. Nyman—And the Australian common law, if I can add to that, that a police officer is not going to be engaging in something that would constitute a defence to a charge by being an agent provocateur. That is Australian common law.

Mr KERR—Yes, it still applies under all these laws.

Prof. Nyman—It is not the common law in the United States.

Mr KERR—But it still applies here because of express statutory enactment in relation to all the schemes. It is certainly in New South Wales and the Commonwealth. I am not certain about every jurisdiction, but I assume the pattern is common, that they all preclude agents provocateurs.

Prof. Nyman—If I can say this, the Law Society recognises that legislation has been passed that opens the door, just as the door was opened by the federal parliament for phone tapping. The Law Society advises you not to proliferate this type of activity by police forces because it will become an industry, just as phone tapping has already become an industry.

Mr KERR—You say that phone tapping is an industry. That is a nice, provocative piece of language. Every interception of a phone must be done by the seeking of a warrant, either in the case of police agencies in terms of the Commonwealth Telecommunications (Interception) Act or, in the case of the ASIO authority, a warrant by the Attorney. Do you seriously put to us that this is something that should not occur?

Prof. Nyman—I seriously put to you that the proliferation of it is a matter about which you ought to be more concerned. In every household where there is a phone tap, it is not just the target whose telephone calls about their private lives are being invaded, it is every other member of the family and every other person who ever uses that phone.

Mr KERR—Yes, but the basis on which a warrant is capable of being sought is set out in legislation. Most people would say the terms on which that can be sought are fairly plausible reasons. Every time someone is arrested or somebody goes to gaol there is an innocent person hurt and left behind. I feel total and abject horror at the circumstance of the kids of people who are gaoled. Randell, the cricket umpire in my own state, has gone off to gaol, and what do his six- and eight-year-old children feel? Every time we seek to influence and to prosecute people for doing wrong we leave behind trails of wreckage. We do so because we think there is a greater community good. The argument that someone might be innocently overheard in relation to a nine-year-old making a call about their social arrangements, fine, I accept that, but the conditions upon which warrants can be sought are set out in legislation, the reporting conditions are transparent, the statistics are known and there is not a proliferation of these things, as you assert. The numbers are well published and they are all subject to Commonwealth control. They are not subject to an expansion at a state level. I was wondering where you are coming from in relation to this.

Prof. Nyman—You have never been a fly on the wall, I assume, when a judge is asked, ex parte, to sign a warrant. The police officer going to get the warrant has put a very persuasive case, and there is nobody to answer it.

Mr KERR—So what?

Prof. Nyman—So the judge signs.

CHAIR—Or not signs, depending on the argument that he himself has determined.

Prof. Nyman—There is nobody to argue against it.

CHAIR—Except that he is a judge. He is not an uninformed person in relation to that.

Prof. Nyman—Judges are accustomed to making decisions as a result of arguments for and arguments against. When there is nobody against the argument generally prevails.

CHAIR—And the analysis of it. I just want to pursue a somewhat related point that Mr Kerr has raised. I draw to your attention the letter that you included with your submission dated 1 December 1997 to the Hon. Paul Whelan. You make a statement on page 2 of that and, to refresh your memory, I will quickly read it to you:

> Rather than channelling substantial resources into operations, for example, to purchase and supply illegal goods, funds could be better expended on increasing the support to the Police Service and the Commissions. This would enable law enforcement officers to carry out more extensive operations of detection and surveillance, leading to the apprehension and prosecution of the principal offenders.

Surely, detection and surveillance are also these sorts of operations.

Prof. Nyman—But detection and surveillance are lawful activity.

CHAIR—Are they? We have just traversed this matter. That is why I was interested to raise it in relation to Mr Kerr's questions.

Prof. Nyman—Mr Kerr and I have a different definition of undercover work. He perceives all undercover work as breaking the law. I try to point out that a great deal of undercover work does not involve any breach of the law at all but simply involves intelligence gathering activities by police officers who are not declaring themselves to be police officers but are behaving as though they are part of the criminal milieu.

CHAIR—I would suggest to you that surveillance invariably involves that as well. It would be very unusual, if a detective was carrying out some controlled operation, that he would have anything on that would identify him as a detective.

Prof. Nyman—Quite so. The overwhelming amount of surveillance activity is carried out by police who are not wearing uniforms, who are not in police cars, who are in cars that do not have a number plate that is going to be traceable. They have cameras that they take photographs with from inside the car and from other places of observation, but they are not breaking the law.

CHAIR—It must be awfully close sometimes. Just to wind up, are you happy with the federal legislation as it was passed following the High Court's determination, or is it that you would prefer to see that wound back to pre- the 1995 High Court determination?

Prof. Nyman—The Law Society would be happiest to leave the law as it was in Ridgeway.

CHAIR—Thank you very much, Professor Nyman, for quite thought-provoking evidence. That concludes our hearings today. We will resume hearings tomorrow at the Commonwealth Parliamentary Offices in Brisbane at 9.30. I thank everybody for their attendance today. I declare the hearing closed.

Subcommittee adjourned at 2.47 p.m.