Submission No.3

AUSTRALIAN
CRIME COMMISSION

Submission on Crimes Legislation Amendment (Powers & Offences) Bill 2011

ACC
AUSTRALIAN CRIME COMMISSION

INTRODUCTION

The Australian Crime Commission (ACC) welcomes the opportunity to provide submissions to the Standing Committee on Social Policy and Legal Affairs on the Crimes Legislation Amendment (Powers and Offences) Bill 2011 (the Bill). This submission addresses in particular the amendments to the *Australian Crime Commission Act 2002* (the ACC Act) that would be made by Schedules 2 and 3 to the Bill.

The ACC strongly supports these changes, as it considers that, by facilitating information sharing within government and development of preventative partnerships with industry, they would significantly contribute to two of the key capabilities[1] identified by the Commonwealth Organised Crime Strategic Framework as necessary to support a comprehensive response to organised crime.

THE ROLE AND FUNCTION OF THE ACC

The ACC is Australia's national criminal intelligence agency with unique investigative capabilities. Established under the ACC Act as a statutory authority to combat serious and organised crime, the ACC reports directly to the Minister for Home Affairs and is part of the Attorney-General's portfolio.

The ACC conducts special operations and special investigations against Australia's highest threat serious and organised criminals through:

- providing national strategic criminal intelligence assessments
- maintaining the nation's criminal intelligence holdings
- developing national responses to organised crime
- developing partnerships, providing coordination and collaboration across the Commonwealth, States and Territories and the private sector, and
- providing an independent view about the risk of serious and organised crime impacting Australia, domestically and abroad.

The ACC works with partners to disrupt, disable and dismantle serious and organised criminal syndicates. The agency seeks to harden the Australian environment against the threat of nationally significant crime through the development of prevention strategies and influencing policy and legislation at a Commonwealth, State and Territory level.

[1] Capability 1 (Intelligence, Information Sharing and Interoperability) and Capability 4 (Preventative Partnerships with Industry and the Community)

The ACC's role and function are supported by the ACC Act and by complementary legislation in each of the States, the ACT and the Northern Territory (the ACC Acts). Key activities and priorities are authorised by the ACC Board. The Board comprises the heads of all State and Territory law enforcement agencies, and the heads of the Australian Federal Police (AFP), the Attorney-General's Department (AGD), the Australian Customs and Border Protection Service (Customs), the Australian Securities and Investment Commission (ASIC), the Australian Security Intelligence Organisation (ASIO), and the Australian Tax Office (ATO). This multi-jurisdictional Board sets the National Criminal Intelligence Priorities, and authorises conduct by the ACC of operations and investigations. Operations are considered to be "special" when the ACC Board considers whether other methods of collecting criminal information and intelligence are effective, or whether ordinary police methods of investigation have been effective. It is the declaring of an operation or investigation 'special' that gives rise to the use of the ACC's coercive powers.

The work of the Board and the ACC is in turn monitored by the Inter-Governmental Committee (IGC) on the ACC, a committee of the Commonwealth and State Ministers administering the ACC Acts (the ACC Ministers). The IGC has the power to revoke a determination by the Board that an intelligence operation or investigation is a special operation or special investigation.

The use of ACC coercive powers is a valuable means of gaining an understanding of serious and organised crime. These powers are also often key to disrupting highly resilient criminal threats where traditional law enforcement methods are not successful. ACC coercive powers can only be used by independent ACC Examiners and only for the purposes of a special operation or special investigation approved by the ACC Board. Coercive powers allow ACC Examiners to:

- summons any witness to appear before an Examiner;
- require that witness to give evidence of their knowledge of criminal activities, involving themselves or others, which are the focus of the investigation or intelligence operation; and
- require them to provide documents or other things to the Examiner.

Examinations are held in private and there are strict provisions governing the use that may be made of any information gathered through use of coercive powers.

The ACC performs a national coordinating role in the fight against serious and organised crime. Close collaboration with Australian law enforcement and related government agencies is central to this role. As such, one of the ACC's unique strengths is the legislative framework allowing information sharing. The framework allows information sharing among the ACC's partner agencies to lawfully combine information, resources and expertise for maximum impact in the coordinated national fight against serious and organised crime.

CHAPTER 1

AMENDMENTS RELATING TO DISCLOSURE OF ACC INFORMATION TO MINISTERS AND MEMBERS OF PARLIAMENT (SCHEDULE 2)

CURRENT LEGISLATION

Subsections 59(1) to (6) of the ACC Act currently provide for the Chair of the Board to give information about the performance of the ACC's functions to the ACC Ministers individually and to the IGC collectively.

The Chair has the following obligations:

- to keep the Commonwealth ACC Minister informed of the general conduct of the ACC in the performance of its functions (subsection 59(1))
- on request by the Commonwealth ACC Minister, to give the Minister information about a specific matter relating to the ACC's conduct in the performance of its functions (subsection 59(1))
- on request by a State ACC Minister, to give the Minister information about a specific matter in relation to the ACC's conduct in the performance of its functions within the jurisdiction of the relevant State (subsection 59(1A))
- on request by the IGC, to inform the IGC about the general conduct of the ACC's operations (paragraph 59(3)(b))
- on request by the IGC, to give the IGC information about a specific matter relating to a current or completed ACC operation or investigation (paragraph 59(3)(a))
- to give the IGC (or, to the extent this is not permitted, the Commonwealth ACC Minister) a report of the findings of any special operation or special investigation conducted by the ACC, for transmission to the governments represented on the IGC (subsection 59(5)).

In addition, the Chair has a discretion to inform the IGC about the general conduct of the ACC's operations at such other times as the Chair thinks appropriate (paragraph 59(3)(b)).

Conversely, the Chair must not give information to a State ACC Minister or the IGC if the Chair considers its disclosure to the public could prejudice the safety or reputation of persons or the operations of law enforcement agencies (subsections 59(2) and (5)).

The very specific terms of these provisions have given rise to some concerns about the practicalities of dealings between the ACC and Ministers.

COMMUNICATION WITH ACC MINISTERS

First, the drafters of the legislation appear to have envisaged that the Chair of the Board would act as the main point of contact between the ACC and the ACC Ministers. In practice, this role has tended to devolve on the CEO because of the volume of work it entails. The Chair, as Commissioner of the AFP, has a separate, much larger organisation to manage and consequently cannot be available to deal with ACC Ministers on behalf of the ACC as often as is necessary to maintain effective liaison. Moreover, the CEO is more immediately familiar with the operations of the ACC and may more readily be briefed.

For these reasons it has become routine, outside the formal meetings of the IGC, for the CEO to brief or meet with ACC Ministers on behalf of the Chair. The Chair is kept informed of such events but commonly plays no active role in relation to them. While it is lawful for the CEO to act in this way because he does so on behalf of the Chair, the ACC considers that the point has been reached where the ACC Act ought to reflect the reality that, without usurping the functions of the Board, the CEO deals with the ACC Ministers on behalf of the ACC independently of, but in consultation with, the Chair.

The same issue was considered recently when the Parliamentary Joint Committee on the ACC was replaced by the Parliamentary Joint Committee on Law Enforcement. In that case it was decided that it was inappropriate for the Commissioner of the AFP to represent both the ACC and the AFP before the Committee. Accordingly, section 8 of the *Parliamentary Joint Committee on Law Enforcement Act 2010* provides that disclosures of ACC information to the Committee are to be made solely by the CEO.

COMMUNICATION WITH OTHER MINISTERS

Secondly, the precision of these provisions suggests that the drafters anticipated that the Chair would communicate such information only to ACC Ministers. Any communication of ACC information to other Ministers would be a matter for ACC Ministers or would take place via other departments or agencies to which the CEO disclosed ACC information relevant to their functions or activities.

This expectation has become increasingly unrealistic. With growing recognition of the interdependence of different policy areas and the need for whole of government policy development processes, it is now common for the CEO to receive requests to provide briefings on issues relating to serious and organised crime for individual Ministers or groups of Ministers other than ACC Ministers. Such briefings are provided on behalf of the Commonwealth ACC Minister but the delivery of such briefings can give rise to difficult legal questions.

For example, in the last five years the ACC has undertaken special operations in relation to the transport, maritime and aviation industries and has been prevented from directly sharing valuable criminal intelligence with the responsible Minister. The capacity of the CEO to address the real issue of giving strategic ACC criminal intelligence directly to the Ministers who need to know about it would be significantly enhanced if the ACC Act expressly recognised that the CEO and the Chair of the Board can deal directly with Ministers other than ACC Ministers.

COMMUNICATION WITH PARLIAMENTARY COMMITTEES GENERALLY

Similarly, the former provisions of subsection 59(6A) to (6D), which authorised the Chair of the Board to disclose ACC information to the Parliamentary Joint Committee on the ACC, and the current provisions of the *Parliamentary Joint Committee on Law Enforcement Act 2010*, could be taken to imply that the Chair and the CEO are not entitled to disclose such information to other Parliamentary Committees. The ACC has always taken the view that such an intent was inherently unlikely, being inconsistent with a fundamental aspect of our system of responsible government. Accordingly, the CEO and other ACC officers have regularly appeared before committees of the Commonwealth and State Parliaments.

However, the ACC has received an increasing number of requests for appearances before specialist committees of State Parliaments dealing with crime commissions and similar bodies. These committees tend to be interested in briefing on the details of the ACC's findings about organised crime in their respective States. Given the extent of such parliamentary interest in obtaining ACC information, it is desirable to provide the ACC with a more express authority for the disclosure of information to Members of Parliament[2] generally. Such disclosures should, of course, be made in a way consistent with the normal conventions on contacts between officials and Members of Parliament.

Another problematic issue is the provision of background briefing to individual members of the Parliamentary Joint Committee on Law Enforcement, for example to help a new member understand how the ACC operates and get a sense of the significance of its work. This type of briefing enhances the effectiveness of the Committee, but it is questionable whether disclosures made to one or more members in these circumstances are disclosures made to the Committee as such.

EXTENSION OF FUNCTIONS OF THE CHIEF EXECUTIVE OFFICER – PROPOSED AMENDMENTS

REPORTING TO ACC MINISTERS AND IGC

Part 1 of Schedule 2 to the Bill proposes to amend subsections 59(1) to (5) of the ACC Act to share the functions of the Chair of the Board with the CEO of the ACC. This amendment would allow the CEO to brief ACC and other Ministers and the IGC in his or her own capacity, independently of the power given to the Chair.

[2] Members of Parliament include a member of either house of Parliament or a member of Parliament of a State (including the Northern Territory or the Australian Capital Territory).

The proposed amendments to subsection 59(1) place a new obligation on the CEO to keep the Commonwealth ACC Minister informed of the general conduct of the ACC and to respond to requests from the Minister about a specific matter relating to the ACC's conduct, this responsibility currently rests solely with the Chair. The proposed amendments to subsections 59(1A), (2), (3) and (5) provide a legislative basis for the CEO to respond to requests from ACC Ministers and to brief the IGC on the matters relating to an ACC operation or investigation or about the general conduct and arrangements of the ACC. The amendments also place a requirement on the CEO not to provide such information that if disclosed to the public could prejudice the safety or reputation of a person or the operation of law enforcement agency. The Act already imposes these obligations on the Chair.

It should be noted that the responsibility of the Chair, under subsection 59(4), to provide formal reports to the IGC or the Commonwealth ACC Minister on the findings of each Board-authorised special ACC intelligence operation or investigation remains the sole responsibility of the Chair. This reflects the particular responsibilities of the Board in relation to special intelligence operations and investigations.

EXTENSION OF FUNCTIONS OF THE CHIEF EXECUTIVE OFFICER – EFFECT

These amendments recognise the true situation, described above, that the Chair of the Board is not involved in the day-to-day administration of the ACC, being responsible for the management of the AFP, and that the CEO is far better placed to report to the Minister and IGC on day-to-day matters concerning the operation of the ACC. Without detracting from the proper authority of the Chair, the amendments would give the CEO express authority to brief the Minister or the IGC in his or her own right, avoiding the need to obtain the approval of the Chair and eliminating any possible question about the CEO's authority to give briefings on behalf of the Chair.

SAFEGUARDS

Amendments to subsections 59(2) and (5) extend to the CEO the obligation, which currently rests solely with the Chair, to ensure that information is not released to State ACC Ministers or to the IGC that, if made public, could prejudice the safety or reputation of persons or operations of law enforcement agencies. This is a natural consequence of extending the CEO's functions to allow direct reporting to the IGC, and ensure that the CEO is bound by the same safeguards as are applicable to the Chair.

SHARING INFORMATION WITH GOVERNMENT MINISTERS AND OTHER MEMBERS OF AUSTRALIAN PARLIAMENTS

Item 26, in Part 2 of Schedule 2, amends the ACC Act to allow the Chair or the CEO to inform Members of Parliament about the general conduct of the operations of the ACC. This disclosure is only permitted where the Chair or the CEO considers it to be in the public interest. This new subsection provides a mechanism for the ACC, either via the Chair or the CEO, to directly provide information to all Members of Parliament.

This amendment would provide an express basis for communication with Ministers other than ACC Ministers. This reflects the increased recognition, noted above, that the activities of serious and organised crime may potentially affect the operations of a wide range of government programs. The amendment recognises the need, if the ACC is to make an optimal contribution to whole of government policy development processes, for the ACC to be free to interact with key personnel of other agencies at all levels, including Ministers.

Similarly, the amendment would confirm expressly that the Chair and the CEO are free to disclose ACC information to Parliamentary Committees and, where appropriate, individual Members of Parliament, at both Commonwealth, State and Territory level, in response to briefing requests and in other situations where they consider disclosure of information will serve the public interest. Such contacts would, of course, be conducted in accordance with the normal conventions governing communications between officials and Members of Parliament.

CHAPTER 2

AMENDMENTS RELATING TO SHARING INFORMATION WITH GOVERNMENT BODIES (SCHEDULE 2)

CURRENT LEGISLATION

Current subsections 59(7) to (9) and (11) provide authority for the CEO to give ACC information to other government agencies, as follows:

Provision	Class of information	Permitted recipient	Conditions
59(7)	information that is in the ACC's possession	(a) a law enforcement agency (b) a foreign law enforcement agency (c) a prescribed agency or body of the Commonwealth, a State or a Territory	(a) relevant to the activities of the receiving agency or body (b) it appears to the CEO to be appropriate to give the information (c) not contrary to a law of the Commonwealth, A State or a Territory that would otherwise apply
59(9)	information that comes into the ACC's possession in the course of an ACC operation or investigation	(a) a Department of State of the Commonwealth or a State (b) the Administration of a Territory (c) an instrumentality of the Commonwealth, a State or a Territory	(a) relates to the performance of the functions of the recipient (b) the CEO considers it desirable to give the information
59(8)	information that has come into the possession of the ACC	an authority or person responsible for taking civil remedies by, or on behalf of, the Crown in right of the Commonwealth, a State or a Territory	(a) may be relevant for the purposes of taking such remedies in respect of matters connected with, or arising out of, offences against the laws of the relevant jurisdiction (b) it appears to the CEO to be appropriate to give the information
59(11)	information that has come into the ACC's possession	ASIO	(a) relevant to security as defined in s 4 of the ASIO Act (b) it appears to the CEO to be appropriate to give the information

On the face of it, the authority provided is very broad. It is fair to say that these provisions have served the ACC well in relation to information sharing with law enforcement agencies and with our other major partners such as the Australian Taxation Office (the ATO) and the Australian Customs and Border Protection Service (Customs). However, outside this core group of partners the operation of these provisions has been less satisfactory.

The difficulties the ACC encounters in sharing information with its key partner agencies derive not from these ACC Act provisions but from special restrictive use and disclosure regimes that apply to information that has been acquired by covert or coercive methods. For example, under section 68 of the *Telecommunications (Interception and Access) Act 1979* (Cwlth) the CEO of the ACC may communicate 'lawfully intercepted information' only to a limited range of agencies, not including the ATO or Customs, and only if the information appears to relate to certain types of matters.

Similarly, under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* an official of the ACC may disclose AUSTRAC information to:

- the ATO (subsection 125(2));
- an authorised official of a 'designated agency' (including Customs and other selected Commonwealth departments and agencies) for the purposes of or in connection with the performance of that official's duties in relation to that agency (subsection 128(2));or
- a person for the purposes of an actual or possible investigation (subsection 128(8)).

In addition, a member of the staff of the ACC may disclose AUSTRAC information for the purposes of, or in connection with performance of the staff member's duties (paragraph 128(14)(f)). These provisions must then be interpreted in light of the fact that the ACC Act does not authorise members of staff to disseminate criminal intelligence (or indeed any ACC information) independently of the CEO.

DISCREPANCIES BETWEEN PROVISIONS

There are certain discrepancies among the provisions subsections 59(7) to (11) of the ACC Act, and particularly between subsections 59(7) and (9), with respect to each of the elements set out in the above table. Whatever the original purpose for the wording of these provisions may have been, it is now difficult to discern any rational policy purpose for a number of the discrepancies. For example, why should information obtained in the course of an ACC operation or investigation (perhaps including examination product and other highly sensitive material) be potentially available to a wider range of government entities under subsection 59(9) than the range that can receive ACC-held information generally under subsection 59(7)? Is there a practical difference between 'appropriate' and 'desirable'? Or is there a difference between an agency or body on the one hand and a Department of State, Administration or instrumentality on the other?

Over time these discrepancies have become a source of increasing difficulty and confusion. First, most information that the former National Crime Authority held was obtained through its own investigations but, because the ACC is the administrator of the national criminal database, a great deal of criminal information and intelligence comes into its possession otherwise than for the purposes of the intelligence operations and investigation that it is authorised to conduct by the ACC Board. Secondly, with increasing recognition of the relevance of criminal intelligence to the operation of a wide range of government agencies, it is now common for the ACC to find it needs to share information with government entities with whom it has not dealt previously. Difficulties may arise, for example, where there is an urgent need to share information with an entity which is not prescribed for the purposes of subsection 59(7) but not all the information has been obtained by the ACC in the course of a Board-authorised operation or investigation.

CASE STUDY 2.1

CARBON TRADING

An example of the difficulties caused by these overlapping but inconsistent rules is the work the ACC has recently undertaken with the Department of Climate Change and Energy Efficiency (DCCEE). The ACC is working with the DCCEE to identify high-risk entities that may seek to exploit some of the schemes administered by the DCCEE.

The DCCEE is not a prescribed agency for the purposes of the ACC Regulations and therefore cannot receive information under subsection 59(7). The alternative is to disseminate the information pursuant to subsection 59(9). This subsection is more restrictive than subsection 59(7), and restricts the type of information able to be communicated to information 'that comes into the possession of the ACC in the course of any operation or investigations conducted by it'. Whilst a large portion of the ACC's information is accumulated through Board approved investigations or operations, the ACC does accumulate information by other means because of its close working relationship with our partner agencies.

Only being able to communicate information to DCCEE that is sourced from an ACC Board investigation or operation limits the type of information the ACC can provide to DCCEE. The amendments would address this problem and allow the ACC to communicate with all government departments and agencies, enhancing the ACC's ability to work with partners outside the traditional areas of law enforcement when necessary.

PRESCRIBED AGENCIES

In response to these difficulties the ACC has sought prescription of large numbers of government agencies under subsection 59(7). At present there are 120 prescribed Commonwealth, State and Territory agencies. The list is prone to become out of date as agencies are restructured or renamed in 9 jurisdictions. In some cases an agency may be prescribed because of an isolated instance where ACC information was relevant to it. Moreover, the ACC continues to identify requirements to disseminate information to new agencies as its priorities shift from time to time. Given that there is no prohibition in the ACC Act on receiving agencies forwarding ACC information to third agencies, and that in some cases subsection 59(9) allows dissemination to agencies not prescribed under subsection 59(7), it is questionable whether the requirement for prescription of agencies serves any specific purpose. It does, however, create further administrative complexity.

EXCLUDED AGENCIES

A further source of difficulty that cannot be so readily addressed has been the fact that some government entities do not clearly fall within any of the classes of permitted recipients. Examples include statutory officers and some local government bodies. Once again, there is no discernable policy reason for excluding these entities and no provision in the ACC Act to preclude agencies that receive ACC information from passing it on to them.

CASE STUDY 2.2

RACING INTEGRITY COMMISSIONER (VICTORIA)

In early 2010 ACC officers met with the recently appointed Racing Integrity Commissioner of Victoria to discuss information sharing issues. It was identified that information collected by each party would potentially be of use to the other in performing its functions. The ACC foreshadowed that, in the course of its investigations, it might collect information showing, for example, patterns of suspicious betting activities, and related money laundering and activity undertaken to avoid detection that could prove valuable in identifying areas of criminality in the racing industry in Victoria.

The ACC made preliminary inquiries about having the Racing Integrity Commissioner prescribed for the purposes of paragraph 59(7)(c) but received advice that the term 'agency or body' does not extend to the holder of a statutory office, such as the Racing Integrity Commissioner. Given the range of sources from which relevant information might be drawn, subsection 59(9) did not offer a satisfactory alternative source of power for disclosures. This restricted the ACC's capacity to contribute effectively, by information sharing, to combating the activities of serious organised crime in the racing industry. Conversely, the Racing Integrity Commissioner has taken steps to have the ACC specified by Order as a body to which the Commissioner may disclose integrity related information under paragraph 37E(j) of the *Racing Legislation Amendment (Racing Integrity Assurance) Act 2009* (Vic). The relevant Minister prescribed the ACC as such a body on 4 January 2011.

Similarly, it has been found that the definition of 'foreign law enforcement agency' does not include criminal intelligence sharing bodies such as Interpol and Europol both because they are international rather than foreign agencies and because they do not directly enforce the law. It is equally apparent that the ACC would not be able to voluntarily provide information to a body such as the International Criminal Court if requested. It seems unlikely that there was ever any conscious policy of excluding disclosures to such international agencies.

In summary, the restrictions imposed by these provisions do not provide any effective safeguards against misuse of ACC information but hamper the ACC's capacity to share information in a way that contributes effectively to combating serious organised crime.

PROPOSED AMENDMENTS

Part 2 of Schedule 2 of the Bill proposes to amend the ACC Act to replace subsections 59(7), (8), (9) and (11) with a new section 59AA. The new section would provide:

- a single definition of the class of information that the CEO may give under the section;
- a single description of the classes of official entity to which the CEO may give ACC information; and
- a single set of criteria for giving ACC information to those bodies.

(There would continue to be a special provision in relation to ASIO, as described below.)

INFORMATION THAT MAY BE DISCLOSED

Under proposed section 59AA the CEO would be able to disclose 'ACC information'. This is defined as 'information that is in the ACC's possession' (item 17). However, proposed section 59AC would have the effect that the CEO could not give information that the ACC had obtained in an examination, if disclosure of that information to the proposed recipient would breach a non-publication direction made by an Examiner under subsection 25A(9). (See Chapter 6 for a discussion of proposed section 59AC and the role of non-publication directions.)

AGENCIES TO WHICH THE CEO MAY GIVE INFORMATION

Proposed paragraphs 59AA(1)(a) to (e) would authorise the CEO to disclose 'ACC information' (as defined) to three classes of recipient:

- any Commonwealth, State or Territory government body[3] or statutory office holder
- a foreign law enforcement, intelligence or security agency
- international bodies that would be prescribed by regulations, being either:
  - an international body that has functions relating to law enforcement or gathering intelligence; or
  - an international judicial body

[3] The term 'body' is defined to include, a body however described, a Department of State, a body established for a public purpose by or under a law if the Commonwealth, a State or a Territory, and a law enforcement agency.

CONDITIONS FOR GIVING INFORMATION

Under paragraphs 59AA(1)(f) to (h) the CEO would be able to share ACC information with these recipients if:

- the CEO considers it appropriate to do so;
- it is relevant to a permissible purpose; and
- doing so would not be contrary to a law of the Commonwealth, a State or a Territory that would otherwise apply.

'Permissible purpose' would be defined in subsection 4(1) of the ACC Act (see item 18). The proposed definition includes the performance of the functions of the ACC and the Board and a full range of Australian and foreign law enforcement purposes (including civil penalty matters, professional or official misconduct and recovery of criminal proceeds/unexplained wealth), as well as purposes relating to national security, revenue protection, policy development and criminology research. This covers all the purposes for which the ACC would normally wish to share information. There is also provision for the definition to be expanded by regulations, should this prove necessary.

GIVING INFORMATION TO ASIO

The proposed section 59AA would follow the present section 59 by retaining a separate provision on giving information to ASIO. This provision, proposed subsection 59AA(2), is in substantially the same terms as the current subsection 59(11) but incorporates an express condition that the disclosure must not be contrary to Commonwealth, State or Territory law that would otherwise apply.

EFFECT OF AMENDMENT

The proposed amendments would eliminate the inconsistencies among the present subsections, so that (setting aside the ASIO provision) in all cases the same information may be disclosed to the same range of potential recipients on the same conditions.

In place of the current restrictions based on the identity of the receiving agency the power to give information would be conditional on the purpose to which the information is relevant. The ACC considers that this shift would:

- eliminate barriers to information sharing, based on the source of the information and the identity of the receiving agency, that now serve no identifiable policy purpose; and
- substitute new criteria, based directly on the appropriate use of the information, for deciding whether information sharing should be permitted.

In contrast with the present situation under paragraph 59(7)(c), where there are frequent requirements to prescribe additional receiving agencies, the ACC anticipates there would rarely be a need to prescribe additional purposes.

One effect of the amendments would be that in practice ACC intelligence products would be able to be made directly available, in a timely way, to any appropriate government agency, including statutory officers and local government. This appropriately reflects the Government's recognition that combating serious and organised crime is no longer a role confined to traditional law enforcement agencies and that there is a need for action to be taken in partnership with other government entities and with a range of foreign and international agencies.

These simplified provisions would undoubtedly assist the ACC to ensure that its intelligence products are received by the right government entities at the right time. However, as noted above, some information the ACC uses in developing intelligence products is subject to special restrictions on use and disclosure imposed by the legislation under which the information of particular types (eg telephone interception product, AUSTRAC information) is covertly or coercively obtained. These restrictions will continue to apply to such information irrespective of the amendments now proposed to be made to the ACC Act. They will continue to require the ACC to produce variations of a single intelligence product for release to different classes of agencies.

CHAPTER 3

SHARING INFORMATION WITH THE PRIVATE SECTOR AND THE PUBLIC (SCHEDULE 2)

CURRENT LEGISLATION

The only express provisions in the ACC Act for the dissemination of ACC information outside government are:

- section 60, which provides for the ACC Board to inform the public about the performance of the ACC's functions by holding public meetings and publishing bulletins: and
- section 61, which provides for the Chair of the Board to give the IGC an annual report on the ACC's operations which must subsequently be tabled by the Commonwealth ACC Minister.

While a bulletin published under section 60 could be directed at a particular audience, it would essentially be public information. There is no provision for the ACC to provide relevant criminal intelligence to private sector entities on a confidential basis.

A significant part of the ACC's work in recent years (for example in relation to organised fraud and crime on the waterfront) has highlighted the need for law enforcement agencies, including the ACC, to operate in partnership with the private sector. On the one hand, the private sector can contribute significantly to the accumulation of criminal intelligence in relation to issues such as organised fraud and identity theft and the identification of vulnerabilities that are exploited by organised crime. On the other, the ACC's resulting intelligence holdings on criminal methodologies and industry vulnerabilities can be used more effectively by being shared with the private sector, so that businesses can use an enhanced understanding of the risks to harden their procedures against criminal attack. Private sector entities that have contributed to the ACC's work have clearly been frustrated by the agency's limited capacity to provide them with usable intelligence in response to their input.

While it is clearly not the function of the ACC to substitute for effective fraud control efforts by private sector entities, there is equally clearly a public interest in using criminal intelligence developed by the ACC to contribute to a reduction in the cost of fraud to the private sector by prevention and early detection. This is now a common practice in the United Kingdom and the United State of America. The Government has expressly recognised the need for the development of partnerships between law enforcement and the private sector in the Commonwealth Organised Crime Strategic Framework. In the absence of provision for confidential briefings to the private sector by the ACC it is not practicable to develop the kind of fully functional partnerships that would effectively serve this public interest.

SHARING INFORMATION WITH THE PRIVATE SECTOR—PROPOSED AMENDMENTS

The proposed section 59AB would allow the CEO to disclose 'ACC information' to private sector bodies (referred to in the Bill as 'bodies corporate'), subject to specific undertakings and conditions, and only if it is necessary for a permissible purpose (as defined). In order to protect ACC information disclosed in this way, the proposed amendments create two new criminal offences of disclosing ACC information for unauthorised purposes and of breaching conditions imposed by the CEO.

Under the proposed section 59AB, bodies corporate (or classes of bodies corporate) prescribed by regulations, would be eligible to receive ACC information. Where a body corporate is prescribed, and subject to the tests, limitations and conditions, ACC information (as defined) can be provided.

CONDITIONS FOR INFORMATION SHARING

For the CEO to provide ACC information to a prescribed body corporate, it is proposed that:

- the CEO must consider it appropriate; and
- the CEO must consider it necessary for a permissible purpose; and
- the body must have undertaken, in writing, not to use or further disclose information except in accordance with a written specification by the CEO permitting such further disclosure, or as required by a law of the Commonwealth, a State or a Territory; and
- the body has undertaken in writing to comply with any conditions specified by the CEO under subsections (4) or (5); and
- disclosing the ACC information would not be contrary to a law of the Commonwealth, a State or a Territory that would otherwise apply.

PURPOSE OF INFORMATION SHARING

Whilst 'permissible purpose' is widely defined, the required degree of connection with the permissible purpose is quite high. Under the proposed subsection 59AB(3) the permissible purpose for which the information is provided must be specified in writing. This provides both parties with certainty as to the purposes for which the information was disclosed.

To share information with the private sector, the CEO must consider that it is 'necessary' for a permissible purpose. This is deliberately higher than the test for providing information to government bodies, where the CEO must consider that it is relevant to a permissible purpose.

ADDITIONAL CONDITIONS—PERSONAL AND COMMERCIAL INFORMATION

A number of limitations and conditions would be imposed on both the CEO and the recipient body corporate that further restrict and regulate the information sharing. As members of the private sector are not subject to accountability regimes to hold them accountable for their actions the CEO would be specifically limited in relation to the provision of information that is personal information (within the meaning of the *Privacy Act 1988*) and information that is confidential commercial information. It is proposed that personal information can only be given where it is necessary for specified limited purposes (such as preventing or detecting criminal offences, or facilitating the collection of criminal information or intelligence) and that confidential commercial information relating to another body or person cannot be provided at all.

WRITTEN UNDERTAKINGS AND DISCRETIONARY CONDITIONS

In addition to the CEO being limited in what information may be shared with a private sector body, it is proposed that a recipient who is to receive ACC information would be required to undertake, in writing, to comply with any conditions specified by the CEO. The private body must undertake, in writing, not to use or further disclose ACC information – unless the CEO has specified in writing that such use or further disclosure can occur and the private body must comply with conditions that the CEO has imposed in relation to dealing with 'personal information' (if applicable).

The CEO may also specify, in writing, any other conditions that the CEO considers appropriate in relation to ACC information that is disclosed to a body corporate. Conditions could include requirements for managing, handling, using, re-publishing and destroying the information, requiring any person accessing the information to hold or obtain a security clearance and a requirement to return or destroy the information.

RECORDING AND DISCLOSURE OFFENCES

To ensure that any unauthorised dealing with ACC information by private sector bodies attracts appropriate sanction, two proposed offences are created by subsections 59AB(7) and (8). There would be an offence of recording or on-disclosing ACC information for a purpose that is not a permissible purpose (as specified in writing by the CEO); and an offence of dealing with ACC information in breach of a condition (specified by the CEO). Both offences are proposed to be punishable by 50 penalty units, imprisonment for 12 months, or both. This sanction is consistent in terms and punishment with section 51 of the ACC Act, which prohibits the unauthorised record or sharing of ACC information by the CEO, a member of the Board, a member of the staff of the ACC or an Examiner.

A defence to either charge can be established if the information was legitimately made public. For this to occur the information must have already been in the public domain before the disclosure occurred and the original disclosure of information into the public domain was not in contravention of section 51, itself an offence of disclosure under subsection 59AB(7) or (8) or in breach of a written undertaking given by the body corporate. In simple terms, if information comes to be in the public domain in a manner that does not breach the ACC Act, a person who publically discloses the same information would be able to make out the defence.

The combination of the requirement that the information be 'necessary' for a permissible purpose, the limits placed on industry only to use the information for that purpose, and the offence provisions for improper use or disclosure, create a regime which can ensure that information provided to private sector bodies is appropriately protected.

SHARING INFORMATION WITH THE PRIVATE SECTOR—EFFECT OF AMENDMENT

These proposed provisions would provide the ACC with a new information sharing ability that does not exist in the Act as it presently stands. If they are enacted, the ACC will have a purpose-designed avenue to work more effectively with industry to minimise the harm that serious and organised crime poses to the community. The inclusion of the ability to share ACC information with private sector bodies is reflective of the growing importance of public-private partnerships in combating organised crime. A range of private sector organisations, including maritime industry organisations and the financial and insurance sectors, have a legitimate interest in information about serious and organised crime and capacity to employ prevention strategies if they were better informed about the risks and threats that relate to their sectors. Sharing formation with such organisations would not only assist individual organisations but the ACC anticipates it would yield a significant dividend in terms of crimes prevented and detected, and additional intelligence fed back to the ACC. Disclosure of sensitive information to private sector bodies does, of course, raise a risk of inappropriate use or disclosure but the ACC considers the safeguards included in the Bill would enable it to manage this risk effectively.

SAFEGUARDS

Administratively, the ACC would ensure that these safeguards are strictly adhered to and that industry groups clearly understand the legislative restrictions that apply to ACC information. It is envisaged that the most practicable means of giving effect to these safeguards, where the ACC expects to enter into an ongoing information-sharing relationship with a private sector body, would generally be to establish a memorandum of understanding (MoU). The MoU would include the necessary undertaking that the body will not use or further disclose the information, except as provided for by the Act. The ACC would still be obliged to identify the 'permissible purpose' for which the ACC information is provided, can be used and further disclosed each time information is provided. In cases where no MoU is in place the ACC would, of course, ensure that the receiving body gives the required written undertakings before information is provided to it.

Engaging in an MoU negotiation process with private sector bodies would also present an opportunity for the ACC to educate these bodies about the legislative regime under which they may receive ACC information and help to underpin the safeguards designed to ensure the information is properly protected and dealt with appropriately.

In considering the sufficiency of the proposed safeguards, it is important to bear in mind the context in which they would operate. The purpose of providing ACC information to private sector bodies would generally be to prevent, or to facilitate the early detection of, criminal offences. Accordingly, information, especially where it includes personal information, may need to be provided at very short notice (e.g. less than 24 hours). In these circumstances, it would be important that safeguards were capable of being applied quickly, or to a significant extent in advance of an individual disclosure, so that they would not necessarily entail such delay as to make it impracticable to use the power of disclosure.

Accordingly, in the development of this Bill the ACC has opposed the inclusion of suggested safeguards that it considered would render the proposed new power of disclosure ineffective. For example, we took the view that mandatory requirements should be expressed in terms of outcomes rather than specific procedures to be adopted. Similarly, we rejected the idea that the disclosure of ACC information generally should be subject to similar restrictions to those that apply to things seized under section 22 of the ACC Act. (Those restrictions would be replaced by the amendments set out in Schedule 3 to the Bill.) The ACC believes the safeguards included in the Bill strike an appropriate balance between the interests of the individual and the needs of law enforcement and crime prevention.

PUBLIC BULLETINS—PROPOSED AMENDMENTS

The proposed amendments to subsection 60(4) would allow the CEO to publish bulletins for the purpose of informing the public about the performance of the ACC's functions. Presently, the Act only allows the Board to publish such bulletins. This proposed amendment would allow the CEO to inform the public about the functions of the ACC without the approval of the Board. It is not proposed that the CEO would exercise this function in circumstances against the wishes of the Board, but it provides the CEO with an independent legislative function to release information publically, without the administrative hurdle of seeking the Board's endorsement for each public bulletin. The Board's power to release public bulletins remains, and the power to hold public meetings rests solely with the Board.

SAFEGUARDS

Subsection 60(5) provides safeguards for the release of public information ensuring that information that could prejudice safety, reputation or the fair trial of a person charged with an offence, must not be released. The amendment to this section ensures that the CEO is bound by this obligation, in the same way as the Board currently is, in relation to any public bulletins. This ensures an appropriate balance between releasing information to the public and ensuring that individuals' safety, reputation and right to a fair trial are the paramount considerations before such information is released.

CASE STUDY 3.1

TASK FORCE GALILEE

In April 2011, the ACC Board established a multi-agency task force that aims to disrupt fraudulent serious and organised investment scams and harden the Australian environment against this type of organised criminality. Two of the Taskforce's objectives are to develop crime prevention and disruption strategies and enhance community resilience to highly sophisticated serious and organised investment scams impacting Australia.

The Taskforce has identified Australian losses to serious and organised investment scams of at least A$93 million since 2007, which encompasses approximately 2,400 individuals and 800 companies including 47 self-managed superannuation funds.

Offshore organised crime groups have also acquired significant quantities of personal information, potentially placing significant numbers of Australians at risk of being targeted. Put simply, the ACC has identified individual Australians who may not yet be victims of organised crime, but are likely to be targeted in the future. The sheer size and volume of this information is so great that individual referrals to law enforcement partner agencies so that they may contact individual victims is not practical or feasible.

Through detailed intelligence collection and analysis, Taskforce Galilee has also developed a detailed understanding of the specific methodologies used by organised crime groups to identify and target potential victims, convince potential investors to invest funds and establish corporate structures offshore to insulate their activities from law enforcement disruption efforts and launder the proceeds of crime. An understanding of these methodologies would allow the private sector to develop appropriate strategies to harden their institutions against serious and organised investment scam fraud (eg by developing risk assessments and implementing appropriate processes, systems and procedures) to protect organisations and customers against serious and organised crime. Furthermore, the Taskforce has established proactive measures to identify future victims, fraudulent companies and their associated bank accounts, which could be used directly by the private sector to warn customers and prevent future losses.

The current restrictions in the Act prevent the ACC from sharing this valuable information with the private sector in a suitable way. The sensitive nature of this information makes publication through a Board bulletin or in the ACC's annual report impractical. To publically disclose the personal information of thousands of people and the methodology used to perpetrate this type of fraud would only add to the incidence of fraud. The ACC is therefore in possession of valuable information but limited in acting on this information as a consequence of the restrictions in the ACC Act.

The proposed amendments would allow the ACC to disclose this information to industry for a 'permitted purpose' and work closely to harden their institutions, and warn their clients, against this type of fraud. The disclosure would be protected by the regime of safeguards proposed in the Bill, and outlined above. Disclosure of this information, subject to the necessary safeguards is clearly in the public interest, helping to protect thousands of Australians from incidents of fraud.

CASE STUDY 3.2

TASK FORCE CHAMONIX

Task Force Chamonix was established by the ACC Board on 15 March 2010 under section 7C(f) of the ACC Act to target transnational criminal networks involved in EFTPOS card skimming fraud activity across a number of Australian jurisdictions. Operating under the High Risk Crime Groups (HRCG) No. 2 Special Investigation, the aim of Task Force Chamonix was to establish a multi-agency co-ordinated targeting of persons of interest and to explore the nexus between EFTPOS terminal skimming and other serious and organised crime.

While Task Force Chamonix realised significant disruption to EFTPOS-card skimming activity in Australia, the inability of the ACC to share information with industry stakeholders including banking institutions, card issuers, retailers and financial sector associations reduced opportunities for more effective and timely environmental hardening.

The ACC acquired an extensive knowledge of the membership of the networks involved and of the methods of operation by which they were able to acquire usable data on individual card holders. Dissemination of these types of information to private sector entities on a confidential basis would have facilitated both the early identification of offenders and prevention of criminal activity by those entities and potentially the development of more resilient technologies and procedures by card issuers.

CHAPTER 4
USE AND SHARING OF RETURNABLE ITEMS (SCHEDULE 3)

INTRODUCTION

In the course of an ACC special operation or special investigation, an ACC Examiner may, by summons under section 28 or notice under section 29, require a person to produce a document or thing and a Judge or a Federal Magistrate may, on application by an Examiner or a member of the staff of the ACC who is a police officer, under section 22, issue a search warrant authorising seizure of things[4] of a specified kind connected with the special operation or special investigation. These powers are integral tools for the collection of intelligence by the ACC.

CURRENT POSITION

At present, the ACC Act, deals only with the use, sharing and disposal of seized items under the section 22 search warrant power. The ACC Act makes no provision in relation to things produced at an examination or produced under a section 29 notice.

Under the existing search warrant provisions in section 22, the head of an ACC special operation or special investigation is permitted to retain a seized thing for as long as retention of the thing is reasonably necessary for the purposes of the ACC special operation or special investigation to which the thing is relevant. Where retention of the thing is not, or ceases to be, reasonably necessary for such purposes, a person participating in the ACC special operation or special investigation is required to:

- where the thing is to be used in evidence in specified proceedings, cause the thing to be delivered to the person or authority responsible for taking the proceedings; or
- cause the thing to be delivered to the person who appears to the person participating in the ACC special operation or special investigation to be entitled to the possession of the thing.

However, these requirements do not apply where the CEO of the ACC has furnished the thing to the Attorney-General of the Commonwealth or of a State, or to a law enforcement agency, in accordance with paragraph 12(1)(a) as evidence admissible in the prosecution of an offence.

This provision is unsatisfactory in two respects when considered in the context of the ACC Act. First, it vests the obligation to pass a thing intended to be used in evidence to a person or authority responsible for taking the relevant proceedings (other than in a case provided for in some parts of subsection 12(1)) in a person participating in the relevant special ACC operation or investigation rather than in the CEO, leaving an inconsistency in responsibility for the handover of evidence. Secondly, the reference to subsection 12(1) is defective in that it erroneously assumes that it would be possible to give evidence to a law enforcement agency under paragraph 12(1)(a), when in fact that must be done under paragraph 12 (1)(c).

[4] 'Thing' includes a document (s22(11), *Australian Crime Commission Act 2002*)

More importantly, it is inconsistent with the recently amended standard Commonwealth provisions on use, sharing and return of things seized and documents produced in Division 4C of Part IAA of the *Crimes Act 1914* (Cwlth) (the Crimes Act). Those provisions allow for broad use of documents and things for law enforcement and related purposes once they have been lawfully seized or produced. It would be more consistent with the ACC Act's approach to information for the ACC Act to authorise similarly broad use of documents and things seized by, or produced to, the ACC.

PROPOSED AMENDMENTS

Schedule 3 to the Bill proposes to amend the ACC Act to introduce the concept of a 'returnable item'. 'Returnable item' is a defined term, and encompasses a thing seized under a section 22 search warrant, a thing or a document produced during an ACC examination and a thing or document produced under a section 29 notice. In this way, the amendments, for the first time, provide legislative direction as to how things produced at an examination or produced pursuant to a section 29 notice must be dealt with. In addition, the amendments allow for expanded uses and sharing of 'returnable items'.

Under the returnable item amendments, returnable items may, in specified circumstances, be made available for purposes additional to the purpose for which the thing was first produced or seized. However, for this to occur, the proposed amendments require that various tests are satisfied.

- The ACC CEO may make a returnable item available for the use of a constable or Commonwealth officer who is not a member of staff of the ACC if necessary for a purpose set out in subsection 3ZQU(1) of the Crimes Act,[5] or for the performance of a function of the ACC or the ACC Board.[6]
- The ACC CEO may make a returnable item available for the use of a constable or Commonwealth officer for which the making available of the item is required or authorised by a law of a State or Territory.
- The ACC CEO may make a returnable item available to a State or Territory law enforcement agency, or a foreign law enforcement, intelligence or security agency, for specified purposes. These purposes include preventing, investigating and prosecuting an offence against a State or Territory law, proceeds of crime proceedings.
- The head of a special ACC operation or investigation may make a returnable item available to a member of staff of the ACC to use for the purpose of the performance of any ACC or any ACC Board function.

The proposed provisions for use and sharing of returnable items do not operate so as to prevent Ministerial arrangements for sharing, specifically in relation to sharing with State or Territory law enforcement agencies and the disposal of such items by those agencies.

---

5 Section 3ZQU deals with purposes for which things and documents may be used and shared.

6 The functions of the ACC and the ACC Board are set out at ss 7A and 7C of the, *Australian Crime Commission Act 2002*, respectively.

EFFECT OF AMENDMENTS

The proposed amendments are important in that they legislate how the ACC is to deal with things produced or seized pursuant to section 29 notices or during examinations. At present, no such regulation exists, which leads to significant ambiguity in relation to the ACC's ability (if any) to further deal with things produced or seized in these ways.

In addition, the expanded circumstances in which the ACC CEO, or head of an ACC special operation or special investigation may make 'returnable items' available permits a significantly more integrated approach to law enforcement and whole of Government information sharing. This is an important aspect which would better allow the ACC to combat multi-jurisdictional and transnational crime. However, appropriate safeguards remain in that the proposed amendments impose conditions on when returnable items may be made available. In general, these conditions require that there is a connection with purposes already permitted by the Crimes Act, the performance of the statutory functions of the ACC or the ACC Board, or a purpose legislated for by State or Territory law.

CHAPTER 5
RETURN OF RETURNABLE ITEMS (SCHEDULE 3)

CURRENT LEGISLATION

As discussed in Chapter 4, the return of items seized by the ACC is only legislated for when the seizure is made under a section 22 search warrant. There is no existing legislation that requires the return (or otherwise) of things produced pursuant to a section 29 notice or at an ACC examination. In relation to the return of items seized pursuant to a section 22 search warrant, the existing legislation provides for a simple return mechanism. In effect, if the CEO has not given a 'thing' to a prosecuting or proceeds of crime authority, a person participating in an ACC special operation or special investigation must either give it to an appropriate authority for use as evidence in related civil proceedings or to assist in investigation of criminal offences, or else must return it to the person apparently entitled to possession. This mechanism is unsatisfactory as it does not take account of circumstances where it is desirable that an item be forfeited or destroyed. In addition, the requirement for a 'participant in a determination' to determine the recipient of a seized item is ambiguous.

PROPOSED AMENDMENTS

The proposed amendments specify that, where the CEO is satisfied that a returnable item is no longer required for any of the purposes for which it may be used, the CEO must take reasonable steps to return the item. The CEO is then empowered to return an item to the person from whom it was seized or, if that person is not entitled to possession, to the rightful owner. The requirement for the CEO to return an item is subject to specified exceptions, including: orders of a court or tribunal of the Commonwealth or of a State or Territory; where the returnable item is forfeited or forfeitable to the Commonwealth or is the subject of a dispute as to ownership; or preventing use in committing a terrorist act, a terrorism offence or a serious offence.

Where an item is to be dealt with other than by way of return on the grounds of preventing use in committing a terrorist act, a terrorism offence or a serious offence, the decision to so deal with the item must be made by an 'issuing officer'. An issuing officer is presently defined in the ACC Act and means a Federal Court Judge, a Judge of a court of a State or Territory or a Federal Magistrate. On application by the CEO, an issuing officer may make an order in relation to a returnable item if satisfied that there are reasonable grounds to suspect that, if the returnable item is returned, it is likely to be used in the commission of a terrorist act, a terrorism offence or a serious offence. Where an issuing officer is so satisfied, the issuing officer may order that the item be retained, forfeited, sold and the proceeds given to the owner, sold in some other way, destroyed or otherwise disposed of.

A decision to deal with a returnable item other than by returning it is subject to a number of safeguards. The decision not to return an item must be made by a judicial officer in his or her personal capacity on application of the CEO. Prior to the application being made, the CEO must take reasonable steps to discover who has an interest in the returnable item and, if practicable, notify each person who the CEO believes to have an interest in the application. The issuing officer must allow a person who has an interest in the returnable item to appear and be heard in determining the application by the CEO. If the issuing officer is not satisfied that there are reasonable grounds for suspecting that the item is likely to be used in the commission of a terrorist act, a terrorism offence or a serious offence, the issuing officer must order that the returnable item be returned.

EFFECT OF AMENDMENTS

The effect of the amendments relating to the return of returnable items is to establish a comprehensive system for the proper handling of items seized by, or produced to, the ACC. The amendments apply consistently to section 22 search warrants, section 29 notices and to items produced at an examination.

As a whole, the proposed amendments provide for significantly greater consistency between information gathering processes under the ACC Act, and other related legislation, particularly the Crimes Act. This is achieved through the consistent definition of terms such as 'serious offence', 'State or Territory law enforcement agency', 'terrorism offence' and 'terrorist act'. This consistency is important because the ACC makes use of general police powers, such as application for and execution of a section 3E search warrant under the Crimes Act, as well as the powers provided by the ACC Act. In fact, section 22 search warrants are only sought in a minority of cases where the ACC wishes to conduct a search. Accordingly, the amendments would contribute significantly to administrative efficiency in that all seized things would be dealt with by substantially the same procedures.

CHAPTER 6

CONFIDENTIALITY IN RELATION TO EXAMINATIONS (SCHEDULE 2)

CURRENT LEGAL POSITION

Subsection 25A(9) of the ACC Act provides that an Examiner may give a direction prohibiting or restricting the 'publication' of certain classes of information about an examination, including evidence given, the contents of a document, or a description of a thing, produced and information about witnesses. Once such a non-publication direction has been given, the CEO may vary or revoke the direction (subsection 25A(10)).

The Examiner is expressly required to give a non-publication direction if not doing so 'might prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been, or may be, charged with an offence' (subsection 25A(9)). Similarly, the CEO is prohibited from varying or revoking a non-publication direction if doing so might cause such prejudice (subsection 25A(11)).

The context indicates that, in this case, 'publish' should be understood in the widest sense, as covering any disclosure to another person either within or outside the ACC.

Subsection 25A(14) makes it a criminal offence to publish information in contravention of a non-publication order.

The ACC Act does not specify how a current non-publication order relates to the power of the Chair of the Board or the CEO to give information about the ACC under section 59. However, the ACC has taken the view that it would be an offence under subsection 25A(14) for the CEO to give ACC information to an agency under, for example, subsection 59(7), if the disclosure of the information to that agency would be inconsistent with the terms of a non-publication direction. In such cases the practice has been for the CEO or a delegate, if lawful and appropriate, to vary the relevant non-publication direction before authorising disclosure of the information to the agency.

NON-PUBLICATION DIRECTIONS AND CONTEMPT OF COURT

The question whether a non-publication order overrides the powers of disclosure under section 59 has taken on great significance in recent litigation concerning the power of ACC Examiners to examine a person about matters that are relevant to criminal charges pending (ie laid but not yet finally disposed of) against the person. This is an important issue for the ACC, because the arrest and charging of a person may in some cases follow quickly on the discovery of organised criminal activity that was not previously suspected. Where such a case falls within the scope of a current ACC special operation or special investigation, the ACC will be keen to obtain criminal intelligence to help it to assess the current extent and significance of the organised criminal activity. To await final disposal of the charges would likely mean foregoing any chance of obtaining current intelligence.

In *Hammond v Commonwealth* [1982] HCA 42; (1982) 152 CLR 188 the High Court held that to use the powers of a Royal Commission to require a person to answer questions designed to establish that he was guilty of the offence with which he was charged would, in the circumstances of the case, raise a real risk of interference with the administration of justice and hence of contempt of court. ACC Examiners have taken the view that, under the ACC Act, the risk of interference with the administration of justice in this situation can be effectively eliminated by:

- excluding from the examination all those involved in the investigation and prosecution of the charges; and
- making a non-publication direction that precludes those persons from accessing the evidence of the accused or otherwise obtaining the benefit of that evidence.

In *OK v Australian Crime Commission* [2009] FCA 1038 the Federal Court of Australia, at first instance, found that a non-publication direction did not override subsection 12(1) of the ACC Act, which requires the CEO to disclose admissible evidence of criminal offences to police or a prosecuting authority. On this basis the Court held that the Examiner's proposed questioning of the applicant about the subject matter of charges pending against him would amount to contempt of court and this result could not be avoided by giving a non-publication direction intended to 'quarantine' the examination from the investigation and prosecution of the charges. On appeal, in *Australian Crime Commission v OK* [2010] FCAFC 61 the majority of a Full Court held that the proposed non-publication direction would override the mandatory and discretionary disclosure provisions in the ACC Act and thus could effectively quarantine the examination and avoid interfering with the administration of justice. That finding recently received further support from a decision of the NSW Court of Criminal Appeal.[7]

Despite these two favourable appellate judgments, there remains a risk that an appeal to the High Court in a future case raising the same issues would lead to the contrary result. That risk will remain so long as the ACC Act makes no express provision on the relationship between a non-publication direction and the disclosure provision in the Act.

PROPOSED AMENDMENTS

Items 19 to 23 of Schedule 2 to the Bill would insert a new subsection 12(2) in the ACC Act, together with notes to the existing subsections 12(1) and 12(1A) cross-referring to the new subsection. Proposed subsection 12(2) would confirm expressly that the obligation to pass on admissible evidence of criminal offences under subsection 12(1) and the discretion under subsection 12(1A) to pass on evidence that would be admissible in confiscation proceedings both operate subject to any relevant non-publication direction.

Similarly, item 27 of Schedule 2 to the Bill would insert a new section 59AC, and items 26 and 27 would insert notes cross-referring to the new section as appropriate. Proposed section 59AC would confirm expressly that powers and duties of disclosure established by the amended section 59 and the new section 59AA and 59AB all operate subject to any relevant non-publication direction.

7 The decision has not been published, as it relates to an ongoing criminal prosecution.

EFFECT OF AMENDMENTS

These amendments would eliminate any doubt that a non-publication direction overrides any power or duty to disclose information under the ACC Act. This would provide the ACC with additional confirmation that Examiners can lawfully require an ACC witness to answer questions concerning the subject matter of criminal charges pending against the witness, provided persons involved in the investigation and prosecution of the charges are excluded from the examination and are precluded by an appropriate non-publication direction from accessing or otherwise deriving assistance from the evidence given by the witness at the examination.

ACC
AUSTRALIAN CRIME COMMISSION