



Crimes Legislation Amendment (Powers and Offences) Bill 2011

House of Representatives Standing Committee on Social Policy and Legal Affairs

9 January 2012

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

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Executive Summary

1. The Law Council has been concerned with the operation of the *Australian Crime Commission Act 2002 (Cth)* (the Act) for many years. One of the Law Council's major concerns has been with the impact of the exercise of coercive powers provided under the Act. Those coercive powers include the power to compel any person to attend an examination, answer questions and produce documents or things to the ACC.
2. One aspect of the use of those coercive powers is the protection of information obtained as a result of their use. The Law Council considers that such information should be subject to a stricter disclosure regime than information obtained by other means. The Law Council considers that the *Crimes Legislation Amendment (Powers and Offences) Bill 2011* (the Bill) does not go far enough in this regard.
3. The Law Council is pleased that the Bill provides more comprehensive rules for the Australian Crime Commission (ACC) to share information generally and for the use, sharing and retention of things seized by or produced to the ACC under the Act. The Law Council is particularly pleased with the thoroughness of the approaches to the sharing of information with the private sector and in relation to the use, sharing and retention of things seized or produced.
4. The Law Council is also pleased that the Bill seeks to clarify the application of a recent Federal Court judgment¹ that evidence and information sharing under the Act are subject to confidentiality directions issued by ACC examiners.
5. The Law Council also supports the Bill's attempts to simplify and clarify information sharing provisions and to increase accountability for the ACC by allowing information to be provided to members of the parliaments of the Commonwealth, the States, the Australian Capital Territory (ACT) and the Northern Territory (NT). The Law Council also supports the Bill's attempt to increase accountability by including an additional matter relating to disclosure of information to private sector bodies in the ACC's Annual Report.
6. However, the Law Council has a number of concerns arising from the drafting of the Bill's provisions in relation to clarification of definitions and tests; the need for greater specification of 'permissible purposes' for which information may be shared; and the need for greater protection for personal information shared with government agencies.
7. The Law Council also considers that additional matters could be addressed in the Bill such as requirements for the Chair of the Board of the ACC (the Chair) or the Chief Executive Officer (CEO) to respond to requests for information within a reasonable time; the broadening of annual reporting requirements in relation to information disclosure to government bodies beyond law enforcement agencies and the development of information handling guidelines in consultation with the Privacy Commissioner.

¹ See *Australian Crime Commission v OK* [2010] FCAFC 61

Introduction

8. The Law Council welcomes the opportunity to make a submission to the inquiry by the House of Representatives Standing Committee on Social Policy and Legal Affairs (the Committee) into the Bill.
9. The Bill was introduced into the House of Representatives on 23 November 2011 and the House of Representatives Selection Committee referred the Bill to the Committee on 24 November 2011 for inquiry and report by 9 January 2012, a period of approximately 6 weeks which included the Christmas/New Year period.
10. The Law Council has raised the issue of adequate periods for consultation on draft legislation over many years with the Commonwealth Government.² The Law Council does not consider the time period for submissions to be made on this Bill to be adequate given that the period includes the Christmas/New Year period when many members of the legal profession are unavailable for consultation as they take leave prior to the opening of the 2012 legal year. Further, the Law Council does not consider the time allowed for submissions to be adequate, given the nature of the Bill, which contains eight lengthy schedules on matters as diverse as enforcement of fines to forensic procedures.
11. In the circumstances, the Law Council is only able to address Schedules 2 and 3 of the Bill as it has had the opportunity to provide comments to the Attorney-General's Department on the policy proposals underlying these schedules and has made previous submissions in relation to the ACC.³
12. As stated in the Explanatory Memorandum, Schedule 2 of the Bill makes a range of amendments to the Act to improve and expand the operation of the ACC's information and disclosure arrangements.⁴
13. As also stated in the Explanatory Memorandum, Schedule 3 of the Bill introduces rules governing the use, sharing and retention of things seized under an ACC search warrant and things or documents produced under summonses or notices issued by ACC examiners. These rules are based on equivalent provisions in the *Crimes Act 1914 (Cth)* (the Crimes Act).⁵
14. The Law Council has a number of concerns in relation to the sharing of information obtained using coercive powers, as discussed below. The Law Council also has a number of concerns arising from the drafting of the new provisions in relation to

² See <http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/human-rights/legislative-standards.cfm>

³ See submission to *Inquiry into the Crimes Legislation Amendment Bill 2010* at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=9E2581D3-DAB9-E29C-A5E6-C3FEC5446DA9&siteName=lca; See submission to *Inquiry into Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=32FA19A0-1E4F-17FA-D244-DEF1F2F0AD95&siteName=lca; See submission to *Inquiry into the Australian Crime Commission Amendment Act 2007* at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=68090002-1C23-CACD-223F-AFB924F50984&siteName=lca; see Submission to *Review of Specific Provisions of the National Crime Authority Act 1984 and the Australian Crime Commission Act 2002* at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8C75D7CA-1C23-CACD-228D-4894BE9D37CC&siteName=lca; See Submission to *Review of the Australian Crime Commission Act 2002* at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8C746416-1C23-CACD-2274-11BC27E1F0AA&siteName=lca

⁴ See Explanatory Memorandum at p 46

⁵ See Explanatory Memorandum at p 66

clarification of definitions and tests; the need for greater specification of 'permissible purposes' for which information may be shared; and the need for greater protection for personal information shared with government agencies. These concerns are outlined below.

15. The Law Council also considers that additional matters could be addressed in the Bill such as requirements for the Chair or the CEO to respond to requests for information within a reasonable time; broadening annual reporting requirements in relation to information disclosure to government bodies beyond law enforcement agencies and developing information handling guidelines in consultation with the Privacy Commissioner. These matters are discussed below.

Relevant provisions of the Australian Crime Commission Act

The ACC, the Board, the CEO, the Examiners, the Inter-Governmental Committee and Coercive Powers

16. The ACC was established in 2003 as a successor to the National Crime Authority and is said to have been formed in response to identified weaknesses in the capacity of traditional policing to combat sophisticated organised crime effectively. In its 2005 review of the Act, the then Parliamentary Joint Committee on the ACC (PJACC) observed that the ACC exists to provide investigations that operate across jurisdictional boundaries, is equipped with necessary specialist expertise and resources, and is able to focus exclusively on organised crime rather than street crime/volume crime.⁶ Since the 2005 review, a number of amendments have broadened the functions of the ACC.⁷
17. The review also observed that one of the considerations behind a separate ACC was the long standing objection to granting coercive powers to police forces such as the capacity to compel attendance by any person at an examination, to produce documents and answer questions.⁸
18. The ACC is able to undertake intelligence operations and investigations authorised by the ACC Board (the Board). The Board may also determine that such operations and investigations are *special* operations and *special* investigations. ACC examiners can conduct examinations for the purpose of special operations and investigations. Examiners are legal practitioners with at least 5 years experience, who are appointed for periods up to 5 years. They are appointed after consultation by the responsible Minister with the Inter-Governmental Committee on the ACC (IGC).⁹ They stand apart from the police and ACC staff involved in ACC operations or investigations.
19. The Board is made up of relevant office holders from the Australian Federal Police, each state and territory police force, the Attorney-General's Department, Customs, the Australian Securities and Investment Commission, ASIO, and Taxation. The

⁶See Parliamentary Joint Committee on the Australian Crime Commission, *Review of the Australian Crime Commission Act 2002*, November 2005 at p 9

⁷ Ibid at p 1, compare the functions under s 7A of the Act at the time of the review with the current functions

⁸ Ibid at p 12

⁹ See sections 7, 7A, 24A, 46B

Chief Executive Officer (CEO) of the ACC is also a member of the Board. The IGC consists of the relevant Commonwealth Minister and State and Territory Ministers.¹⁰

20. The Board provides strategic direction; determines priorities; authorises operations and investigations, including special operations and investigations; establishes task forces; disseminates strategic intelligence assessments and reports to the IGC.¹¹ The IGC monitors the work of the ACC and the Board, oversees the strategic direction of the ACC and the Board and receives reports from the Board for transmission to the Governments represented on the IGC.¹²

The Coercive Powers, Evidence and Information Sharing

21. ACC examiners can exercise coercive powers in the context of special operations and investigations, including the power to compel any person to attend an examination, answer questions and produce documents or things. Examiners can issue summonses for persons to appear at an examination under section 28 and for such persons to produce documents or things at the examination. Examiners can also issue notices to other persons to produce documents or things to an examiner or member of staff of the ACC under s 29. The Law Council and others have previously raised concerns that there has been 'leakage' of the coercive powers to supplement ordinary police investigations and proceedings.¹³ The Law Council maintains these concerns.
22. If the person does not attend the examination, does not answer questions or does not cooperate or produce documents or things at the examination, he or she will be guilty of an offence under section 30. There is significant erosion of the privilege against self-incrimination under section 30 with no derivative use immunity being provided. The lack of provision for derivative use immunity means that evidence or information subsequently gathered as a result of evidence or information obtained under the coercive powers may be used against the person in criminal proceedings. The Law Council has previously raised concerns about the lack of derivative use immunity in section 30.¹⁴ The Law Council maintains these concerns.
23. A person refusing to answer questions, cooperate or produce documents or things at an examination may also be referred to a prescribed court to be dealt with for contempt under sections 34A to 34D as an alternative to being prosecuted for an offence, such as the offence under section 30.
24. Section 25A provides that the examination must be held in private and the examiner may give directions about persons who may be present. This section also demonstrates the extraordinary nature of ACC processes in comparison to ordinary police investigations, which result in court proceedings that are generally conducted in public.
25. The Law Council has taken the view that evidence or information obtained pursuant to the coercive powers should be subject to more stringent sharing restrictions than evidence or information obtained through other means and continues to maintain

¹⁰ See sections 7B and 8

¹¹ See s 7C

¹² See s 9C

¹³ See Submission to *Review of the Australian Crime Commission Act 2002* at

http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=8C746416-1C23-CACD-2274-11BC27E1F0AA&siteName=lca; see note 5 at pp 21-24

¹⁴ See Submission to *Review of the Australian Crime Commission Act 2002* at

http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=8C746416-1C23-CACD-2274-11BC27E1F0AA&siteName=lca

that view.¹⁵ However, the Law Council acknowledges that the current provisions of the Act, particularly sections 12 and 59 which allow for sharing of evidence and information do not reflect the view taken by the Law Council.

26. Sub-section 12 (1) requires the CEO to provide any *evidence* that would be admissible in the prosecution of an offence against a law of the Commonwealth, a State or a Territory, which is obtained by the ACC in an investigation or operation, to the relevant Attorney-General, law enforcement agency or person or authority authorised to prosecute the offence.¹⁶
27. Sub-section 12 (2) allows the CEO to act in a similar manner in relation to *evidence* that would be admissible in confiscation proceedings such as proceedings under the *Proceeds of Crime Act 2002* (Cth).
28. Section 59 sets out a variety of circumstances in which the Chair of the Board (the Chair) must and the CEO may provide *information* to Ministers, the IGC, government agencies, authorities, departments, instrumentalities and persons exercising public functions.
29. The Federal Court has determined that the provision of evidence or information pursuant to sections 12 or 59 is subject to any direction given by an examiner exercising coercive powers in relation to maintaining confidentiality of evidence or information obtained in the examination.¹⁷ Section 25A (9) provides that the examiner must give such a direction if the failure to do so might prejudice the safety or reputation of a person or the fair trial of a person who has been or may be charged with an offence.
30. The Law Council acknowledges that section 25A (9) allows more specific protection for evidence or information obtained as a result of the exercise of coercive powers but maintains that further protections for such evidence or information should be provided given the extraordinary nature of the coercive powers and the likelihood of the information gathered being extremely sensitive.
31. The Law Council also acknowledges that section 51, which is a general secrecy provision, requires the CEO, staff members, Board members, and examiners not to disclose *information* acquired by reason of or in the course of performance of duties under the Act except for the purposes of or in connection with prescribed legislation.
32. The Law Council also acknowledges that other statutory provisions may apply to protect information collected by the ACC pursuant to other statutory powers such as the *Telecommunications Interception Act 1979* (Cth), although the Law Council has also raised concerns about the extent of such protections.¹⁸
33. However, the Law Council maintains that information obtained through the use of coercive powers under the Act should be subject to a stricter information sharing regime rather than being subject to the general information sharing provisions in section 59 as amended by the Bill.

¹⁵ Law Council correspondence with the Minister for Home Affairs, 6 August 2010 and with the Attorney-Generals' Department 20 December 2010 and 16 August 2011

¹⁶ Section 4 defines a State to include the Australian Capital Territory and the Northern Territory and a Territory not to include these two territories.

¹⁷ See note 1

¹⁸ See Submission to Inquiry into Privacy Law at

http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8C76B960-1C23-CACD-22C9-D59E0D29BCD4&siteName=lca

Search Warrants

34. Section 22 provides that an examiner or a member of staff of the ACC who is also a member of the Australian Federal Police (AFP) or the police force of a State, the Australian Capital Territory (ACT) or the Northern Territory (NT) may apply to a prescribed judicial officer acting in a personal capacity for a search warrant relating to things connected to a special operation or investigation in particular circumstances. The section also provides that the person to whom the warrant is issued may seize such things and deliver them to any person participating in the special operation or investigation. Things are defined to include documents.
35. Further, the section provides that the person executing the warrant may in certain circumstances seize other things which he or she believes would be admissible evidence in prosecutions for offences against a law of the Commonwealth, a State or a Territory.
36. The section contains some provisions for retention and sharing of seized things.

The Amendments relating to Disclosure of Evidence and Information

Definitions

37. Proposed amendments under Schedule 2 of the Bill provide for the insertion in sub-section 4 (1) of definitions of 'ACC information' and 'permissible purposes'.
38. Under Schedule 2 of the Bill 'ACC information' is defined as 'information that is in the ACC's possession'. The Explanatory memorandum states that this definition will include all information that the ACC has in its possession but will not include a thing seized under a search warrant issued under section 22 or a document or thing produced under section 28 or 29 (the coercive powers). The Explanatory Memorandum also draws attention to the definition of 'returnable item' in Schedule 3 of the Bill and notes that the definitions of 'ACC information' and 'returnable items' will ensure that there is a clear divide between how the ACC deals with each.
39. The Law Council notes that there is no definition of 'information' or 'thing' in sub-section 4 (1) although section 22 relating to search warrants provides that 'thing' includes a document. The Law Council considers that it is open to interpretation that a document or thing is a form of information.
40. The Law Council also notes that the Bill makes amendments to section 12 which deals with the sharing of evidence but that there is also no definition of 'evidence' in sub-section 4 (1). The Law Council also considers that it is open to interpretation that a document or a thing is a form of evidence. The Law Council considers that 'evidence', 'information' and 'thing' should be defined in order to clarify the scope of the information sharing and evidence sharing provisions.¹⁹
41. The Law Council also suggests that the statement in the Explanatory Memorandum that 'ACC information' does not include a thing seized under section 22 or a

¹⁹ The Law Council notes that the *Evidence Act 1995* (Cth) contains a definition of 'document' and that the *Crimes Act 1914* (Cth) contains definitions of a 'thing relevant to an indictable offence' and a 'thing relevant to a summary offence'

document or thing produced under sections 28 or 29 should be included in the Bill itself.

42. The Law Council also notes that the Explanatory Memorandum refers to information in the ACC's possession that it has lawfully acquired or generated prior to the commencements of the amendments.²⁰ The Law Council suggests that this qualifier, 'lawfully acquired or generated' also be included in the definition of 'ACC information'.
43. 'Permissible purpose' is relevant to the amendments to information sharing which will be included in sections 59AA and 59AB. It refers to one or more of a number of purposes for sharing information including:
- (a) Performing the functions of the ACC or the Board;
 - (b) Preventing, detecting, investigating, prosecuting or punishing:
 - (i) Criminal offences or activities that might constitute criminal offences (including under a law of a foreign country); or
 - (ii) Contraventions of a law of the Commonwealth, a State or a Territory imposing a penalty or sanction; or
 - (iii) Seriously improper conduct (including professional misconduct or misconduct by a public official);
 - (c) Preventing, detecting or investigating threats to national security;
 - (d) Preventing serious threats to an individual's life, health or safety, or to public health or public safety;
 - (e) Enforcing laws (including laws of foreign countries) relating to proceeds of crime and unexplained wealth;
 - (f) Protecting public revenue;
 - (g) Developing government policy;
 - (h) Researching criminology; and
 - (i) Any other purpose prescribed by regulations.
44. The Law Council notes that information for a number of these purposes could probably be shared under the existing section 59. However, the expression of number of these permissible purposes appears to go beyond the possibilities under the existing section 59 and to be expressed quite broadly, including:
- (a) Activities that *might* constitute criminal offences (including under a law of a foreign country) (emphasis added);
 - (b) Seriously improper conduct (including professional misconduct or misconduct by a public official);
 - (c) Protecting public revenue;
 - (d) Developing government policy; and

²⁰ See Explanatory Memorandum at p 65

(e) Researching criminology.

45. While the Law Council notes that the Explanatory Memorandum contains relevant examples of such purposes, it appears that the drafting may go further than necessary to encompass such examples.
46. 'Activities that might constitute criminal offences (including under a law of a foreign country' and 'seriously improper conduct (including professional misconduct or misconduct by a public official)' could cover a wide variety of activities and conduct that may fall well short of attracting criminal or significant civil sanctions.
47. Protecting public revenue, developing government policy and researching criminology also appear to be expressed more broadly than necessary in the context of the type of information the ACC is likely to have in its possession. The Law Council suggests that a qualifier relating to serious and organised crime should be introduced to reduce the breadth of some of these expressions, for example 'protecting public revenue from threats posed by serious and organised crime'; 'developing government policy relating to serious and organised crime' and 'researching criminology relating to serious and organised crime'. Such qualifiers would also be consistent with the focus of the ACC referred to above.

Evidence Sharing

48. The Bill inserts notes into section 12 which deals with the sharing of evidence. The notes intend to clarify that sharing of evidence under this section is subject to any confidentiality directions made by an examiner under section 25A (9) as determined recently by the Federal Court.²¹ The Law Council supports this clarification. However, the Law Council is concerned that reliance on confidentiality directions being made by examiners to address issues arising from the sharing of evidence obtained under coercive powers is insufficient to address those concerns and places a heavy burden on examiners to consider all possible consequences of the directions to be made.

Information Sharing

Simplifying Provisions

49. The Bill inserts a series of headings into section 59 which relates to the sharing of information. The Explanatory Memorandum states that the existing provisions in section 59 are unnecessarily complex and that the new provisions will be set out in a simpler and clearer manner. The Law Council agrees and supports the insertion of the headings which delineate the provisions for the sharing of information with the Commonwealth Minister, the IGC, and members of the parliaments of the Commonwealth, the States, the ACT and the NT. Such information sharing is subject to the Chair not being required to provide information that could prejudice the safety or reputation of persons or the operations of law enforcement agencies.
50. The Explanatory Memorandum notes that the new sub-section 59 (7) will allow the ACC to share information with members of the relevant parliaments and not just members of the IGC. The Law Council supports this new provision as it potentially provides greater accountability for the ACC.

²¹ See note 1

Responsibilities of the CEO

51. The Bill inserts references to the CEO as well as the Chair being required to provide information under section 59 to the Commonwealth Minister, the IGC and members of the IGC in certain circumstances. The Explanatory Memorandum notes that currently the Chair is the sole conduit for information provided by the ACC to the relevant Commonwealth Minister and the IGC but that as the head of the ACC, the CEO is expected to deal directly with the relevant Commonwealth Minister and is best placed to report on the ACC's activities as he or she has more involvement than the Chair in its day to day operations.²² The Law Council supports the amendments and suggests that the Chair or the CEO (as the case may be) should be required to provide the information within a reasonable time of the request being made to the Chair or the CEO respectively.

Government Agencies

52. The Bill inserts new section 59AA relating to sharing information with government bodies, including Commonwealth, State, Territory and foreign agencies as well as the Australian Security Intelligence Organisation (ASIO). The new section will replace existing sub-sections 59 (7), (8), (9) and (11).
53. Proposed sub-section 59AA (1) provides that the CEO may disclose ACC information to:
- (a) A body of the Commonwealth, a State or a Territory; or
 - (b) A person who holds an office or appointment under a law of a Commonwealth, a State or a Territory; or
 - (c) An agency that has responsibility for:
 - (i) Law enforcement in a foreign country; or
 - (ii) Intelligence gathering for a foreign country; or
 - (iii) The security of a foreign country; or
 - (d) An international body that:
 - (i) Has functions relating to law enforcement or gathering intelligence; and
 - (ii) Is prescribed by the regulations...; or
 - (e) An international judicial body that is prescribed by the regulations...;
- if:
- (f) The CEO considers it appropriate to do so; and
 - (g) The CEO considers that the information is relevant to a permissible purpose; and
 - (h) Disclosing the ACC information would not be contrary to a law of the Commonwealth, a State or Territory that would otherwise apply

²² See Explanatory Memorandum at p 47

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54. A 'body' is defined broadly in sub-section 59AA (3) to include a law enforcement agency, a department, 'a body (whether incorporated or not) established for a public purpose by or under a law of the Commonwealth, a State or a Territory' and 'a body however described'. The latter two descriptions appear extremely broad and the Explanatory Memorandum provides no examples, which could be used to assess whether the definition is too broad or not. The Law Council suggests that the Committee examine this definition with assistance from the Attorney-General's Department.
55. The Law Council notes that the approach to defining a government body is a significant departure from the approach in existing sub-section 59 (7) which provides for disclosure to law enforcement agencies, including foreign law enforcement agencies and other agencies or bodies which have been prescribed by the regulations.²³
56. The Law Council also notes that the approach to defining a government agency is also a significant departure from the existing sub-sections 59 (8) and (9), which refer to authorities and persons responsible for taking civil remedies by or on behalf of the Crown in right of the Commonwealth, a State or a Territory and to Departments of State of the Commonwealth or a State, the Administration of a Territory or an instrumentality of the Commonwealth, a State or a Territory.
57. The Explanatory Memorandum states that sub-sections 59 (7) to (9) have created difficulties for the ACC when it has needed to share information with a body that did not fit within the specific descriptions currently used in those sub-sections.²⁴ However, the Explanatory Memorandum does not provide any examples of bodies that do not fit within the current descriptions. The Law Council is concerned that the very broad definition of 'body' proposed may go further than necessary to include those bodies that the ACC considers it needs to share information with and suggests that the Committee explore this issue with the Attorney-General's Department.
58. The Explanatory Memorandum notes that the requirement for the CEO to consider whether it is appropriate to disclose ACC information and the requirement that disclosure not be contrary to law in s 59AA (1) replicates requirements under existing paragraphs 59 (7) (d) and (e) which will be repealed.²⁵
59. The Explanatory Memorandum also notes the new requirement in s 59AA (1) for the CEO to consider whether the disclosure is relevant to a permissible purpose as outlined in the new definition inserted into s 4 (1). As noted above, the Law Council has some concerns about the breadth of the definition of 'permissible purpose'. The Law Council also notes the use of the expression '*relevant* to a permissible purpose' rather than the expression '*necessary* for a permissible purpose' used in the proposed section relating to disclosure to private sector bodies, as discussed below. Overall, the Law Council is concerned that the discretion vested in the CEO (or a delegated SES ACC staff member) to determine what information is disclosed may be too broad, particularly when the information is of a sensitive nature, as acknowledged in the Explanatory Memorandum,²⁶ and may include personal information.

²³ See Regulation 9 and Schedule 6, *Australian Crime Commission Regulations 2002* (Cth)

²⁴ See Explanatory Memorandum at p 57

²⁵ See Explanatory Memorandum at pp 56-57

²⁶ See Explanatory Memorandum at 60

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60. In relation to the possible disclosure of such information, the Law Council notes that it has previously raised concerns about the exemption of the ACC from the *Privacy Act 1998* (the Privacy Act). The Law Council acknowledges that the Attorney-General's Department has advised that the ACC complies with the Information Privacy Principles as far as possible even though it is exempt.²⁷
 61. The Law Council has also raised the desirability of the Government responding to the recommendation of the Australian Law Reform Commission (ALRC) in its inquiry into the Privacy Act that the ACC develop and publish information-handling guidelines in consultation with the Privacy Commissioner.²⁸
 62. While the Law Council acknowledges that this ALRC recommendation is one of those to be dealt with in the second stage of the Government's response to the inquiry, which has not yet been reached, it is disappointed that the Government did not use the opportunity presented by the Bill to expedite its response to this particular recommendation. As this Bill expands the types of bodies with which information may be shared, such as international judicial bodies, and expands the purposes for which information may be disclosed, it would appear timely for the information-handling guidelines to be developed in conjunction with the commencement of the Bill. The Law Council suggests that the Committee explore this issue with the Attorney-General's Department.
 63. The Law Council also supports the requirements discussed below in relation to the disclosure of information to private sector bodies for the CEO to specify conditions relating to use and further disclosure and for the relevant bodies to undertake in writing to comply with those conditions, subject to penalties for non-compliance. The Law Council suggests that the Committee should consider whether such additional requirements should also apply to government bodies, particularly in relation to personal information.

Private Sector Bodies

64. Proposed s 59AB provides that the CEO may disclose information to a private sector body corporate that is prescribed or included in a class of bodies corporate prescribed by regulations and that the CEO is required to consider similar matters to those outlined above in relation to disclosure to government bodies, although as noted, is required to consider whether the information is 'necessary for' a permissible purpose rather than 'relevant to' one.
65. Proposed section 59AB also contains additional requirements for the body corporate to have undertaken in writing to comply with conditions relating to use or further disclosure of the information as specified by the CEO in writing. It also creates offences for non-compliance with such conditions.
66. Proposed section 59AB also contains specific requirements in relation to the disclosure of *personal* information within the meaning of the *Privacy Act 1988* (the Privacy Act) to a body corporate. The Law Council is pleased that these requirements relating to personal information have been included. As noted above, it has previously raised concerns about the exemption of the ACC from the Privacy Act. As also noted above, it also considers that the Government should respond to the ALRC recommendation relating to the development of information-handling

²⁷ Law Council correspondence with the Minister for Home Affairs, 6 August 2010 and with the Attorney-Generals' Department 20 December 2010 and 16 August 2011

²⁸ Ibid

guidelines for the ACC, particularly as such guidelines would complement the requirements in proposed section 59AB.

Annual Report requirements

67. The Bill also provides for an additional matter to be included by the Chair in the ACC Annual Report provided pursuant to section 61. The additional matter relates to the general nature and extent of any information disclosed to a private sector body corporate. The Law Council supports this inclusion to strengthen the accountability mechanism established by the Annual Report.
68. The Law Council notes that the existing requirement under paragraph 61 (2) (d) in relation to reporting of the general nature and extent of information disclosed to government agencies is limited to 'a law enforcement agency'. The Law Council suggests that this requirement should be expanded given the broadening of the types of government bodies to which information can be disclosed and the permissible purposes for which information can be disclosed.
69. The Law Council suggests that the new requirement could simply refer to 'the general nature and extent of any information disclosed by the CEO during that year under section 59AA (government bodies) or 59AB (private sector bodies)'.
70. The Law Council notes that the report against the requirement in paragraph 61 (2) (d) contained in the 2010-11 ACC Annual Report by the Chair simply refers back to the section of the report which describes the ACC's activities.²⁹ While this section refers to a number of law enforcement agencies, the report may provide more specific details of the nature and extent of information disclosed to government and private sector bodies if the suggestion above is adopted.

Information Sharing subject to Confidentiality Directions

71. Proposed section 59AC provides that sections 59, 59AA and 59AB are subject to any confidentiality direction made by an examiner under sub-section 25A (9). However, as noted above in relation to evidence sharing, the Law Council is concerned that reliance on confidentiality directions being made by examiners to address issues arising from the sharing of information obtained under coercive powers is insufficient to address those concerns and places a heavy burden on examiners to consider all possible consequences of the directions to be made.

Retrospectivity

72. Item 29 of Part 2, Schedule 2 provides that the amendments contained in that Part apply to any ACC information whether it comes into the possession of the ACC before or after it commences.
73. While the Law Council generally opposes retrospective application of amendments, particularly relating to criminal law,³⁰ it accepts the justification set out in the Explanatory Memorandum of the need for the ACC to deal consistently with

²⁹ See Australian Crime Commission Annual Report 2010-2011 at <http://www.crimecommission.gov.au/publications/annual-report/chair-annual-report-2010-11>

³⁰ See Law Council of Australia, *Policy Statement on Rule of Law Principles* at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=4858D679-AA9B-27F0-219A-40A47E586C70&siteName=lca

information lawfully acquired or generated prior to the commencement of the amendments.³¹

The Amendments relating to Returnable Items

74. Schedule 3 inserts a definition of 'returnable item' into sub-section 4 (1) and defines it as:
- (a) A thing seized under a warrant issued under section 22; or
 - (b) A thing or document produced:
 - (i) Under a notice given under section 29; or
 - (ii) During an examination conducted under Division 2 of Part II.
75. Schedule 3 introduces rules governing the use, sharing and retention of returnable items which are based on provisions in the Crimes Act.
76. As noted above, section 22 currently contains some provisions for the sharing of things seized under a warrant where such sharing is relevant to the investigation of an offence or the pursuit of civil remedies. As the Explanatory Memorandum states, there are no explicit rules governing what can be done with things or documents obtained under sections 28 or 29. The Law Council therefore supports the introduction of more comprehensive rules for the use, sharing and retention of returnable items and observes that the proposed rules appear to be more restricted in their operation than the provisions relating to the sharing of information discussed above.
77. The proposed rules allow the CEO to make a returnable item available to a constable or a Commonwealth officer as defined by the Crimes Act, (including an ACC staff member), if *necessary* for a purpose under an existing provision of the Crimes Act for using and sharing documents and things; for performing the functions of the ACC or the Board; or as authorised by the law of a State or Territory.
78. The CEO may also make a returnable item available to a State or Territory law enforcement agency, or an agency that has responsibility for law enforcement, intelligence gathering or security in a foreign country for any of a number of purposes prescribed by reference to the Crimes Act or relevant laws of a State or Territory.
79. Where the CEO is satisfied that a returnable item is not or is no longer required for any of the above purposes or for other judicial or administrative proceedings, the CEO must take reasonable steps to return the item to the person from whom it was seized or who produced it, or, if that person is not entitled to possession, to the owner. However, the CEO does not have to take these steps in a number of prescribed circumstances, including if the CEO has applied for or obtained an order from a Federal Court judge, a Federal Magistrate or a judge of a court of a State or Territory (acting in a personal capacity) under proposed sub-section 24AC in relation to the item.

³¹ See Explanatory Memorandum at p 65

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80. Before making the application, the CEO must take reasonable steps to discover who has an interest in the item and notify each such person if practicable to do so. The judicial officer must allow such persons to be heard in relation to the application.
 81. The judicial officer may make an order under proposed sub-section 24AC if satisfied that there are reasonable grounds to suspect that the item is likely to be used, if returned, in the commission of a terrorist act, a terrorism offence or a serious offence by the owner or the person from whom it was seized or who produced it. The judicial officer may order that the item be retained for a specified period; be forfeited; destroyed; otherwise disposed of; or if not a document, be sold. If not so satisfied, the judicial officer must order return of the item.
 82. The Law Council supports the elements of the proposed rules for the use, sharing and retention of returnable items which are based on procedural fairness and the exercise of judicial discretion.

Retrospectivity

83. Item 11 of Schedule 3 provides that the amendments made by the Schedule apply to any returnable item whether seized or produced before or after the Schedule commences.
84. While the Law Council generally opposes retrospective application of amendments, particularly relating to criminal law,³² it accepts the justification set out in the Explanatory Memorandum of the need for the ACC to deal consistently with returnable items lawfully acquired prior to the commencement of the amendments.³³

Conclusion

85. The Law Council supports a number of provisions of the Bill which provide simpler, clearer and more comprehensive rules for the ACC to share information generally and for the use, sharing and retention of things seized or produced under the Act. The Law Council also supports attempts to increase accountability through a number of provisions of the Bill.
86. However, the Council continues to be concerned about the impact of the use of coercive powers under the Bill and considers that a stricter information sharing regime should apply to information obtained through the use of coercive powers. The Law Council also has a number of concerns with the drafting of definitions and tests under the Bill, as discussed above. The Law Council also considers that a number of additional matters could be addressed in the Bill, as also discussed above. The Law Council suggests that the Committee address these concerns and matters in this inquiry.

³² See Law Council of Australia, *Policy Statement on Rule of Law Principles* at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=4858D679-AA9B-27F0-219A-40A47E586C70&siteName=lca

³³ See Explanatory Memorandum at p 77

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 56,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.