Chapter 3

Powers

Introduction

3.1 As outlined in Chapter 1, the Australian Crime Commission is the descendent of Royal Commissions of the late 1970's and early 1980's and the later National Crime Authority. Historically, Royal Commissions have possessed powers which are not ordinarily available to other bodies, and especially not to police. While the ACC is not a Royal Commission, its extended investigative and intelligence role has its genesis in these Royal Commissions.

3.2 This chapter gives a short overview of the investigative powers available to the ACC, and then examines how these powers have been applied in practice.

What are the powers available to the ACC?

3.3 At the core of the ACC are the coercive powers: the capacity to compel the attendance at Examinations, to produce documents and to answer questions.

3.4 In his second reading speech on the ACC Establishment Bill 2002 the then Chair of the Committee, the Hon Bruce Baird noted that among the main areas of concern to the committee in its inquiry into the bill were the use of coercive powers, and the justification for their use.[1] These powers allow the issue of summonses to attend and notices to produce documents to an ACC hearing, and the Committee received a broad range of evidence in relation to them in this Inquiry. Their use remains a focus for the Committee, as an oversight body for the ACC.

3.5 The coercive powers stand outside the normal methods of investigation and intelligence gathering and their use is circumscribed through the authorisation process of the Board. The Board will determine that a matter is a special operation or a special investigation which allows the coercive powers to be used.

3.6 Section 7C(2) of the ACC Act sets out the requirements to be observed by the Board when determining the case for a special operation.[2] Section 7C(3) sets out the requirements for a special investigation.[3] The Act specifies that the determination must be in writing and include details of the allegations of criminal activity and the purpose of the investigation or operation.

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1 The Hon Bruce Baird MP, *House of Representatives Hansard,* 13 November 2002, p. 8960

2 7C(2) consider whether methods of collecting the criminal information and intelligence that do not involve the use of powers in this Act have been effective.

3 7C(3) consider whether ordinary police methods of investigation into the matters are likely to be effective.

3.7 The making of such a determination by the Board then allows an eligible person within the ACC to apply for search warrants – including applications by telephone (sections 22 & 23), or an ACC examiner to:

- apply to the Federal Court for the surrender of a passport (section 24);
- conduct examinations, (section 25A);
- issue a summons to attend an examination (section 28);
- issue a notice to produce documents (section 29);
- apply to the Federal Court for a warrant where a witness fails to surrender a passport, produce documents or attend an examination (section 31).

3.8 The ACC also has authority under section 21 to gather relevant information from other sources – in particular, databases across the Commonwealth and state public sectors, and the private sector. Section 59 of the ACC Act includes broad powers to obtain and disseminate relevant information obtained in the course of ACC investigations.

3.9 In addition to the powers described above, the ACC has a range of investigative powers common to law enforcement agencies.

3.10 The ACC can apply for a warrant to use surveillance devices as described in the *Surveillance Devices Act 2004*. Surveillance devices are described in section 6 of that Act as 'a data surveillance device, a listening device, an optical surveillance device or a tracking device', or a combination of any of these. The power to seek surveillance device warrants is not dependent upon a matter being a special operation or a special investigation. The Ombudsman inspects the surveillance device records to determine compliance with the Act and reports to the Minister every six months.

3.11 The *Telecommunications Interception Act 1979* authorises the ACC to apply for telephone interception warrants. The Act also requires detailed records of the warrant and its associated documentation to be retained by the ACC. Under Part 8 of the Act the Ombudsman may inspect these records and report the findings to the relevant Minister.

3.12 Part 1AB of the *Crimes Act 1914* authorises the ACC to take part in controlled operations. Under subsection 15G(1) law enforcement officers, and other authorised persons who commit a Commonwealth or state offence in the course of an authorised controlled operation are exempted from both civil and criminal liability. The CEO of the ACC is required to report to the Minister on requests to authorise controlled operations and on the action taken in respect of authorised controlled operations.

3.13 The ACC's conduct of controlled operations is also subject to supervision by the Commonwealth Ombudsman.[4]

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4 Commonwealth Ombudsman, *Submission 4,* p. 6. See Chapter 5 on Accountability for further detail.

3.14 In addition to these statute-based powers, the ACC has available those powers which are exercised by secondees from the AFP and other agencies. The AFP submission notes:

> The ACC relies heavily upon its seconded workforce from the AFP and other agencies as it does not have the ability to appoint investigators with police powers in its own right under the ACC Act. Sworn AFP secondees to the ACC are able to use their police powers when investigating criminal activity involving Commonwealth offences, giving the ACC an investigative capability otherwise unavailable to it.[5]

Powers under state and territory legislation

3.15 Each state and territory has enacted complementary legislation to the ACC Act. With the exception of NSW, and allowing for individual State drafting conventions, the state and territory ACC legislation is consistent in structure and content, and incorporates the relevant parts of the Commonwealth legislation, placing them in the state act. The NSW legislation applies the ACC Act and Regulations to NSW, and includes some specific provisions allowing particular functions and arrangements to apply in NSW.

3.16 The state and territory legislation was necessary to enable the ACC and the states to work co-operatively, and to ensure there were no gaps in the constitutional powers available to Commonwealth and State law enforcement agencies. The legislative arrangements underpin the State representation on the Board, and on the Intergovernmental Committee (IGC).

Challenges to ACC powers

3.17 Since the commencement of the ACC there have been a series of Federal Court challenges to the ACC's powers. The principal bases for these challenges have included:

- the abrogation of the privilege against self incrimination for Commonwealth, state and foreign offences;
- the abrogation of legal professional privilege;
- whether the ACC can summons a person likely to be charged with a criminal offence, and whether the power to conduct an investigation is extinguished when the criminal proceeding commences;
- whether a Board determination was valid;
- whether the amendment of a Board determination was valid;
- whether the ACC has power to disclose information obtained under its coercive powers to the Australian Taxation Office;

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5 Australian Federal Police, *Submission 10*, p.5

- whether there is a privilege against spousal incrimination and if so, whether is applies to de facto relationships;
- whether the definition of 'federally relevant' in section 4A of the ACC Act is supported by a federal head of power;
- compliance with the requirements for the issues of summonses under subsection 28(1); and
- the suppression of names of parties.

3.18 The Committee also notes that the recent decision in *AA Pty Ltd and Mr BB v Australian Crime Commission*[6] is under appeal. The decision centred around the power of the Australian Crime Commission to disseminate information which it obtained through use of its compulsory powers of investigation. In this case the issue was whether the information could be given to the ATO and whether for the purposes of dissemination, the ATO could be construed as a 'law enforcement body' – the Court said it could not. This has some significance for a number of matters involving the ATO and the ACC,[7] and will be viewed with interest by the Committee. (See also Chapter 8 'Legislative Change').

Determinations and the availability of coercive powers

3.19 As noted above, the ACC is set apart from other law enforcement agencies by the availability of the coercive powers used by Examiners.

3.20 Mr Milroy explained that the Commission uses its coercive powers in a broad based way within a special intelligence operation or a special investigation, they are a part of the ACC's capability to gather information, intelligence and evidence:

> Where we are profiling something – whether it is a case or a particular area of crime that we want to better understand – and we want to research that particular area or profile a particular individual's involvement, we would use the coercive powers tactically as a method of gathering information and more knowledge about the subject matter.[8]

3.21 In evidence Mr John Hannaford, ACC Examiner explained to the Committee that the coercive powers are exercised only after deliberation within the ACC. Submissions are then made to the examiners regarding use of the powers, and Mr Hannaford noted that an Examiner's authorisation is not automatic, with instances when those submissions were rejected by the Examiner, and the powers were not used.[9]

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6 [2005] FCA 1178

7 *AA Pty Ltd v Australian Crime Commission [2005] FCA 1178* noted in *Submission* 14B, p. 6

8 Mr Milroy, *Committee Hansard*, Canberra 11 October 2005, p.13

9 The Hon John Hannaford, ACC Examiner, *Committee Hansard*, Canberra 11 October 2005, p. 1

The 'leakage' of the coercive powers

3.22 A long-time concern of the Committee has been to ensure that the special coercive powers are limited in their availability, and do not become a routine element of ordinary police investigation. This concern is driven by the substantial erosion of the law's traditional protection of the privilege against self incrimination and the associated right to silence inherent in the coercive powers. This concern underpinned the traditional refusal by parliaments to grant coercive powers to police.

3.23 Thus, in his second reading speech introducing the ACC Establishment Bill 2002, the then Attorney General the Hon Daryl Williams QC said:

> The government agrees that it is not appropriate that coercive powers be given to police and therefore agrees with the AFP Commissioner's views. There is no inconsistency with this position in the proposal before the House for the ACC. There is a clear distinction between the authorisation of the use of coercive powers and the exercise of those powers.[10]

3.24 Similarly, Mr Mick Keelty, the AFP Commissioner, also indicated at a previous hearing that he considered the exercise of such powers by police inappropriate.[11]

3.25 In its report on the establishment of the ACC, the Committee distinguished between the authorisation of the use of the coercive powers – by the Board – and their actual use, which is limited to the examiners. This limitation gave the Committee confidence that the coercive powers would be exercised at arms length from the police. However evidence from the current hearings again raised concerns about the 'leakage' of the ACC's powers into ordinary police operations.

3.26 In Melbourne, Mr Peter Faris QC observed:

> I have seen cases where, as far as I can judge, the police had been investigating or having problems. …The Crime Commission takes it over for a short period of time, investigates it, gets more evidence and hands it back. It has this sort of on request role, which I think is probably inappropriate given all the circumstances and I think it happens quite a lot.[12]

3.27 Mr O'Gorman made a similar observation about the Queensland Police Service which:

> is increasingly engaging in joint operations with the Australian Crime Commission which has the end effect – I say query intended – of getting

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10 The Hon Daryl Williams QC MP, *House of Representatives Hansard*, 14 November 2002, p. 9041

11 Commissioner M Keelty, *Committee Hansard,* 2 April 2001, p.144

12 Mr Peter Faris QC, Barrister, former Chair National Crime Authority, *Committee Hansard*, Melbourne, 16 September 2005, p. 12

> around the lack of Queensland based telephone tapping powers. … the position the Queensland government has held for some time … is that, until such time as the federal government is prepared to address the Queensland government's request for a Public Interest Monitor concept to oversee telephone tapping powers, the Queensland government is not prepared to enter into a discussion with the federal government to have telephone tapping powers in the state.[13]

3.28 Mr Gary Crooke QC observed that the examiners are not as involved in the investigative process as the NCA examiners were, and as a result are distanced from what is occurring. He said:

> The difference with the NCA was that, when members conducted a hearing, they were very much over the top of what was happening and made it their business to be absolutely certain that the national intelligence based approach was taking place. I fear that what is happening – and I emphasise that I do not know – is that the position of the examiner is very much like the position of the person who pitches his tent behind the grandstand and waits for people in the game to march somebody through while they go back to the game and the examiner is none the wiser.[14]

3.29 Invited to comment on the potential for the ACC to be a 'bolt-on facilitative mechanism for conferring these coercive powers on police jurisdictions,'[15] he responded:

> That is a very real danger. They do not have those powers but they will use this merely, as you say, as a bolt-on, to make sure they will get them, in what may well be an ordinary policing operation.[16]

3.30 During discussions, Committee Deputy Chair, the Hon Duncan Kerr SC MP observed that:

> …you have this creeping extension not through any malice but because the organisation has achieved one of the objectives of the Commonwealth – that of greater cooperation and relevance – but at some price, and that price being its extension into areas that have never been expressly articulated or endorsed.[17]

3.31 The ACC rejected these suggestions. The Committee asked The Hon Mr Hannaford, an Examiner, whether he believed that the structural change to an

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13 Mr Terry O'Gorman, President, Australian Council for Civil Liberties, *Committee Hansard,* Brisbane*,* 19 August 2005, p. 31

14 Mr Gary Crooke QC, Barrister, former Chair National Crime Authority, *Committee Hansard,* Brisbane, 19 August 2005, p. 43

15 The Hon Duncan Kerr, SC MP *Committee Hansard,* Brisbane 19 August 2005, pp. 44-45

16 Mr Gary Crooke, *Committee Hansard,* Brisbane 19 August 2005, p. 45

17 The Hon Duncan Kerr SC MP, *Committee Hansard,* Canberra 7 October 2005, p. 7

organisation led by police is causing leakage of the ACC's coercive powers and to more routine policing matters?[18] Mr Hannaford disagreed:

> The situation is that when the board makes its determination for a special operations special investigation that provides a particular focus for the exercise of the powers. As a result of the management mechanisms which have been put in place by the CEO and approved by the board through the governance oversight committee, that again provides the focus for particular operations that are to be conducted. It is only as a result of the conduct of those operational activities that a decision is made at an operational level that there should an exercise of the coercive powers, and then submissions are made to the examiners.[19]

3.32 The ACC's response emphasised that the separation of the authorisation by the board and the use of the powers means that the use of coercive powers is conducted at arms length from its authorisation.

3.33 Mr Michael Manning from the Commonwealth Attorney General's Department also explained that:

> …the problem that you allude to – that this is a sort of 'you scratch my back and I'll scratch yours' approach to what issues are to be investigated – is probably one that is inherent in any kind of national structure like this, whether it be the NCA or the ACC. There is always that risk and you will always hear assertions that that sort of thing is going on.[20]

3.34 A further indirect check on the inappropriate use of the coercive powers derives from the limited availability of the Examiners, as noted by the Hon Duncan Kerr:

> The fact that there are three examiners occupied full-time on this task is in a sense an effective mechanism for ensuring that only important things are addressed. …If you expanded it, given the way in which we now have much more facility for a cooperative approach, you would increase the risk and danger that this would become an add-on, a bolt on, an adjunct to law enforcement more generally across the whole Commonwealth, instead of an exceptional, extraordinary set of powers designed to deal with the real bad guys in the system.[21]

3.35 While the Committee appreciates that the discretion to authorise the powers rests first with the Board, and the discretion to use them rests with the examiners, the evidence suggests that there is at least the perception that both the coercive and

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18 Senator Santo Santoro, Committee Chair, *Committee Hansard,* Canberra, 11 October 2005, p. 1

19 The Hon John Hannaford, Examiner Australian Crime Commission*, Committee Hansard,* Canberra , 11 October 2005, p. 1

20 Mr Michael Manning, Attorney-General's Department, *Committee Hansard,* Canberra 7 October 2005, p. 8

21 The Hon Duncan Kerr, *Committee Hansard,* Canberra, 7 October 2005, pp 7-8

incidental ACC powers are being used in a way that is at variance with the spirit and intention of the ACC Act. The Committee considers that this is a matter for the internal governance of the ACC; as a governance matter it is one which will be scrutinised regularly by the Committee.

The ACC examination

3.36 The examination is in some respects the 'engine room' of ACC operations. They are conducted by one of three statutorily appointed examiners who are given wide discretion as to how the process is to be conducted.[22]

3.37 Examinations take place in private,[23] and legal representatives are permitted to attend, as is any other person authorised by the examiner to be present. Summonses are issued by the examiner; these may request the attendance of a person to give evidence (section 28) or the production of documents (section 29). The examination process is bound by confidentiality provisions and by the secrecy provisions contained in section 51 of the ACC Act.

3.38 A person appearing before an examiner has limited privilege against self-incrimination. Section 30(4) provides that a person may claim self-incrimination by a document or answer, but the claim must be made before producing the document or giving the answer. Under section 30(5), the material cannot be used in criminal proceedings against the person except where the proceedings concern the falsity of the document or answer or in confiscation proceedings.

3.39 The Committee was also told that the ACC examiners advise the witness that they may also seek a general protection from self-incrimination although according to Mr Hannaford this has been questioned recently.[24] Referring to this practice, Ms Westwood told the Committee that members of the executive of the Criminal Defence Lawyers Association endorsed:

> … as a good practice [that] of allowing a witness to claim a blanket privilege against self-incrimination – I am referring to section 30 – at the commencement of proceedings. That facilitates the running of proceedings.[25]

3.40 The Committee notes that this practice appears to assist the examination process, and will ask to the Commission to apprise the Committee of any developments in the matter referred to by Mr Hannaford.

3.41 During the review, five issues have arisen in relation to examinations:

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22 Section 25A

23 subsection 25A(3)

24 The Hon John Hannaford, *Committee Hansard*, Canberra, 7 October 2005, p. 77

25 Ms Sarah Westwood, Criminal Defence Lawyers Association of Victoria, *Committee Hansard,* Melbourne, 16 September 2005, p. 26

- inappropriate encroachment on the privilege against self incrimination
- The availability of legal representation
- The conduct of the examinations
- Problems with the summons process
- Use of material from examinations

Self -incrimination of persons charged with a criminal offence

3.42 In their submission[26] and in evidence,[27] the Attorney General's Department notes that it is unclear whether an examiner can summon as a witness under section 28 of the Act, persons who have been charged with a criminal offence, or who are the subjects of asset confiscation proceedings, and then proceed to question them on issues arising from those proceedings.[28] The Attorney General's Department cites two cases, *Hammond v the Commonwealth*[29] and *Mansfield v* ACC[30] as suggesting that such summonses may not be issued, but notes that there are suggestions in more recent cases that this is not the case although the matter is not decided.

3.43 While the abrogation of the privilege against self incrimination is now well established – it was the subject of amendments to the NCA Act late in its existence, and was carried across to the ACC – the issue has emerged in relation to persons who are facing criminal charges, and who are required to appear before an ACC examination.

3.44 The Law Council of Australia was emphatically opposed to a person in those circumstances giving evidence to an ACC examination, although the Council did suggest a way in which this might be managed:

> It would be wrong to coerce a person to give evidence in circumstances where the subject matter was the subject of a criminal trial and that person would be in a position in due course of deciding whether he or she would give evidence. It would be a matter of concern if the coercive power were applied to force an accused person to divulge their position before a trial. That would demean the right to silence and demean a fair trial thoroughly and inappropriately…. Of course it does not mean that there should not be an examination, full stop. It is merely a question of deferring that issue and that examination until the trial itself has been dealt with.[31]

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26 Commonwealth Attorney General's Department, *Submission 17*, p. 11

27 Mr Miles Jordana, Commonwealth Attorney-General's Department, *Committee Hansard*, Canberra, 7 October 2005, p. 3

28 Commonwealth Attorney General's Department, *Submission 17*, p.11

29 (1982) 152 CLR 188

30 (2003) 132 FCR 251

31 Mr Ross Ray QC, Law Council of Australia *Committee Hansard*, Canberra 7 October 2005, p. 42

3.45 The Attorney General's Department suggested that the solution may lie in an amendment to the ACC Act along the lines of section 21 of the *Police Integrity Commission Act 1996 (NSW)* or section 18 of the *Independent Commission Against Corruption Act 1988 (NSW)*. The Department's submission continues:

> Under those provisions the Commission may conduct and report on an investigation while relevant legal proceedings are in progress, but is authorised to suppress information about the investigation to ensure [it] does not does not prejudice the fair trial of a person for an indictable offence. …such legislation would need to be carefully crafted to avoid interfering with the proper exercise of the judicial power.[32]

3.46 The Committee also noted in discussions with the representatives of the Office of the Director of Public Prosecutions that the matter may be more complicated than it first appears. Mr Kerr postulated the following:

> … somebody who is charged with a crime may still be a person of interest in relation to another set of criminal behaviours. That seems to me to be conceivable and it would not be improper for that person to be examined in relation to disassociated and unrelated matters. But to the extent that there is an overlap that might be material to the fate of the criminal proceeding in which they have already been charged. [33]

3.47 While Mr Bermingham Deputy Director, of the Office of the Commonwealth Director of Public Prosecutions observed that the indemnity which is available could be used, Mr Kerr noted that this would only apply to direct use of that testimony, and would not attach to facts which were discovered in consequence of that testimony – so-called 'derivative evidence'.[34]

3.48 The Committee considers that it is of paramount importance that ACC proceedings do not prejudice a fair trial, or interfere with judicial independence. At the same time, the Committee acknowledges that the work of the ACC should not be impeded unnecessarily, and that any ambiguity should be resolved as a matter of priority.

Recommendation 1

3.49 The Committee recommends that the Attorney General's Department and the Australian Crime Commission develop legislation as a matter of urgency to ensure that a person summonsed by the ACC, at a time when they are the subject of criminal or confiscation proceedings, may only be examined in relation to matters quarantined from those material to the pending proceedings.

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32 Commonwealth Attorney General's Department, *Submission 17*, p. 11

33 The Hon Duncan Kerr, SC MP, *Committee Hansard,* Canberra, 7 October 2005, p. 18

34 Mr Ian Bermingham, *Committee Hansard.* 7 October 2005, p. 19

The conduct of examinations

3.50 During the hearings the Committee heard a number of concerns about the examination process, relating to the inappropriate resemblance of the proceedings to a court, the undefined nature of the proceedings, and lack of procedural rules.

3.51 Mr Faris QC, recounted:

> …we are shown into what appears to be a courtroom but in fact is not a courtroom. There is an examiner sitting up, above and beyond like a judge, but of course he is not a judge. The whole impression that it is meant to convey is that somehow the examiner is like a judge and is an impartial, unbiased umpire, which is just not true. The examiner tries to tell my client that that is the case, which again I find untrue.
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> And
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> You then have the client sitting in a witness box and counsel at the bar table. It has all the trappings of and looks identical to a court, but it is not.[35]

3.52 Mr Faris argues that it is 'artificial in the extreme' and the parallel to a court is inaccurate.

3.53 Ms Westwood, on behalf of the Criminal Defence Lawyers Association, also expressed reservations about 'quasi court proceedings':

> …questioning is often conducted as if the witness were under cross-examination in front of a jury. … in a kind of context where credit is a relevant matter. It is the view of the association that in cases like that there is a clear intent to entrap witnesses giving evidence in front of the commission. While it is the association's view that persons who have been proven to have given false evidence before the commission should be subject to penalties, in the context of … an examination or a hearing which is an information gathering exercise, which may concern the investigation of a third person and their criminal conduct – the methods employed by the counsel who assist the commission are unnecessary. They put witnesses, who are already likely to be intimidated, into an unnecessarily combative situation. It is not clear whether that assists in the overall objective of the commission...[36]

3.54 In its submission, the Law Council of Australia expressed its concern at the wide discretion given to the Examiner in the conduct of examinations.[37] In evidence before the Committee the Treasurer of the Law Council Mr Ross Ray QC said:

> We at the Law Council … strongly believe that the examinations should be conducted in accordance with the fundamental rules of evidence. Rules of

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35 Mr Faris QC, *Committee Hansard,* Melbourne, 16 September 2005, p. 7

36 Ms Sarah Westwood, *Committee Hansard,* Melbourne 16 September 2005, p. 27

37 Law Council of Australia, *Submission 18*, Paragraph 23, p. 6

> evidence provide a level of natural justice, and natural justice underpins the logic of each of the rules.[38]

3.55 The Law Council's submission suggested that a set of procedural rules for examinations be developed by the ACC in accordance with the rules of evidence.[39]

3.56 Finally, concerns were raised at the ill-defined nature and scope of the proceedings, which permit a kind of 'fishing expedition' without notice to the subject of the examination. Ms Westwood noted that the parameters of the investigation were not explained to the examinee:

> We would compare that with a situation where a person who is to be charged or interviewed in relation to criminal offences will be given notice of the issues and, where they have accessed legal advice, their lawyer is often able to gain a reasonable understanding of the nature of the investigation by speaking to police before their questioning proceeds. In our view, that facilitates, again, the provision of legal advice and the proper understanding of people's rights. It is a practice that we believe does not happen at the commission, and that leads to certain consequences.[40]

3.57 A similar comment was made by Mr Chris Staniforth, Chief Executive Officer of the ACT Legal Aid Office in its submission to the Inquiry, which described two recent cases, and complained at the 'apparent lack of accountability in the conduct of examinations carried out by the ACC examiners'.[41]

Summons processes

3.58 Two concerns were raised by witnesses in relation to the summons process under section 28. The first relates to the insufficient time allowed for the production of documents. Ms Westwood told the Committee that a client was served with a witness summons to which a response was required within 12 hours:

> In that time, they had to produce reasonably substantial business records as well as obtain legal advice. Generally that creates the sort of situation where, as a lawyer, you are required to drop everything else and deal with it, and there is often a substantial amount of advising required in a very short time frame. In our view, that hinders a witness's ability to access properly qualified legal advice. [42]

3.59 The issue of summonses and return dates was put to the ACC, and Mr Hannaford explained that the examiners always consider the reasonableness of the

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38 Mr Ross Ray QC, *Committee Hansard,* Canberra 7 September 2005, p. 38

39 LCA, *Submission 18*, paragraph 27, p.7

40 Ms Sarah Westwood, *Committee Hansard,* Melbourne 16 September 2005, p. 27

41 ACT Legal Aid Office, *Submission 5,* p. 1

42 Ms Westwood, *Committee Hansard* Melbourne, 16 September 2005, p.26

time frames allocated; however, there will be circumstances where the issue of a summons is urgent. Mr Hannaford continued:

> It is not inconceivable that the time between the service of the summons and the return date is inadequate. If that arises and the witness turns up – sometimes with a lawyer – and says that they have not had a reasonable time to get a lawyer, we grant an adjournment if it is reasonable in that circumstance. Sometimes they will turn up with a lawyer who says, 'I haven't had a reasonable opportunity to give advice.' We take that into account and, depending upon the circumstances, we might grant an adjournment to allow that to occur.[43]

3.60 The second matter relates to the clarity and content of the summons. Mr Staniforth noted that the summons document itself:

> is a densely drafted, highly technical legal document, which I understand it has to be, but the punters out in the street do not read them... I wonder if there could be two things: a plaining of the English so that the guts of what is required is made clear to the recipient, and also – this is the stronger of the two points I would make – something like that which a police officer drafts when she or he is seeking … an ordinary search warrant. The warrant says pretty much what you are after.[44]

3.61 A possible consequence of this is the questioning beyond the apparent ambit of the summons. Ms Westwood told the Committee:

> At present it has been noted by some members of my association that the only way to deal with this matter would appear to be to initiate proceedings in the Federal Court. …We understand that it does not happen; therefore, we have a situation, in the association's view, where witnesses are extremely vulnerable. There is an unfairness …that could be corrected by requiring that more information be provided at the start and that there be some reasonable setting of the parameters of what the subject of the examination is before the examination commences.[45]

Legal representation

3.62 Section 27 of the ACC Act provides for assistance to be granted where the Attorney General is satisfied that it would involve substantial hardship to the person to refuse the application; or the circumstances of the case are of such a special nature that the application should be granted.

3.63 However, legal aid is not available for ACC proceedings from the State and Territory Legal Aid Commissions. While these are administered by the states, they

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43 The Hon John Hannaford, *Committee Hansard* , Canberra, 7 October 2005, p. 76

44 Mr Chris Staniforth Chief Executive Officer ACT Legal Aid Office, *Committee Hansard* , Canberra, 13 October 2005, p. 3

45 Ms Westwood, *Committee Hansard*, Melbourne, 16 September 2005, p. 27

offer aid for both State and Commonwealth matters, so there appears to be no jurisdictional reason why they could not assist persons summonsed to attend or produce documents under an examination.

3.64 It is not clear to the Committee why a witness under this legislation should not be subject to the normal legal aid regime, with its means tested assistance. Legal aid solicitors are experienced in representing clients in criminal law matters, and this would appear to be a far more efficient procedure for representation than having to provide an application to a government department before even approaching a lawyer.

3.65 Given the budgetary constraints under which Legal Aid Commissions operate, if assistance were to be made available from the Legal Aid Commissions, it would be necessary for funds to be provided to them for this specific purpose.

Conclusions and recommendations

3.66 The Committee appreciates that the environment in which the ACC examinations operate is potentially volatile. As far as short return times for summonses are concerned, this may be necessary in circumstances where the examiner is concerned that the material might be destroyed or altered before it can be produced. The Committee acknowledges that at times short return dates are unavoidable.

3.67 The Committee is also aware that the Examination process is more analogous to the discovery or pre-hearing process or to tribunal proceedings than to litigation. However, it appears that the summons documents themselves may require some attention in both form and content. Mr Staniforth's comment about the density of the prose in the document[46] suggests that ACC process is out of step with documents used in general court and tribunal proceedings which in the last few years have made attempts to use plain English, and ensure that the 'date time and place' information is clearly set out.

3.68 The unease about the lack of information in the documents is also of concern – although, again the Committee acknowledges that these proceedings are not court proceedings and the person is not being charged. The maxim that the person must be allowed to know the case against them does not apply, as at least at this point, there is no case.

3.69 However, the business of the ACC is 'serious and organised crime', and the implications for the person summonsed are grave. The Committee notes Mr Hannaford's comments regarding the granting of an adjournment to enable the person to seek legal advice.

3.70 The Committee also notes Mr Hannaford's offer to examine the explanatory memorandum which accompanies the summons.

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46 Mr Chris Staniforth, *Committee Hansard.* 13 October 2005, p 3

3.71 Mr Hannaford explained that summonses are accompanied by an explanatory memorandum which also explains to the witness that they are not to disclose the fact of the summons having been served on them, although they may discuss the summons with their lawyers. He continued:

> I guess we have taken the view that the presence of that advice is enough to draw their attention to the fact that they can go and see a lawyer. But I also understand that the practice is that, when the summons is served by the officers, that is emphasised to the person verbally – that they are not to discuss the summons with anybody… If there is a view that we ought to expand that explanatory memorandum, then that could be looked at.[47]

Recommendation 2

3.72 The Committee recommends that both the summons and the memorandum be revised to ensure that as far as possible, recipients understand what is required of them, and that procedures allowing adjournments for the purpose of seeking legal advice be included in the ACC's examination practice.

3.73 The Committee received a supplementary submission in which the ACC indicated that release of its Examinations Policy and Procedures document would reveal operational considerations which it is not appropriate to release publicly. The ACC acknowledges that there are benefits in improving public awareness of the practices in examinations, and has indicated that it intends to develop and release a public information bulletin.

3.74 The Committee makes the observation that there are serious implications for clients and counsel inherent in the lack of information regarding the ACC's procedures. The Committee accepts that the ACC is not a court, however other bodies which are not courts – the Senate among them – publish comprehensive information for witnesses called before them.

3.75 The Committee considers that to assist lawyers and witnesses to deal more efficiently with Examinations, the ACC should produce a practice and procedure manual. The manual should include explanatory material in plain English, suitable for extraction and attachment to summonses.

Recommendation 3

3.76 The Committee recommends that the ACC develop without delay, a practice and procedure manual for the benefit of practitioners and those summoned for examination or to produce documents.

47 The Hon John Hannaford, *Committee Hansard* , Canberra, 7 October 2005, p. 76

Use of material from examinations

3.77 In evidence in Melbourne, Ms Westwood told the Committee of her organisation's concerns about the distribution of Commission transcript. She noted that:

> section 59 [of the ACC Act] clearly contemplates control by the chief executive officer over where the transcript goes and to whom it goes, there is a further issue of what happens to that information once it has left the Australian Crime Commission.[48]

3.78 Mr Faris told the Committee of his experience of the Crime Commission in Melbourne, which:

> has now developed the idea that you come along and you represent your client. Your client is giving evidence and you are taking notes…. When it is finished…legal professional privilege notwithstanding …The examiner purports to make an order that you have to give them your notes, which they then seal in an envelope or something. That is nonsense, but they are serious about it.[49]

3.79 The Committee appreciates that there are secrecy requirements covering the information obtained at an examination. However, it is difficult to understand how a legal practitioner can be expected to advise a client when the relevant notes have been sealed and removed.

Dissemination of Examination transcripts

3.80 The concern by practitioners at the fate of documents in the custody of the ACC is understandable given the provisions of section 59. The requirements under the section of the Chair of the Board and the CEO to provide information or documentation are broad, and extend to providing relevant specific or general information to the IGC, to foreign or domestic law enforcement agencies, departments of States or Territories and the PJC. There is a limitation on material which might prejudice the safety or reputation of persons or the operations of law enforcement agencies.

3.81 The Committee notes that it is difficult to regulate the distribution of material of this kind. The Committee would hope that material identifying participants would be removed before it was distributed as general information, this would not be the case where the information was being used in a joint operation or to inform intelligence partnership participants.

3.82 In the case of the material held by legal practitioners, it probably relies on the practitioner's ethical responsibility to maintain the confidentiality of records in their

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48 Ms Westwood, *Committee Hansard*, Melbourne 16 September 2005, p. 27

49 Mr Faris, *Committee Hansard,* Melbourne 16 September 2005, p. 14

possession; the ACC examination transcripts would probably be analogous to the transcript of a matter conducted in a closed court, and the same restrictions on its access would apply.

3.83 Ms Westwood noted that transcript could still be required for production under subpoena – and cited experiences in which:

> certain persons, when charged with serious criminal offences, have had their associates analyse some briefs, which may include transcript, to identify persons they consider to be informants.[50]

3.84 Further, where this – and other issues – have been raised:

> other than a formal acknowledgement of their concerns …nothing further has been heard from the commission. In the view of the association, that is not good enough.[51]

3.85 In a supplementary submission to the Committee, the ACC observed that the Examiner makes a direction at the end of the examination as to the persons or organisations to whom material should be published. This decision is based on each individual case and is not governed by predetermined policies.[52]

3.86 The CEO (or delegate) makes any decision under section 59 of the Act to release information to a third party after a non-disclosure direction is made by an Examiner. The Commission notes that this process involves consideration of any restrictions which should be imposed on access to the material by the agency receiving it, and there are sanctions under subsection 25A(14) for breach of any direction as to the non-publication of the material. There is scope to narrow the terms of the non-publication directions to ensure only the specific intended use is permitted.[53]

3.87 As to the subpoena of transcripts, the Commission says:

> Except where a prosecution does not derive from an ACC investigation (in which case the secrecy provision in s51 of the Act will apply) the ACC is not exempted from complying with the general law relating to compliance with a subpoena. The ACC will take such steps as are necessary to protect the confidentiality and the security of information held by the ACC (e.g. claims fro public interest immunity) but that is subject to the general law as it applies to such claims before the courts.[54]

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50 Ms Westwood, *Committee Hansard* , Melbourne, 16 September 2005, p. 28

51 Ms Westwood, *Committee Hansard* , Melbourne, 16 September 2005, p. 28

52 Australian Crime Commission, *Submission 14B*, p. 2

53 *Submission* 14B, pp.2 and 3

54 *Submission* 14B, pp.2-3

3.88 The Committee was concerned that the examination transcripts contain information – it is not evidence in the sense that a court transcript is evidence. The material can contain information which is prejudicial to individuals, and which may never be used as a basis for legal proceedings, although in the wrong hands could be used for retributive action against a witness.

3.89 The Commission's supplementary submission gives some reassurance that there are procedures which govern the use and dissemination of transcript of examinations. The Committee cannot overemphasise the Commission's responsibility to ensure that the distribution of material is undertaken mindful of the potential consequences for the individuals involved.

3.90 In the light of the reservations expressed by practitioners in the course of the hearings, the Committee suggests that the information bulletin mentioned above, might include details of these practices, to give some reassurance to practitioners and witnesses.

Power to gather information

3.91 As we have seen in the Chapter 2 discussion of the purpose of the ACC, the core function of the organisation is the collection, analysis and dissemination of criminal intelligence. It is to this end that the ACC was granted the special coercive powers. However, also vital to the effectiveness of this intelligence function is the extent of the ACC's legal authority to gather relevant information from all other sources – in particular, databases across the Commonwealth and state public sectors, and the private sector.

3.92 The Committee was told that AUSTRAC, Customs,[55] the AFP, and other Commonwealth agencies provide information for the ACC, and the ACC reciprocates.

3.93 Three issues have come to the Committee's attention that may operate to limit the most effective collection of information.

International criminal intelligence

3.94 A growing feature of organised crime is its trans-national character, and to counter these operations effectively, the ACC must have the capacity to collect information from sources outside Australia. There are a number of agencies which could (or do) provide such information to the ACC, including the Australian Secret Intelligence Service (ASIS), the Australian Security Intelligence Organisation (ASIO), the Defence Signals Directorate (DSD), the Australian Taxation Office (ATO), the Australian Customs Service (ACS), AUSTRAC, and the Department of Foreign Affairs Network.

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55 Customs representatives noted that they have experienced some technical difficulties with ACID which are being resolved. Mr Lionel Woodward, Chief Executive Officer, Australian Customs Service, *Committee Hansard* , Canberra, 11 October 2005, p. 36

3.95 The AFP provides the ACC with the intelligence from its International Liaison Network (ILN), which has 30 posts located in 27 countries around the world.[56] Similarly, the ACS has officers posted in Washington, Jakarta, Bangkok, Beijing and Brussels.[57]

3.96 This may seem to provide the basis for a rich supply of international criminal intelligence. However, the Committee is also aware that officers within the networks of these other agencies have a wide range of duties, which may see the intelligence collection requirements of the ACC accorded low priority. At the same time, many of these officers will not have the specialist knowledge or training to gather intelligence of greatest use. As the ACC notes:

> Intelligence collection is not the primary function of the Liaison Officers [of the AFP] and that various demands placed on Liaison Officers leaves little capacity to proactively identify and collect intelligence.[58]

3.97 It is presumably for these very reasons that many agencies, such as DIMIA and the ACS have developed their own networks of overseas officers instead of relying solely on the representation of the Department of Foreign Affairs and Trade.

3.98 The Committee notes the AFP's view that:

> The ACC should continue to build its role as an operational domestic criminal intelligence agency. International law enforcement issues and intelligence are catered for primarily via the AFP's international operations… Direct ACC involvement in international liaison and activities diverts resources from other national priorities and poses a risk of duplication of effort with agencies already established in this field.[59]

3.99 The Committee does not wholly accept the AFP's views in this regard. While agreeing that the ACC is primarily a domestic agency, the divide between what is domestic crime and what is international crime is becoming less and less clear, and the time may come when the ACC should be provided with its own criminal intelligence and liaison officers in key locations.

3.100 However, at this time the Committee notes the joint efforts of the ACC and AFP to resolve these issues.[60] It is therefore premature to make a recommendation on this matter, however, it will remain a matter of interest to the Committee.

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56 Australian Federal Police, *Submission* 10, p. 4

57 Mr Woodward, *Committee Hansard*, Canberra 11 October 2005, p. 35

58 ACC, *Submission 14B*, Attachment F

59 AFP, *Submission 10*, p. 8

60 ACC, *Submission 14B*, Attachment F

Disseminations to non-law enforcement agencies

3.101 A more pressing matter is the possibility that continued information sharing – apart from information shared between police forces – could require regulatory authorisation to continue its development. In evidence, Mr Miles Jordana, Deputy Secretary, National Security and Criminal Justice, Attorney-General's Department told the Committee that the scope of the ACC's authority to do this has presented two problems:

> First, a recent judgment in the Federal Court suggests that the ACC may only be able to disseminate information to Australian agencies other than police forces if they are prescribed by regulation. This may substantially delay the dissemination of relevant material to an agency with which the ACC does not deal regularly.[61]

3.102 If on examination this is the case, the Committee sees this as a significant barrier to the ACC's effectiveness, and the matter should be rectified without delay. The Committee considers that such barriers to information sharing between the ACC and other agencies must be identified, and strategies developed to overcome them.

Recommendation 4

3.103 The Committee recommends that the ACC in consultation with the Attorney General's Department identify barriers to information sharing, and where regulatory or legislative remedies are necessary these be developed and implemented.

Exchanges of information with the private sector

3.104 Mr Jordana's second problem concerned the possible exchange of intelligence with the private sector:

> there is no provision for the ACC to disseminate information or intelligence to the private sector. This is a problem, for instance, in the ACC's work on financial and identity fraud. The telecommunications and financial services industries are actively contributing to the ACC's development of information and intelligence holdings on fraud but the ACC cannot disseminate information and intelligence back to the private sector to help it prevent and respond to further attempts at fraud. This tends to discourage corporations from cooperating because there is little tangible benefit for them in developing the relationship.[62]

3.105 This issue is also reflected in the recent report by Sir John Wheeler on airport security and policing, who makes this observation:

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61 Mr Miles Jordana, *Committee Hansard*, Canberra, 7 October 2005, p. 5

62 Mr Miles Jordana, *Committee Hansard*, Canberra, 7 October 2005, p. 5

> Australia appears to be lagging behind leading Western countries, such as the UK, in integrating intelligence exchange between the public and private sectors, and this requires a significant mindset change and practical action.
>
> [F]urther major gains will require a changed culture of cooperation, sharing and openness to new technologies and methods across Federal, State and private sector agencies and personnel … [.][63]

3.106 The Insurance Australia Group (IAG) submission notes a number of ways in which the ACC could better target motor vehicle theft and financial crime. The submission suggests a task for including the ACC and the IAG to develop a national treatment plan for insurance crime in Australia.[64] The Committee notes that there the ACC has already provided assistance to the IAG in a study undertaken by the Economist Intelligence Unit (EIU) on the cost and impact of insurance fraud. The ACC collated and de-identified data to ensure confidentiality.[65]

3.107 There can be no objection to the ACC and the private sector engaging in task forces and research, provided that the information given is not linked to an identifiable entity. However when the matter becomes one of sharing intelligence or information as the IAG suggests in its earlier submission cited above, this raises a much more difficult and controversial problem centring around the protection of personal information – a fact acknowledged by Mr Jordana.[66]

3.108 The Committee understands that it is extremely difficult in the complex environment in which society – and criminals – operate, to strike a balance between the need for intelligence on criminal activity and the protection of the individual's right to privacy.

3.109 The Committee notes that the Attorney General's Department is currently in discussions about this matter with the ACC. As any alteration to the present arrangement would require legislation, the Committee would consider it appropriate for an exposure draft to be distributed among the peak bodies – public and private – for consultation. Such draft legislation may also be a matter the Committee would examine in a separate inquiry.

Effectiveness of the coercive powers and the issue of contempt

3.110 A matter that generated considerable discussion in the inquiry is the growing incidence of witnesses failing to attend an examination, producing documents, or

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63 Wheeler, the Rt Hon J., *An Independent review of airport security and policing for the government of Australia*, September 2005, p. xv

64 Insurance Australia Group, *Submission* 19, p. 4

65 Insurance Australia Group, *Submission* 7 to the PJC Inquiry on the ACC Annual Report 2003-2004, p. 1

66 Mr Miles Jordana *Committee Hansard,* Canberra 7 October 2005, p. 5

answering questions.[67] Under section 30 of the current ACC Act, such persons may be charged with an offence, and if convicted by the Court, may receive a fine or up to five years imprisonment.

3.111 To date, there have been seventy-three referrals to the Commonwealth Director of Public Prosecutions for these offences. As Mr Bermingham told the Committee:

> We have completed about 39. Of those 39, only seven had been finally determined by a finding of guilt or otherwise. There was one acquittal and there have been six convictions. So we see it as fairly early days, looking at the history of events. Of those six matters, the penalties ranged from a fine in two instances to custodial terms imposed in the other four. They ranged from a very short period to terms of two or three months and 12 months.[68]

3.112 However, the evidence suggests that either these provisions, or their administration, requires attention to ensure less delayed outcomes.

3.113 The offences as they exist in the ACC Act must be prosecuted through the courts. However, as Mr Melick told the Committee, similar provisions in the NCA Act caused difficulties:

> By the time they got around to prosecuting, it was well down the track. …I was always very keen to have the contempt power unless we could get guaranteed cooperation in getting people before the courts almost straightaway.[69]

3.114 Mr Hannaford told the Committee that the examiners are of the view that there needs to be 'some strengthening in this area'[70] and Mr Jordana also indicated that the process is too slow.[71]

3.115 Four options, singly or in combination, have been proposed to increase the effectiveness of the coercive powers:

- The introduction of a contempt power
- The development of expedited procedures for handling the matters before the courts
- An increase in the penalties
- Vary the bail presumption

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67 Commonwealth Attorney General's Department, *Submission 17,* p. 14

68 Mr Bermingham, *Committee Hansard*, Canberra, 7 October 2005, p. 14

69 Mr Aziz Melick, *Committee Hansard,* Sydney 9 September2005, p. 29

70 The Hon John Hannaford, *Committee Hansard,* 7 October 2005, p. 5

71 Mr Miles Jordana, *Committee Hansard,* 7 October 2005, p. 4

Contempt powers

3.116 The first option is to give the Commission itself powers to punish for these offences rather than have to refer an offence to a court. This has the advantage of being able to deal with a recalcitrant or unwilling witness immediately.

3.117 There is also some precedent for the consideration of such powers. In 2000, the NCA Amendment Bill included contempt provisions, although these did not proceed. The *Independent Commission Against Corruption Act 1989 (NSW)* also initially contained contempt provisions, but these have since been removed.

3.118 This option did not find favour with a number of experienced lawyers. The Hon Jerrold Cripps QC, a Commissioner of ICAC, told the Committee that ICAC's contempt powers had been removed because:

> it was thought those contempt proceedings are appropriate to courts of law but they should not be very readily transposed to administrative tribunals.[72]

3.119 Similarly, Mr Costigan QC, a former Royal Commissioner, told the Inquiry:

> I have never been a great fan of the contempt concept. I think if people are not going to answer questions then they are not going to answer them. My experience when I was doing the royal commission, particularly in terms of confidential hearings … was that I did not have much trouble with people refusing to answer questions; my difficulty was that they told lies.[73]

3.120 The Law Council of Australia agreed:

> It would be our position to think that the person should not be dealt with by the ACC for contempt but that the matter be referred to a judicial officer to deal with.[74]

Expedited proceedings

3.121 The second option is to make arrangements to ensure that offences of this type are dealt with by the courts in the quickest possible time. As Mr Terry O'Gorman told the Committee:

> If there is a delay then it is a matter, whether by negotiation with the court or by legislation, of giving it a fast-track…. I would not have thought that would be particularly hard to do.[75]

3.122 Mr Hannaford, an ACC Examiners, appeared to agree with these views.[76]

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72 The Hon Jerrold Cripps QC, Commissioner of the Independent Commission Against Corruption, *Committee Hansard,* Sydney, 9 September 2005, p. 5

73 Mr Frank Costigan QC, *Committee Hansard,* Canberra, 7 October, 2005, p. 54-55

74 Mr Ross Ray QC, *Committee Hansard,* Canberra, 7 October 2005, p. 47

75 Mr Terry O'Gorman, *Committee Hansard* Brisbane, 15 August 2005, p. 39

Increased penalties

3.123 As noted, under sections 29 and 30, if a person refuses to attend, refuses to produce documents, refuses an oath or affirmation or refuses to answer questions, there is a maximum penalty of 200 penalty units ($22,000) or five years imprisonment. Commissioner Keelty was of the view that these penalties should be increased.[77]

3.124 The Attorney General's Department submission offered a slightly different view:

> The existing penalties are probably high enough in principle to deter any witness who would be concerned at the prospect of imprisonment, but their effectiveness depends on the ease of prosecution and the willingness of the courts to make full use of the available penalties.[78]

Remove or change the presumption in favour of bail

3.125 Another suggestion was removal of the presumption in favour of bail for persons who refuse to answer questions at an examination. Commissioner Keelty said in evidence;

> The presumption to bail in these cases needs to be withdrawn, I think. There is no point having a person before an ACC hearing, charging them with not cooperating with the hearing and then providing them with bail. So I think the presumption to bail has to be eliminated and the penalties have to be much more severe than they already are. [79]

3.126 The presumption in favour of bail has been contracting for some time. In NSW, numerous amendments to the *Bail Act 1978* have resulted in a list of offences for which there is a presumption against bail. These include certain drug offences, repeat serious property offences and serious firearms and weapons offences.

3.127 The Law Council of Australia did not support the proposition on the basis that the purpose of refusing bail is to protect the community:

> To simply reverse the onus here seems to be really a threat rather than a logical response to a risk to the community and a threat to the individual to then behave and give evidence in accordance with the wishes of the examiner.[80]

3.128 Mr Costigan was also not in favour of reversal:

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76 The Hon John Hannaford, *Committee Hansard,* Canberra, 11 October 2005, p. 5

77 Commissioner Keelty, *Committee Hansard*, Canberra, 7 October 2005, p. 29

78 Commonwealth Attorney General's Department, *Submission 17*, p.13

79 Commissioner Keelty, *Committee Hansard*, Canberra, 7 October 2005, pp. 29

80 Mr Ross Ray QC, *Committee Hansard*, Canberra, 7 October 2005, p. 41

> I think you start off with the presumption that people should not be locked up without good cause. There are some well-defined exceptions in the Crimes Act around the country and it requires a very serious offence like murder to get the reversal. I am not sure what happens in the terrorist organisations, but I think there might be a case there for reverse onus on appropriate evidence, but not generally.[81]

Conclusions

3.129 The Committee agrees with witnesses that it is not appropriate to provide the ACC Examiners with contempt powers, which are appropriate only to courts.

3.130 The Committee is not convinced that there is any substantial reason to remove the presumption in favour of bail nor to introduce a reverse presumption at this stage, although the Committee concedes that there is always a risk that a person accused of an offence under the ACC Act may abscond before the matter is dealt with. Should there be evidence that this is a problem for the ACC the matter could be reconsidered, but any action to remove or alter the presumption should not, in the Committee's view be taken only because there is a fear that witnesses might disappear.

3.131 The Committee considers that the most prudent and potentially the most effective measure, is to retain the current offence provisions, but come to an arrangement with the courts to expedite the court's dealing with the offence. A timely disposition of these matters could be achieved through the implementation of a suggestion by Mr Kerr that 'a protocol between the Commonwealth and the courts [be developed] to enable priority to be given to disposition of these matters.'[82]

3.132 Although officers of the Commonwealth Director of Public Prosecutions foresaw difficulties with this approach,[83] the Committee points out that there are already many matters that go before the courts which are the able to be dealt with urgently.

3.133 The Committee also suggests that consideration be given to allow State Courts to deal with these matters.

Access to police powers

3.134 During the inquiry there was discussion about the most appropriate arrangements for ACC officers to be granted police powers, including the right to carry firearms, and the right to use of force. This is likely to be necessary in circumstances where staff may need to apply for and execute warrants or may need to be armed for self-protection, and are likely to fall into one of two categories:

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81 Mr Frank Costigan QC, *Committee Hansard* , Canberra, 7 October 2005, p. 55

82 The Hon Duncan Kerr, *Committee Hansard,* Canberra, 7 October 2005, p. 41

83 Mr Bermingham, *Committee Hansard*, Canberra, 7 October 2005, p. 15

- Either a former member of a law enforcement agency who takes up a position as a civilian team leader of surveillance or as a civilian team leader in an investigation or intelligence area; or
- seconded police officers from a state/territory and who are required to operate in another state or to deal with Commonwealth matters.

3.135 In the short term, this requirement was addressed by:

> a limited system of swearing specific ACC officers as AFP Special Members allowing them to exercise certain police powers, including use of force. The AFP has placed a range of conditions on the use of the Special Member provision including minimum training requirements for ACC officers and the applicability of AFP critical incident management procedures in any incident involving AFP Special Members within the ACC.[84]

3.136 Commissioner Keelty explained in evidence that these would generally be people with particular skill capabilities, and 'by and large they would all be people who are police.'[85]

3.137 The use of these special constable provisions raises several concerns. The principal problem is, as Mr Jordana of the Attorney General's Department explained: that:

> these persons are not under the control of the police force which appointed them but those same police forces remain notionally responsible for their use of police powers.[86]

3.138 In so far as the first category of civilian members of the ACC being sworn in as special constables, there is the additional concern that it blurs the line between police and civilians, notwithstanding that in practice most of the individuals concerned will be ex-police. This concern is twofold. First is the practical issue of ensuring that the requisite standards of training and competence are met. Second is the appropriateness of having civilians exercising police powers.

3.139 The exact extent of the powers concerned have not been identified. The Committee is not therefore clear whether the requirements for these ACC civilian officers is limited to the carriage of firearms, or extends to the full range of powers of an AFP officer.

3.140 All officials agreed that the special constable arrangements should be viewed only as temporary.[87] Mr Milroy told the Committee that:

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84 Australian Federal Police *Submission 17,* p. 12

85 Commissioner Keelty, *Committee Hansard,* Canberra, 7 October 2005, p. 28

86 Mr Miles Jordana, *Committee Hansard,* Canberra 7 October 2005, p. 4

> the current arrangements are probably not satisfactory in the long term and that there is a need for a class of officer or that the ACC should see some protection under its own act for officers who are required to carry out specific operational duties who are public servants – that is, who have the required training and skill to carry out specific duties but who are no longer sworn officers of a police or a regulatory body.[88]

3.141 Mr Jordana proposed one solution:

> Options for addressing the ACC's needs that could be considered include creating a class of authorised ACC officers to exercise some or all of the powers of a constable or only focusing on particular powers or immunities for particular circumstances or people.[89]

3.142 The Committee agrees that in the longer term it is not appropriate to use the current arrangements for using special constables of the AFP, particularly as it is not entirely clear what the powers are, what they need to be, and what circumstances necessitate appointing them.

3.143 The Committee notes the solution to this issue adopted by the United Kingdom recently for its new Serious Organised Crime Agency (SOCA), a body analogous to the ACC. The establishing legislation, the *Serious Organised Crime and Police Act 2005* in the United Kingdom provides Serious Organised Crime Agency with the powers of a constable, an officer of Revenue and Customs and a person having the powers of an immigration officer.[90] The appointment may be limited by time, and by the extent and kind of powers to be exercised.

3.144 The ACC Act has no such specifications. The Committee considers that the current uncertainty is inappropriate and that where ACC civilian officers have a legitimate operational requirement to exercise police powers, these powers and the conditions for their use should be specified in the ACC Act. This would be consistent with the powers granted to the officers of similar specialist agencies such as ASIO or Customs.

3.145 The Committee also notes the experience of several other agencies in relation to the carriage of firearms.

3.146 Mr Lionel Woodward, Chief Executive Officer of the Australian Customs Service, told the Committee that his agency has two categories of armed employees.

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87 Commissioner Keelty, *Committee Hansard,* Canberra, 7 October 2005, p. 29; see also AFP, *Submission 17*, p. 12

88 Mr Milroy, *Committee Hansard*, Canberra, 11 October 2005, p. 11

89 Mr Miles Jordana, *Committee Hansard,* Canberra, 7 October 2005, p. 4

90 Section 43 *Serious Organised Crime Act 2005 (UK)*. See also UK House of Commons Library, *The Serious Organised Crime and Police Bill – the new agency; and new powers in criminal proceedings*, Research Paper 04/88, p. 11

The first deals with wildlife, and the second – more recently created category – are located in the National Marine Unit. Mr Woodward continued:

> I think the lessons to be learned are to ensure that national standards are applied, that a firm legislative basis is formed, that there are operational procedures which make absolutely clear the circumstances in which a firearm can and cannot be used and that it is a last resort – our people are equipped with a range of other devices, including capsicum spray – and that there is training to the AFP standard, which we do.[91]

3.147 Conversely, Mr John Pritchard Deputy Commissioner of the ICAC, told the Committee that ICAC investigators were armed until about three or four years ago. The matter was reviewed due to Occupational Health and Safety issues which arose, and the investigators were disarmed.[92] Mr Pritchard continued:

> … the surveillance unit has recently had its arms restored because of the nature of the work they carry out. There is a strong case that there is a greater need for them to have some personal protection in the way they operate.[93]

3.148 Mr Pritchard also told the Committee that the ICAC has memorandum of understanding with the New South Wales Police to allow it to draw on their resources to assist in situations where a risk assessment is made for a particular investigation. The example cited by Mr Pritchard was the execution of a search warrant where the risk assessment suggests the occupants of premises could be dangerous.

3.149 There are legitimate concerns surrounding the use of ACC personnel who are not police having access to arms and the use of force. However, there are also persuasive arguments from other agencies, and it is interesting to note that the ICAC has had to reinstate the ability to bear arms for its surveillance staff.

Recommendation 5

3.150 The Committee recommends that the ACC consider statutory proposals to amend the ACC Act to provide categories of ACC officers with the necessary identified powers, including such matters as the powers to apply for or execute a warrant, and the right to carry a firearm. These should replace the current system of the use of Australian Federal Police special constable provisions.

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91 Mr Lionel Woodward, *Committee Hansard* Canberra, 11 October 2005, p. 35

92 Mr John Pritchard, Deputy Commissioner, Independent Commission Against Corruption, *Committee Hansard,* Sydney, 9 September 2005, p. 12

93 Mr John Pritchard, *Committee Hansard,* Sydney 9 September 2005, p. 12

3.151 From a broad strategic perspective, the Committee notes that these developments, while justified, advance the perception of a gradual drift by the ACC to a body increasingly resembling a police force, and the erosion of the distinction between the ACC and the AFP. The ACC is not, and should not be, a police agency. This is a matter that the PJC will continue to observe closely in the future.