



OFFICE OF THE  
CHIEF EXECUTIVE

Our Ref: 12/16882

Mr Graham Perrett MP  
Chair of the Standing Committee on Social Policy and Legal Affairs  
PO Box 6021  
Parliament House  
Canberra ACT 2600

Dear Mr Perrett

## **Supplementary Submission to the Standing Committee on Social Policy and Legal Affairs**

The ACC welcomes the opportunity to provide a supplementary submission to the Standing Committee on Social Policy and Legal Affairs. This supplementary submission addresses:

- the existing mechanisms for governance and oversight to which the ACC is subject;
- concerns about the adequacy of safeguards for confidentiality of personal information disclosed to the private sector, and
- concerns about perceived erosion of the presumption of innocence.

### **Governance and Oversight**

The ACC is subject to multiple mechanisms that ensure robust governance and oversight. Some of these mechanisms derive from the requirements of the ACC Act and reflect the ACC's role as a coordinated and responsive national criminal intelligence body. Other mechanisms are external to the ACC and the ACC Act, and reflect the ACC's proper accountability to government and independent regulatory scrutiny.

### **Functions of the ACC**

The ACC is established by the *Australian Crime Commission Act 2002*, and the Act specifies the functions that the ACC is to perform. The ACC performs its role within the scope of these statutory functions, and in accordance with the specific legislative requirements of the ACC Act.

The functions conferred upon the ACC contain two important mechanisms for governance and oversight:

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- the ACC has no power to authorise intelligence operations or investigations, and must only undertake such activities when authorised by the ACC Board; and
- the ACC must comply with reporting requirements, including the provision of reports to the Board on the outcomes of intelligence operations or investigations.

### ACC Board

The ACC Board is established by the *Australian Crime Commission Act 2002* and the Act specifies the composition of the Board and the functions that it is to perform. The composition of the Board is a key factor in allowing the fusion of Commonwealth, State and Territory interests and ensures that the strategic direction provided to the ACC reflects national priorities.

As well as representing the interests of key Commonwealth, State and Territory stakeholders, the ACC Board performs an important role in the governance of the ACC. Functions conferred upon the ACC Board include:

- to authorise the ACC to undertake intelligence operations or investigations
- to determine whether such an operation is a special operation or whether such an investigation is a special investigation, and
- to report to the Inter-Governmental Committee on the ACC's performance.

A determination by the ACC Board that an operation or an investigation is 'special' is a prerequisite for ACC coercive powers to be enlivened. Such a determination, by the Board, is subject to statutory controls and governance measures:

- for the ACC Board to determine that an operation or an investigation is 'special', the ACC Board must have regard to additional criteria that address whether non-coercive methods of collecting the criminal information and intelligence have been effective, or whether ordinary police methods of investigation are likely to be effective; and
- in voting for a special ACC operation/investigation, at least nine Board members (including at least two eligible Commonwealth Board members) must vote in favour of making the determination. Whilst the ACC CEO is a member of the Board, the ACC Act provides that the ACC CEO is not entitled to vote.

### ACC Examiners

ACC examiners are independent statutory office holders appointed by the Governor-General. ACC examiners are responsible for approving the exercise of the ACC's coercive powers. However, for an ACC examiner to approve the use of coercive powers:

- such powers must have been enlivened by an ACC Board authorisation; and
- the examiner must determine that the exercise of the coercive powers is reasonable in all the circumstances.

### Inter-Governmental Committee on the ACC

The Inter-Governmental Committee on the ACC is established by the *Australian Crime Commission Act 2002*. The Committee comprises the Commonwealth Minister for Justice and a Minister to represent each State and Territory government. The Committee contributes to the oversight of the ACC in performing its statutory functions, including:

- to monitor generally the work of the ACC and the ACC Board;

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- to oversee the strategic direction of the ACC and the ACC Board; and
- to receive reports from the Board for transmission to the Governments represented on the Committee.

As an important additional oversight mechanism, subject to voting requirements, the Committee:

- may request the Chair of the ACC Board to give further information to the Committee in relation to a determination; and
- may revoke a special determination made by the ACC Board (which effectively allows the Committee to disallow the exercise of ACC coercive powers).

### **The Role of Chair of the Board**

The Chair of the ACC Board is the Commissioner of the Australian Federal Police. The ACC Act imposes specific requirements upon the Chair that are directed to ensuring the accountability of the ACC to the responsible Minister. The Chair of the Board must keep the Minister informed of the general conduct of the ACC in the performance of the ACC's functions.

The ACC Act also imposes additional requirements on the Chair of the ACC Board, directed at providing State Ministers serving on the Inter-Governmental Committee, and the Committee itself, with certain information. The Chair of the ACC Board must comply with lawful requests, subject to exemptions concerning safety, reputation or law enforcement operations.

The Chair of the ACC Board is required to prepare a report (the ACC annual report) of the ACC operations during the year that ended on 30 June and furnish the report to the Inter-Governmental Committee.

### **Minister for Justice**

The ACC is accountable to the Minister for Justice and is a part of the Attorney-General's portfolio.

### **Parliamentary Joint Committee on Law Enforcement**

The Parliamentary Joint Committee on Law Enforcement is established by the *Parliamentary Joint Committee on Law Enforcement Act 2010*. The Committee consists of five Members from the Senate and five Members from the House of Representatives. The Committee performs a key role in ensuring the governance and accountability the ACC, and its statutory functions include:

- to monitor and to review the performance by the ACC of its functions;
- to report to both Houses of the Parliament, any matters relating to the ACC or its performance of which the Committee thinks the Parliament should be aware;
- to examine the annual reports of the ACC and report to Parliament on any matter appearing in, or arising out of, any such annual report;
- to examine trends and changes in criminal activities, practices and methods and report to Parliament any change which the Committee thinks desirable to the functions, structure, powers and procedures of the ACC; and
- to make inquiries into issues, within its area of responsibility, raised by the Parliament and report back.

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The ACC CEO must comply with a request by the Committee to give the Committee information in relation to an ACC operation or investigation. The ACC CEO must also, when requested by the Committee, inform the Committee concerning the general performance of the ACC's functions. The ACC CEO may decide not to comply with such a request only where the information requested is sensitive and the public interest that would be served by giving the information to the Committee is outweighed by the prejudicial consequences that might result from giving the information to the Committee. Such a decision by the ACC CEO is reviewable by the Minister responsible for the ACC.

### **Australian Commission for Law Enforcement Integrity**

The Australian Commission for Law Enforcement Integrity (ACLEI) is an independent statutory body established by the *Law Enforcement Integrity Commissioner Act 2006*. The functions of ACLEI include preventing, detecting and investigating corruption issues in the ACC.

ACLEI must be notified of internally identified matters alleging corrupt activity by an ACC staff member.

### **Commonwealth Ombudsman**

Complaints relating to any aspect of the ACC or its staff can be made to the Commonwealth Ombudsman's Office. The Ombudsman may then investigate the matter or refer it to the ACC for investigation. The Ombudsman may also commence investigations of his or her own motion.

The Commonwealth Ombudsman also has additional responsibilities to inspect ACC records regarding surveillance and telecommunications warrants and controlled operations. The Ombudsman's Office publishes reports on its findings and reports on controlled operation certificates at least once per year to the Parliamentary Joint Committee on Law Enforcement in a private session.

### **Australian National Audit Office**

The ACC is subject to audits by the Australian National Audit Office.

### **Freedom of Information (FOI)**

The ACC is subject to the *Freedom of Information Act 1982* (FOI Act). The ACC has established business processes for ongoing compliance with the FOI Act.

### **Judicial decisions**

People affected by a decision made by the ACC or an ACC Examiner may seek a review under the *Administrative Decisions (Judicial Review) Act 1977* or section 39B of the *Judiciary Act 1903*.

### **Adequacy of existing external governance and oversight**

The ACC endorses appropriate governance and oversight of its activities. However, such governance and oversight must be carefully implemented to properly safeguard the confidentiality of sensitive personal and operational information held by the ACC. The ACC believes that this balance is presently well achieved by the ACC Act.

The ACC notes that the Crimes Legislation Amendment (Powers and Offences) Bill 2011, provides additional mechanisms for oversight and accountability, and the ACC supports these amendments. In particular, the ACC:

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- supports the extension of responsibility to the ACC CEO for certain functions presently exclusively performed by the Chair of the ACC Board (such as keeping the Minister informed and providing information to the Inter-Governmental Committee); and
- supports the introduction of criminal offences of disclosing ACC information for unauthorised purposes and breaching conditions imposed by the ACC CEO in relation to ACC information.

The ACC does not believe that significant additional governance or accountability mechanisms are required, or are appropriate, as a consequence of legislative amendments proposed by Crimes Legislation Amendment (Powers and Offences) Bill 2011. The ACC is already subject to an appropriate level of scrutiny and oversight which has proven to be sufficient to ensure that the ACC is conducted with integrity and in accordance with legislative safeguards.

### **Disclosures to the Private Sector—Protection of Sources, Information-Subjects and Recipient Entities**

This part of our supplementary submission addresses issues raised by the Rule of Law Institute of Australia (RoLIA) during their appearance. Mr Speed, in his opening statement (at pages 23 and 24 of the proof Committee Hansard) expressed concerns about the protection of three classes of person in relation to the disclosure of personal information under proposed section 59AB, namely the original source of the information, the information-subject and the recipient entity.

In relation to the first and second classes we understand RoLIA's concern to be that the safety of a source may be prejudiced, and a person alleged or inferred to be involved in criminal activity may be subject to dismissal or other disadvantageous employment action, if identified in information given to a private sector entity. In relation to the third class we understand the concern is that employers who act on ACC information to the detriment of an employee may be liable to legal action by the employee.

### **Safeguards against Disclosure of Identity**

#### *RoLIA's Argument for Prohibition of Disclosure of Personal Information to the Private Sector*

Mr Speed, at page 25, acknowledges the value of a non-publication direction issued under subsection 25A(9)<sup>1</sup> of the ACC Act as a safeguard in its existing context and appears to

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<sup>1</sup> Subsection 25A(9) of the ACC Act gives an ACC examiner power to direct that evidence given before the examiner, information about a document or thing produced to the examiner, or information about the identity of a witness or the giving of evidence, must not be published or may only be published in specified ways or to specified persons (a non-publication direction). The examiner must give a non-publication direction if 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. In other circumstances (for example, if disclosure of the information might prejudice law enforcement operations) the examiner has a discretion to give a non-publication direction.

Subsection 25A(14) provides that it is a criminal offence to publish information in contravention of a non-publication direction given under subsection 25A(9). The maximum penalty applicable is imprisonment for 12 months and a fine of 20 penalty units.

Subsections 25A(10) and (11) give the CEO the power to vary or revoke a non-publication direction. However, the CEO must not vary or revoke a non-publication direction if 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.

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accept that a non-publication direction takes priority over the power to disclose information to the private sector under proposed section 59AB. (Section 59AC expressly provides that sections 59, 59AA and 59AB are subject to any relevant direction in force under subsection 25A(9). The effect of s 59AC is to make it explicit that confidentiality directions made in relation to examinations override other sections of the ACC Act that make provision for the disclosure of ACC Information. This amendment confirms the view expressed by the majority in *Australian Crime Commission v OK* [2010] FCAFC 61 (2 June 2010) and reflects the ACC's interpretation of s 25A(9)).

However, Mr Speed then states:

“The existing Act recognises that there can be a real danger to people if they are identified. That is not carried through in any way into the bill. The bill simply says if the commission meets these conditions, which you tick off, basically all matters are at the discretion of the commissioner...”

On this basis he argues that disclosure of personal information under proposed section 59AB should be prohibited.

### *Examination Information and Non-Publication Directions*

It is clear that, under the proposed provisions, it would not be lawful to disclose to a private sector entity information relating to an examination that is the subject of a non-publication direction, if the disclosure would be inconsistent with the direction. The CEO would need to consider, before disclosing to a private sector entity any information that is derived from an examination and relates to an identifiable person, whether to do so would contravene a non-publication direction and, if so, whether the CEO may lawfully vary the direction to permit the proposed disclosure. For this latter purpose the CEO would need to consider whether the safety, reputation or fair trial of any person might (not 'would') be prejudiced and whether any such risk could effectively be eliminated by imposing conditions on the receiving entity.

Moreover, if the receiving entity were given notice of the non-publication direction, it too would, by implication, be bound by the direction.

The restrictions in the Bill will ensure that personal information derived from examinations is not disclosed lightly to a private sector entity and that its use by the receiving entity will be subject to appropriately restrictive conditions.

### *Information obtained by conventional inquiries*

Accordingly, we assume that the issue RoLIA is seeking to address is the protection of personal information derived from sources other than coercive examinations. It is true that

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In the view of the ACC the principal objective of these provisions is to prevent prejudice to the safety, reputation or fair trial of any person arising from the exercise of the examination power without restricting the capacity of examiners to summon witnesses and conduct examinations. Accordingly, the ACC has taken the view that any ambiguity about the operation of non-publication directions should be resolved by giving precedence to a non-publication direction over any power or duty to disclose information that might otherwise arise from the ACC Act.

For example, section 59 of the Act gives the CEO a discretion to disclose information held by the ACC to certain classes of government entities, subsection 12(1A) gives the CEO a discretion to give admissible evidence to an appropriate authority to support the taking of confiscation proceedings, and subsection 12(1) requires the CEO to provide admissible evidence of a criminal offence to an appropriate entity to enable its use in prosecution of that offence. The ACC Act does not expressly state that a non-publication direction takes precedence over these duties and discretions (an omission the current Bill would address) but the ACC has acted on the understanding that the Act confers such precedence by necessary implication.

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much information held by the ACC is derived from more conventional investigative activities. Information of this type is not subject to non-publication directions, although it may be subject to a security classification if its disclosure could prejudice ongoing operations or the safety of informants or undercover investigators. Other law enforcement agencies hold information of this type and are not precluded from disclosing it to an appropriate recipient for operational purposes. We query why the ACC should be required to treat such information as if it had been obtained by coercive process. Clearly, however, operational considerations will often militate against disclosure of such information before the completion of an investigation. In light of these considerations the ACC does not accept the need for a prohibition on disclosure of personal information obtained by conventional investigative methods.

### Use of Information by Recipient Entities

#### *The Direct Use Scenario and the Presumption of Innocence*

There is some discussion at pages 23–26 of the proof Committee Hansard of a scenario in which information of a possibly incriminating character about an employee is provided to a private sector entity in the expectation that it will act on the information (for example, by dismissing the person) without taking any further steps of its own to confirm that the person is engaged in activity harmful to the interests of the entity. Alternatively it is suggested that the receiving entity will feel pressured to act in this way and accept the information as proven because of the perceived authority of the ACC. This scenario gave rise to expressions of concern about the presumption of innocence being eroded. While these concerns are legitimate, we would argue that they are misplaced.

#### *Indirect Use and Preventive Measures*

The scenario appears to be based in part on some comments I made earlier in the day (see page 4 of the proof Committee Hansard), although it derives ultimately from issues raised in some of the written submissions to the Inquiry.

In context my comments were directed to illustrating how the capacity to pass information to the private sector might be used to facilitate preventive action. There was not intended to be any suggestion that this was an example where we would expect or encourage an employer to take punitive measures. As Ms De Veau indicated, passing personal information suggestive of criminal activity to an employer would be a rare event and would require the CEO to impose special safeguards tailored to the particular situation to prevent inappropriate use. However, in view of the extensive subsequent discussion of the direct use scenario, it may be useful to amplify our position on this question.

It is certainly not the intention of the ACC that such precipitate action would be taken by an employer, either at the ACC's instigation or because of a misperception. Indeed, such an outcome is not in the operational interests of the ACC: it could result in operationally sensitive information being prematurely disclosed to a criminal associate or in public legal proceedings. Even where the ACC is very sure of the accuracy of the information it would not want it exposed in this way. Moreover, the Bill in no way changes the law as to the action an employer may take on the strength of information received, nor would that be appropriate. Further, the ACC does not envisage a situation where information is provided to the private sector with an expectation that the private sector act on the information, instead of information being provided to the appropriate police agency. The ACC Act still requires the

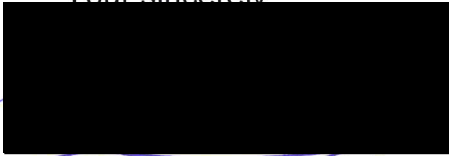
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ACC to pass admissible evidence to the appropriate authorities, this obligation is not diminished by the proposed amendments.

Rather, the ACC envisages that, in the rare case where information suggesting criminal conduct by a specified individual is disclosed to a private sector entity, it will be made very clear that the entity must undertake its own inquiries and, if appropriate, act on the results of those inquiries but that the ACC information is to be used solely as a 'lead' and not as evidence to justify employment action. Many large private sector entities have the capacity to conduct effective and discreet inquiries and the existence of such capacity would be a consideration relevant to the decision whether to make this type of disclosure in a particular case.

On behalf of the ACC, I thank you for the opportunity to make a supplementary submission to the Standing Committee on Social Policy and Legal Affairs. Should you wish to discuss any aspect of the submission further please contact my office on 02 62436814 or via email at [officeofthceo@crimecommission.gov.au](mailto:officeofthceo@crimecommission.gov.au)

Your sincerely



*J. Lawler*

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