

Parliament of the Commonwealth of Australia

**PARLIAMENTARY JOINT COMMITTEE
ON THE AUSTRALIAN CRIME COMMISSION**

**Review of the
Australian Crime Commission
Act 2002**

November 2005

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ISBN 0 642 71591 2

This document was prepared by the Secretariat of the Parliamentary Joint Committee on the Australian Crime Commission and printed by the Senate Printing Unit, Parliament House, Canberra.

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RECOMMENDATIONS

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.

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.

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.

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.

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.

Recommendation 6

4.48 The Committee recommends that the ACC Act be amended to provide for the appointment of the Commissioner of Taxation to the ACC Board.

Recommendation 7

5.51 The Committee recommends that formal arrangements be instituted to confirm the current practice of reporting allegations of misconduct to relevant accountability organisations, including the PJC, the IGC, the Commonwealth Ombudsman, and the proposed Australian Commission for Law Enforcement Integrity.

Recommendation 8

5.52 The Committee recommends that formal arrangements be put in place to require the Commonwealth Director of Public Prosecutions to notify the Commonwealth Ombudsman, and the proposed Australian Commission for Law Enforcement Integrity of any allegations of misconduct by officers of the ACC.

Recommendation 9

5.61 The Committee recommends that the CEO of the ACC direct, in the ACC Policy and Procedures, that in any case where the ACC procedurally has a choice of regulatory regime for the use of investigatory powers, it adopts as a matter of practice, the Commonwealth protocols.

Recommendation 10

5.128 The Committee recommends that section 55AA of the Australian Crime Commission Act 2002 be amended to broaden the scope of the Commonwealth Ombudsman's briefing to the PJC to include any matter relating to the operations of the ACC.

Recommendation 11

5.136 The Committee recommends that the ACC Act 2002 be amended to provide explicit requirements to Board agencies to provide enumerated classes of information to the PJC on the ACC.

Recommendation 12

5.137 The Committee recommends that the Australian Commission for Law Enforcement Integrity Bill, when introduced, include provisions that provide for scrutiny of the agency's operations by this Committee.

Recommendation 13

5.140 The Committee recommends that the Parliament create a new Parliamentary Joint Committee on Commonwealth Law Enforcement, with jurisdiction to supervise the operations of the Australian Crime Commission, the Australian Federal Police and other Commonwealth law enforcement agencies.

Recommendation 14

5.141 The Committee recommends that the legislation for the creation of the Australian Commission for Law Enforcement Integrity includes provision for the Committee to refer matters to the Commission for investigation, with a requirement to report to the Committee on the results of such investigations. This ensures the completeness and effectiveness of arrangements for scrutinising the operations of agencies, and - were its jurisdiction expanded as recommended above - prevents the Committee's workload from becoming too great for effective Parliamentary supervision of the relevant agencies.

Recommendation 15

6.17 The Committee recommends that where priority issues involving the ACC arise, the Commonwealth continue to grant funds on a 'once-off' basis' when this occurs between budgetary cycles.

Recommendation 16

6.36 The Committee recommends that the issue surrounding the employment of secondees be addressed as a priority. Any review should address the standardisation of salary and working conditions through the development of a common secondment arrangement, as well as the implications of this system on the integrity and disciplinary framework.

Recommendation 17

6.46 The Committee recommends that Section 46B of the Australian Crime Commission Act 2002 be amended to provide that the maximum number of examiners allowed to work with the Commission at any one time be limited to three. The Committee also recommends that a further provision be inserted allowing the regulations to review and prescribe a higher number of examiners if and when the need arises.

Recommendation 18

8.9 The Committee recommends that regulatory, or if necessary legislative changes be introduced to allow persons summonsed for an Examination to be eligible for legal aid from the legal aid commissions, subject to the usual means tests.

Chapter 1

Introduction

The Committee

1.1 The Parliamentary Joint Committee (PJC) on the Australian Crime Commission (ACC) is established under section 53 of the *Australian Crime Commission Act 2002*. The duties of the Committee are set out in section 55:

- (1) The duties of the Committee are:
 - (a) to monitor and to review the performance by the ACC of its functions;
 - (b) to report to both Houses of the Parliament, with such comments as it thinks fit, upon any matter appertaining to the ACC or connected with the performance of its functions to which, in the opinion of the Committee, the attention of the Parliament should be directed;
 - (c) to examine each annual report on the ACC and report to the Parliament on any matter appearing in, or arising out of, any such annual report;
 - (d) to examine trends and changes in criminal activities, practices and methods and report to both Houses of the Parliament any change which the Committee thinks desirable to the functions, structure, powers and procedures of the ACC; and
 - (e) to inquire into any question in connection with its duties which is referred to it by either House of the Parliament, and to report to that House upon that question.
- (2) Nothing in this Part authorises the Committee:
 - (a) to undertake an intelligence operation or to investigate a matter relating to a relevant criminal activity; or
 - (b) to reconsider the findings of the ACC in relation to a particular ACC operation/investigation.
- (3) To avoid doubt, the Committee may examine, and report to both houses of the Parliament on, information given to it under section 59.

Terms of reference

1.2 On 20 July 2005, the Committee adopted the following terms of reference:

Pursuant to Section 61A, the Committee will review the operation of the Australian Crime Commission Act 2002, with particular reference to:

1. the effectiveness of the investigative, management and accountability structures established under the Act, including:
 - a) the Australian Crime Commission;

- b) the Chief Executive Officer;
 - c) the Examiners;
 - d) the Australian Crime Commission Board;
 - e) the Intergovernmental Committee; and
 - f) the Parliamentary Joint Committee on the Australian Crime Commission
2. whether the roles, powers and structure granted to the Australian Crime Commission under the Act and associated legislation remain appropriate and relevant to meeting the challenge of organised crime in the 21st century.
 3. The need for amendment of the Act.
 4. Any other related matter.

1.3 The terms of reference include the PJC itself, since as a creation of the ACC Act, it is logical that the review should encompass an evaluation of the Committee's work. The Committee recognised the inevitable difficulty of an objective self-assessment. For this reason, the Committee determined to invite an independent person to examine the PJC's role and performance, with the following terms of reference:

Pursuant to Section 61A of the ACC Act 2002, you are to inquire into the role and functions of the Parliamentary Joint Committee on the Australian Crime Commission, established under Part III of the Act.

In particular:

2. the appropriateness of the Committee's statutory role and functions; and
3. the effectiveness of the Committee in fulfilling its statutory charter, particularly in relation to its key functions of:
 - a) scrutinising the ACC's activities and its use of its special investigatory powers; and
 - b) contributing to policy debate in relation to emerging trends and patterns in organised criminal activity relevant to the ACC.

1.4 Professor James Davis, Emeritus Professor of Law at the Australian National University was chosen with the unanimous agreement of the Committee, and in consultation with the Minister for Justice. In drafting his report, Professor Davis had the benefit of the Committee's own thoughts in relation to its role and performance, which form the section of Chapter 5 titled 'PJC on the ACC'. Professor Davis' report is at Appendix 3.

Conduct of the inquiry

1.5 The Committee advertised the inquiry in the Australian newspaper on Wednesday 3 August 2005, as well as writing to a number of interested organisations and individuals.

1.6 Public hearings were held in Brisbane on 19 August, Sydney on 9 September, Melbourne on 16 September and Canberra on 7, 11 and 13 October. One further hearing was held in Melbourne on Friday 28 October, in order to provide a representative of the Victoria Police with the opportunity to respond to adverse comments made in earlier hearings.

1.7 The Committee wishes to record its appreciation to all those who took the time to prepare submissions and appear before the Committee. Many of the submissions were of high quality and great assistance.

1.8 The Committee wishes to particularly thank the officers of the ACC for their helpfulness and responsiveness to the Committee in providing information, answering additional questions and in their readiness to give evidence on several occasions.

Problems in gathering evidence

1.9 The Committee must also record its disappointment with the lack of cooperation shown by a number of state governments and agencies. These comments relate to two categories of agencies.

1.10 The first category is agencies represented on the ACC Board. The Committee sought meetings with several commissioners of police, including those of Queensland, NSW and Victoria. The NSW Commissioner declined to appear or send a representative.

1.11 In Victoria, Chief Commissioner Nixon also declined the specific request to appear, although as noted, a senior representative of Victoria Police did appear at a special hearing in Melbourne, albeit for the limited purpose of answering criticisms made of Victoria Police by an earlier witness.

1.12 The Queensland Commissioner also declined, but did at least send instead a senior detective. This officer's evidence was valuable and the Committee appreciates his involvement.

1.13 The common rationale in each case appears to be that the officers in question had already made their views known by means of the joint ACC and ACC Board submission, and that they had nothing further to add. Implicit in their refusal is the fact that, as officers of their states, they are not obliged to give evidence to a Federal Parliamentary Committee.

1.14 The Committee does not consider this to be acceptable. While these officers are state government officials, as ACC Board members they are also senior office holders of an agency created by Federal Act of Parliament and as such, they are under a duty to assist the Committee in the same manner that they doubtless (and appropriately) assist members of the Intergovernmental Committee in their considerations.

1.15 Their view that they had nothing further they wished to say to the Committee overlooks the fact that the Committee had matters that it wished to discuss with them. In each case, the Committee had a particular interest in meeting with the Commissioners in their capacity as ACC Board members, to discuss both the national operation of the ACC and the particular criminal and operational environment in their jurisdictions. Other members of the ACC Board proved willing to assist the Committee, including both its Chairman, Mr Keelty, and the CEO of the Australian Customs Service, Mr Woodward.

1.16 The second category comprises agencies with related roles to that of the ACC, and includes the Queensland Crime and Misconduct Commission, the NSW Police Integrity Commission, and the NSW Crime Commission, which all declined to provide information or meet with the Committee. The Committee recognises that these agencies are not subject to the Committee's jurisdiction and are not obliged to assist. However, the fact that they perform closely related tasks in a similar environment suggests that they may be able to provide valuable insights into investigating organised crime and corruption from a perspective perhaps slightly different to that of the ACC.

1.17 It is regrettable that, in an inquiry into the operations of a national law enforcement agency like the ACC, the Committee has encountered such a lack of national perspective or cooperation. The Committee sincerely hopes that there will be opportunities in the future in which it can meet with these related agencies as well as the parliamentary committees that in many cases oversee them.

Overview of the history of the ACC and background to this review

1.18 A series of Royal Commissions during the late 1970's and early 1980's – notably the Moffit, Woodward, Costigan, Stewart and Williams Royal Commissions – led to a belief that a standing Royal Commission was needed to deal with the investigation of serious organised crime. Many felt that police forces had largely been ineffective against organised crime, and traditional methods of detecting and investigating offences were ill-suited to the task of controlling it.

1.19 In contrast with police inquiries, which are essentially reactive and directed towards individuals and individual crimes,¹ the principal attraction of a Royal Commission is the availability of coercive powers, which allow an investigating body to take initiatives which are outside the scope of legally acceptable criminal investigation, and which are not available to police. Most importantly, these extraordinary powers are entrusted to the judiciary, and not to executive agencies.

1.20 These considerations led to discussions in the Australian Police Ministers' Council and the Standing Committee of Attorneys-General with a view to the creation of a National Crime Commission. Legislation for the National Crime Commission

1 National Crime Authority, Annual Report 1984-85, p. 7

was passed by the Commonwealth Parliament in December 1982, but due to opposition from various states and police forces, was never proclaimed. The incoming Hawke government in 1983, announced a review of the National Crime Commission, and a discussion paper was released setting out various options, which, together with other material, formed the basis for a national conference in July 1983. Out of these proceedings came the *National Crime Authority Act 1984*.²

1.21 In the eighteen years of its existence, a perception emerged that there were problems with the fundamental structure of the NCA. This led to a review of the NCA, conducted by former AFP Commissioner Mr Mick Palmer, and former Secretary of the Attorney General's Department, Mr Tony Blunn. This report has never been made public, but its findings, together with the results of the April 2001 Summit on 'a safer Australia' formed the basis for the new Australian Crime Commission Establishment Bill 2002. According to the then Attorney General, Mr Daryl Williams:

If you take the analogy of a car, with the NCA we had an 18 year old car. It may work as well as it can, but it has limits. The government decided it was time to review the adequacy of the NCA as Australia's premier law enforcement vehicle. It decided Australia needed a state of the art organisation to combat the state of the art amenities used by criminal organisations.³

1.22 The Committee's present review represents the continuation in a regular series of reviews of the NCA by the Parliamentary Joint Committee on the NCA, conducted in 1988, 1991 and 1998.

1.23 These reviews continue to assess, at a strategic level, the continuing relevance, effectiveness and accountability of these organised-crime fighting bodies and the wide powers they wield in the national interest.

2 The Hon. R.J. Hawke MP, *House Hansard*, 7 June 1984, p. 3111

3 The Hon. D. Williams QC MP, *House Hansard*, 14 November 2002, p. 9041

Chapter 2

Purpose

Introduction

2.1 This chapter begins with a consideration of the fundamentals of the ACC: why it was created, and whether its purpose is still valid. We then compare these purposes with the organisational focus that the ACC has adopted in practice and assess whether it is heading in the right direction.

Purpose of the ACC

2.2 During debate on the ACC Act 2002, the Attorney General, the Hon. Daryl Williams stated that the ACC was established to 'provide an enhanced national law enforcement capacity through':

- improved criminal intelligence collection and analysis;
- setting clear national criminal intelligence priorities; and
- conducting intelligence-led investigations of criminal activity of national significance, including the conduct and/or coordination of investigative and intelligence task forces as approved by the board.¹

2.3 In relation to its intelligence role, the ACC is to:

- Provide a coordinated national criminal intelligence framework;
- Set national intelligence priorities to avoid duplication;
- Allow areas of new and emerging criminality to be identified and investigated; and
- Provide for investigations to be intelligence driven.²

2.4 Accordingly, under Section 7A of the ACC Act, the aim of the ACC is to: reduce the incidence and impact of serious and organised criminal activity on the Australian community.

2.5 Federally relevant criminal activity is:

- a) a relevant criminal activity, where the serious and organised crime is an offence against a law of the Commonwealth or of a Territory;
or
- b) a relevant criminal activity, where the serious and organised crime:

1 The Hon. D. Williams QC MP, *House Hansard*, 26 September 2002, p. 7328

2 The Hon. D. Williams QC MP, *House Hansard*, 26 September 2002, p. 7328

- (i) is an offence against a law of a State; and
- (ii) has a federal aspect.³

2.6 Serious and organised crime means an offence:

- a) that involves 2 or more offenders and substantial planning and organisation; and
 - b) that involves, or is of a kind that ordinarily involves, the use of sophisticated methods and techniques; and
 - c) that is committed, or is of a kind that is ordinarily committed, in conjunction with other offences of a like kind; and
 - d) that is a serious offence within the meaning of the Proceeds of Crime Act 2002, ...
- (da)that is:
- (i) punishable by imprisonment for a period of 3 years or more; or
 - (ii) a serious offence within the meaning of the Proceeds of Crimes Act 2002;⁴

2.7 The *Proceeds of Crime Act 2002* includes the offences of : 'theft; fraud; tax evasion; money laundering; currency violations; illegal drug dealings; illegal gambling; obtaining financial benefit by vice engaged in by others; extortion; violence; bribery or corruption of, or by, an officer of the Commonwealth, an officer of a State or an officer of a Territory; perverting the course of justice; bankruptcy and company violations; harbouring of criminals; forging of passports; firearms; armament dealings; illegal importation or exportation of fauna into or out of Australia; cybercrime; and matters of the same general nature as one or more of the matters listed above.'

2.8 The role of the ACC has several important aspects:

2.9 First, the ACC – and the National Crime Authority before it – was formed in response to identified weaknesses in the capacity of traditional policing to combat sophisticated organised crime effectively. These weaknesses reflect the characteristics of both traditional policing and organised crime.

2.10 Policing is characterised by strict jurisdictional boundaries across which state, territory and Federal police have limited capacity to act. This has traditionally frustrated efforts by law enforcement agencies to tackle organised crime groups that move freely across state and national borders. The police response to organised crime is further hampered by the need to focus on the heavy demands of community volume policing, with its attendant political demands. As Mr Mellick SC stated:

3 *Australian Crime Commission Act 2002*, s 4

4 *Australian Crime Commission Act 2002*, s 4

It is unfortunate that policing tends to be parochial and reactive in nature and often tends to have to answer to the political expediency of the time.⁵

2.11 Police:

get a certain budget, and if there is a premier screaming about bikie gangs, gang rapes in the south-west or wherever, or parliamentary travel rorts, they are the things that get done and your mind gets taken off the main game.⁶

2.12 This was mirrored by comments of Detective Superintendent Gollschewski of the Queensland Police Service:

Essentially, state jurisdictions are driven by calls for service, volume crime and those issues. A lot of our resources are focused on the call for service and volume crime type issues. We put a bit aside for the organised crime stuff, but we can only do so much ...⁷

2.13 In practice, state police are under significant pressure to react to routine crime such as burglaries, assaults, or street crime, which means there is limited time and few resources for detectives to invest in the long-term, sophisticated and often well-hidden operations of organised crime groups. Put slightly differently, standard police investigations are 'reactive' in that they are focused on solving particular crimes. This approach has been found to be less effective in tackling organised crime where the emphasis must be on unearthing crime that may not be visible, on understanding a wider pattern of criminal behaviour, and anticipating crime rather than reacting to it. It is for this reason that the ACC stresses the importance of its 'intelligence led' investigations. Practically speaking, this means that the investigations of the ACC are less concerned with finding an offender responsible for a particular offence, than with developing a comprehensive picture of the operations, methods and structures of criminal networks.

2.14 The ACC therefore exists to provide investigations that operate across jurisdictional boundaries, equipped with the necessary specialist expertise and resources, and able to focus exclusively on organised crime rather than street crime/volume crime.

2.15 This crucial difference was aptly summed up by Mr Gary Crooke QC, a former NCA Chairman:

[T]he NCA was there not only because of the federal limitations on jurisdiction but, more particularly, like a royal commission, to get to the background of the problems, discover whether there was something systemic and put together a bigger picture. ...

5 Mr Aziz Mellick SC, *Committee Hansard*, Sydney, 9 September 2005, p. 24

6 Mr Aziz Mellick, *Committee Hansard*, Sydney, 9 September 2005, p. 27

7 Detective Superintendent Stephan Gollschewski, *Committee Hansard*, Brisbane, 19 August 2005, p. 26

to take it further and say, ‘Well, where did that come from, where did it come from before that, where did the money come from, what was the money trail and was there overseas involvement and the like?’ There is a world of difference in that. When you are in the field as a police officer and the constraints on you are to get results and move on to the next one, you cannot take that attitude. The public demands that you just get on with it, arrest the person and say, ‘Next, please.’⁸

Issues relating to the purpose of the ACC

2.16 Evidence to the Committee raised several issues relating to the purpose of the ACC: is there still a need for the ACC, and is the ACC focusing on the right things?

Is the ACC still needed?

2.17 A perhaps rhetorical, but nevertheless valid, question is whether the rationale for the creation of the ACC remains. This question takes two forms: is a specialist organised crime fighting body, equipped with special coercive powers, still needed in the current and foreseeable organised crime environment? Secondly, does there need to be a separate ACC or could its role be equally fulfilled by transferring its powers to some other existing law enforcement agency – in particular, the Australian Federal Police?

2.18 Predicting the future criminal environment is always difficult – a matter that is explored in more detail in the final chapter. However, it is clear from the evidence that the task of combating serious and organised crime will continue to be complicated by the wider trends towards globalisation in banking and commerce, and driven by the increasing capacity and speed of information technology, telecommunications and transport. According to Mr Milroy, CEO of the ACC:

Most notable are the uptake of mobile systems, increased data transmission rates and the proliferation of increasingly powerful multifunction devices. There is ample evidence that criminal groups are taking advantage of these developments and as a result continue to become more flexible and sophisticated in their operations.

In the coming years there is no doubt that serious organised crime will continue to engage some of the best professional minds in the legal and accounting professions, as well as engaging and soliciting information and advice from experts in shipping, transportation, travel, banking, finance and communication technology. This will be aided by the time-held strategy of organised crime corrupting people in the public and private sectors to facilitate ongoing criminal enterprises and activities.

8 Mr Gary Crooke, QC *Committee Hansard*, Brisbane, 19 August 2005, p. 42. Note also the comments of The Hon. D. Williams MP, *House Hansard*, 26 September 2002, p. 7328; Mr Frank Costigan QC, *Committee Hansard*, Canberra, 7 October 2005, p. 51; and Mr Aziz Mellick SC, *Committee Hansard*, Sydney, 9 September 2005, p. 27

The commission believes that major developments and trends that may occur in Australia over the next five years are likely to involve finance sector fraud becoming even more prevalent, serious and organised crime groups continuing to develop regional partnerships to facilitate the trafficking of a wide range of illicit commodities, the lucrative and growing nature of the local amphetamine market, and identity crime remaining a key enabler of many criminal activities.⁹

2.19 The increasingly transnational nature of this type of crime will be further influenced by a pattern towards more fluid and opportunistic organised crime syndicates. As Louise Shelley, the Director of the US Transnational Crime and Corruption Centre argues:

Transnational crime will be a defining issue of the 21st century for policymakers – as defining as the Cold War was for the 20th century and colonialism was for the 19th. Terrorists and transnational crime groups will proliferate because these crime groups are major beneficiaries of globalization. They take advantage of increased travel, trade, rapid money movements, telecommunications and computer links, and are well positioned for growth.¹⁰

2.20 Based on these factors, it is evident that the rationale that underpinned the creation of the ACC, and its predecessor the NCA, has grown stronger in the years since its inception.

2.21 But does there need to be a separate agency such as the ACC, or might it not be more efficient to simply role the ACC into the larger AFP?

2.22 The Australian Federal Police Association (AFPA) submission to the inquiry argued strongly that there is little justification for retaining a separate ACC, which it argues should be merged into the AFP. Pointing to efficiencies in staff management, the capacity of the larger organisation to provide better career structures and the better handling of integrity issues, the AFPA submits that:

... 21st Century organised crime in its many facets requires a well resourced professional organisation to effectively fight and win the battle. The AFPA maintains that the AFP is that body. To fund other agencies, including the ACC, merely dilutes resources into unnecessary duplications.¹¹

2.23 The Committee also notes the comments of Mr Costigan QC, who suggested that, in his view, the ACC is already almost a subset of the AFP:

9 Mr Alastair Milroy, *Committee Hansard*, Canberra, 7 October 2005, p. 61. Note also the comments by Mr Frank Costigan QC, *Committee Hansard*, Canberra, 7 October 2005, p. 51

10 Transnational Crime and Corruption Centre, www.american.edu/tracc/, accessed 14 October 2005

11 AFPA, *Submission 16*, p. 4

the ACC is, in effect, another police force under the control basically of the AFP but with the assistance and cooperation of the police commissioners of the states and territories.¹²

2.24 There were, and remain, four considerations behind a separate ACC. The first is the long standing objection to granting coercive powers to police forces¹³ (a matter that is examined in detail in chapter 4). Second, as a matter of law, the AFP cannot perform the role of the ACC. The AFP's task is to investigate offences under Commonwealth law, and has no jurisdiction to investigate state or territory offences, which remain the preserve of the relevant state and territory police forces. To perform the ACC's national role, the states and territories would need to pass complementary legislation (as they have done with the ACC). However, for political reasons, this is unlikely to occur, as Mr Costigan pointed out:

if you did not have it as a separate body and you gave to the AFP the powers which you have given to the ACC, it would be more likely that you would have problems with the states. I think if for no other reason you are going to get this better working relationship, which is absolutely critical, then you need to draw it back a bit from one police force.¹⁴

2.25 The ACC provides a politically and jurisdictionally neutral focal point for the creation of joint task forces in areas that are not necessarily of interest or relevance to the AFP. Mr Keelty noted that:

a lot of the focus of the ACC has not necessarily been in the same area as the focus of the AFP – examples being the underworld killings in Victoria and the outlaw motorcycle gangs, which by and large tend to be the focus of the state jurisdictions rather than the AFP. So in a sense we are complementing each other. ... The AFP already has quite an extensive network in overseas countries. Hopefully we are value adding to the ACC as much as the ACC is value adding to us.¹⁵

2.26 The ACC therefore does not duplicate the AFP role, but rather seeks to complement both the AFP and the state and territory police forces. Most importantly, the ACC's greatest strength is its intelligence role. As Mr Keelty explained:

there is no other body in law enforcement in this country that can provide the over-horizon strategic assessment of what is coming around the corner in terms of law enforcement. ...

To take a 10-year look at where we are at this point in time, we have a big focus on terrorism, transnational crime and the trafficking of women and

12 Mr Frank Costigan QC, *Committee Hansard*, Canberra, 7 October 2005, p. 53

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

14 Mr Frank Costigan QC, *Committee Hansard*, Canberra, 7 October 2005, p. 54

15 Mr Mick Keelty, *Committee Hansard*, Canberra, 7 October 2005, p. 34

children. They are crimes not focused on before by law enforcement agencies.¹⁶

2.27 The ACC's role as a national criminal intelligence agency is worth closer examination, since it is an area where it differs somewhat from its nominal predecessor, the NCA, which had more of an independent investigatory focus, and existed separately from the Australian Bureau of Criminal Intelligence. Combining the two functions – investigative and intelligence – gives the ACC important advantages.

2.28 First, there are significant practical advantages for an intelligence agency to be able to proactively collect its own material. As Mr Mellick SC, a former Member of the NCA explained, the two functions of investigation and intelligence are inextricably intertwined and it is artificial to try to separate them:¹⁷

In my experience, it was always the case that the best intelligence came from your own investigations. People tended to close-hold matters they found out themselves because of being possessive or suspicious. ... But, often, significant matters of intelligence just did not get passed on because of either concerns about security or parochial issues.¹⁸

2.29 Relying on other police agencies to provide information is not always adequate for the additional reason that they may not be looking for the same things. As Mr Mellick SC further explained, one of the best ways you get genuine intelligence is 'being on the ground with a mindset of what you are looking for':

If you are walking around a street doing a surveillance operation, you tend to look for the things that that particular operation has got you attuned to looking for. It was quite interesting the number of times our NCA surveillance teams picked up matters on another investigation because of their knowledge from the hearing process about that investigation even though it was not one of their investigations. To me it just accentuates the fact you have got to be on the ground yourself gathering the intelligence as well as using other people.¹⁹

2.30 Second, access to coercive powers has always been heavily restricted. These powers are becoming more widespread among law enforcement agencies,²⁰ so the ACC's role can no longer be defined by the singularity of these powers. In contrast,

16 Mr Mick Keelty, *Committee Hansard*, Canberra, 7 October 2005, p. 35

17 Mr Aziz Mellick SC, *Committee Hansard*, Sydney, 9 September 2005, p. 34

18 Mr Aziz Mellick SC, *Committee Hansard*, Sydney, 9 September 2005, p. 24

19 Mr Aziz Mellick SC, *Committee Hansard*, Sydney, 9 September 2005, p. 28

20 Most states now have agencies which share the coercive powers of the ACC, including the Queensland Crime and Misconduct Commission, the NSW Police Integrity Commission, the NSW Crime Commission, the NSW Independent Commission Against Corruption, the Corruption and Crime Commission of Western Australia, and the Office of Police Integrity in Victoria.

the role of national criminal intelligence agency is one that is clearly unique to the ACC. Mr Milroy told the inquiry:

the ACC is playing a unique and significant national role in gathering, correlating and analysing national criminal intelligence and information gained from Commonwealth, state and territory law enforcement agencies and the private sector. The commission adds value to this intelligence and disseminates it in a strategic and actionable form to assist in determining a national response to serious and organised crime. This helps shape law enforcement policy and strategic direction at both a jurisdictional and a national level.²¹

2.31 And further:

it particularly recognises the importance of its national criminal intelligence priorities and the picture of criminality in Australia to strategic intelligence products that are informing national law enforcement policy and operational responses to the activities of serious and organised crime groups in this country. ... It is progressively establishing itself as a critical national repository for criminal intelligence and information. As mentioned previously, it is playing a key role in facilitating the exchange of this intelligence.²²

2.32 This view is also evident in the submission from the AFP:

In the AFP's view the most significant role assigned to the ACC is its intelligence function. While there are numerous investigative LEAs in Australia, the ACC's role as the national criminal intelligence agency is a unique one in Australian law enforcement and serves as a significant capacity enhancement for the ACC's partners.²³

2.33 The Committee endorses this role and considers that given the likely trends in organised criminal activity, there remains a strong and probably growing role for the ACC.

ACC Priorities

2.34 A final matter to consider is whether the ACC is focusing on the right matters.

2.35 The ACC's strategic priorities are set by the ACC Board, and are set out in the National Criminal Intelligence Priorities (NCIPs) and in the authorisation of the ACC operational work.²⁴ To date, the Board has approved Intelligence Operations and Special Intelligence Operations in relation to:²⁵

21 Mr Alastair Milroy, *Committee Hansard*, Canberra, 7 October 2005, p. 60

22 Mr Alastair Milroy, *Committee Hansard*, Canberra, 7 October 2005, p. 61

23 AFP, *Submission 10*, p. 10

24 ACC, *Submission 14*, p. 16

25 ACC, *Submission 14*, p. 5

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- ID Crime and card skimming
 - Amphetamines and Other Synthetic Drugs (AOSD)
 - Vehicle re-birthing
 - Major fraud
 - Serious and organised fraud
 - Identity crime
 - People trafficking for sexual exploitation
 - Crime in Australia's category one airports and Board approved category two airports.
 - Outlaw motorcycle gangs

2.36 Special investigations authorised by the Board are:

- Established Criminal Networks
- Firearms
- Money laundering and tax fraud
- Established Criminal Networks (Victoria)
- High risk crime groups

2.37 Comment from one submission suggested that the ACC's strategic priorities could be improved. Mr Bottom, an author and journalist with long experience with organised crime, told the Committee that the ACC should remain focused on what he sees as its 'core business' – drug trafficking:

Our criticism is basically that, whilst the ACC is doing a good job in targeting a multiplicity of aspects of organised crime, it is tending to overlook the most serious aspect, which is what it was set up for. There were a series of federal and state royal commissions concerned about the drug trade. That seems to be subsumed now in these multifaceted approaches by the modern ACC.²⁶

2.38 He concludes that 'As valid and necessary, as all these Determinations may be, emphasis on tackling the networks involved in drugs should have the highest priority.'²⁷

2.39 The Committee does not agree with this view. The ACC is not, and has never been, an agency designed exclusively to combat drug trafficking. As is explicit in the purpose of the Act, the Commission's purpose is to target serious and organised crime. The Act then leaves considerable flexibility for the ACC Board to determine which aspects of organised crime to focus on, reflected in the National Criminal Intelligence

26 Mr Bob Bottom, *Committee Hansard*, Brisbane, 19 August 2005, p. 4

27 Mr Bob Bottom, *Submission 1*, p. 2

Priorities and the Board Determinations. This flexibility is important, because the focus and tactics of organised crime groups will vary over time, adapting to new market opportunities and constraints, and the ACC must be able to change its own focus accordingly.

2.40 Stated differently, drug trafficking is just one of a number of illegal business activities undertaken by organised crime syndicates. So while illicit drugs are an important part of organised crime operations in Australia – and this importance is reflected in the operational focus of the ACC – they are not the only part.

2.41 The ACC needs have the ability to investigate and understand the totality of these illegal businesses, and have the operational freedom to focus its attacks on the weakest parts of syndicates' operations. The most effective way to shut down a drug trafficking network may be through one of its other, more vulnerable, operations.

2.42 The ACC Board, with the accumulated experience of its membership, and advised by ACC intelligence, is well placed to direct this focus.

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.

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

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;

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

- whether there is a privilege against spousal incrimination and if so, whether it 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

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

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

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

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 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:

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 submission²⁶ 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

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.

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.

And

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

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

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

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 document⁴⁶ 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.

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

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 from public interest immunity) but that is subject to the general law as it applies to such claims before the courts.⁵⁴

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.

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.

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:

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

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

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 September 2005, 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

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:

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:

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:

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.

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.

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.

Chapter 4

Structure

Introduction

4.1 This chapter examines the elements of the structure established by the *ACC Act 2002*, and in particular, the relationships between some of these elements.

4.2 The aspect of the ACC's structure that attracted the most comment throughout the inquiry is the Board, probably because it differs so fundamentally from the structure of the National Crime Authority. Other elements of this quite complex organisation received little or no comment in the evidence presented to the Committee. Thus, potentially interesting configurations and relationships created within this structure are left unexplored in this review, such as:

- the role of the Minister for Justice and other parts of the ACC
- the role of the Intergovernmental Committee (IGC); and
- the internal structure of the ACC itself.

4.3 Ideally, this lack of comment reflects a well balanced and effective structure which is generating no problems.

4.4 It should be noted that the role of examiners is addressed in chapter 3 of the report, while the CEO's role is considered below in the context of his relationship with the Board.

Overview of the ACC structure

4.5 The ACC Act creates an organisation with five core elements:

- The ACC:¹ which is internally subdivided into four directorates: operations, intelligence, infrastructure and corporate services, and strategy and governance.
- The CEO: who is responsible for the management and administration of the ACC, who acts in accordance with policies determined, and any directions given, in writing by the Board, and who must also manage, co-ordinate and control ACC operations/investigations.²

1 Created by sections 7 & 7A

2 Division 3 Subdivision A. Duties are set out in section 46A

- The Examiners: who are responsible for the conduct of Examinations carried out pursuant to the Act for the purposes of a special ACC operation or investigation.³
- The ACC Board: which is primarily focused on providing strategic guidance to the ACC and the determination of its priorities.⁴
- The IGC: which monitors the operations and strategic direction of the ACC and the Board, and receives reports from the Board for transmission to the governments represented.⁵
- The Parliamentary Joint Committee on the ACC (the PJC):⁶

4.6 Thus, in practice the Act provides for an organisation led by a CEO, which reports to the Board, and whose special coercive powers are authorised by the Board and exercised by the Examiners. The overall organisation is then scrutinised by the IGC, the PJC and the Ombudsman.

4.7 This can be contrasted with the NCA, which was headed by a Chair and two other Members. This group had administrative control, led investigations and exercised the coercive powers. The NCA reported to an Intergovernmental Committee which, much like the ACC IGC, consisted of relevant ministers of the Commonwealth government and the states, and was responsible for general oversight of the NCA and the referral of particular matters for special investigations using coercive powers.

4.8 It is also relevant to recall the management structure of the Australian Bureau of Criminal Intelligence (ABCI), which was incorporated into the ACC. Although the ultimate responsibility in matters of policy for the ABCI rested with the Australian Police Ministers' Council, operational control belonged with a Management Committee of all Australian Commissioners of Police, to which the Director of the ABCI reported.⁷

4.9 It is evident from these antecedents, how the new ACC incorporated elements of its predecessor organisations into its management structure, with the NCA IGC becoming the ACC IGC, while the ABCI Management Committee was effectively transformed (with some additions) into the ACC Board.

3 Examiners are appointed pursuant to Division 3 Subdivision B; duties are outlined in sections 24A & 25A

4 ACC, *Submission 14*, p. 16. See Division 1 Subdivision B. Functions of the Board are set out in section 7C.

5 Division 1 Subdivision C

6 Part III. For further details on the role and activities of the PJC, see Chapter 5 Accountability.

7 Keith Askew, Assistant Commissioner, Director ABCI, *Drugs – the role of the ABCI and the Australian Criminal Intelligence Database*, Paper to the Asia Pacific Technology Conference 1993

The ACC Board

4.10 The Committee is aware that there are significant difficulties in making any assessments of the Board's operations given that it meets in private and its minutes are not published. However, the evidence collected during the inquiry indicates that the Board is proving successful in its structure and operations.

4.11 It is certainly clear that the Board has been active. As Mr Milroy told the Committee, while the Act only requires the Board to meet twice per annum, it has managed to meet around four times each year, and in one year met five times.⁸ Considering that the Board members have to converge from all over the country, and each can be expected to have extremely busy schedules, this is no mean achievement.

4.12 Mr Milroy further explained that the Board operates outside of formal meetings through several mechanisms. In between the Board meetings there is a strategic direction committee, which was established by the Board and consists of the Chair, the Chief Officer from the ACT, the Commissioner from New South Wales and the CEO.⁹

In addition to that, I go around the country and meet with the board members, between every board meeting, to discuss the board agenda, to look at any policy issues that may be coming from the various board members' environments and to discuss the work that the ACC has been doing, particularly in the determination area.¹⁰

4.13 The Board has also made decisions on all matters envisaged by the Act, including establishing the National Criminal Intelligence Priorities and Determinations on special intelligence operations and special investigations, upon which the ACC's use of its special powers depends.

4.14 The Committee was told by Mr Keelty, the Chairman of the Board, that the Board has also developed a successful working culture:

It is a robust board. Those of us who have been around this game for some time are quite surprised at the level of commitment and the level of non-jurisdictional bias there is in trying to get the job done. People represent their views.¹¹

4.15 As Mr Keelty suggests, this is a substantial achievement, given the size of the Board and the diversity of interests and jurisdictions represented on it.

8 Mr Alastair Milroy, *Committee Hansard*, Canberra, 7 October 2005, p. 71

9 Although it should be noted that this Committee cannot exercise any board powers under the Act.

10 Mr Alastair Milroy, *Committee Hansard*, Canberra, 7 October 2005, p. 71

11 Mr Mick Keelty, *Committee Hansard*, Canberra, 7 October 2005, p. 32

4.16 In the context of the major change from the NCA's structure, it is evident that the ACC Board offers several quite significant advantages. The most obvious of these is the capacity of the Board to overcome jurisdictional problems and work at a genuinely national level. As several witnesses commented, this is a fundamental reality of Commonwealth/state cooperation. Mr Jordana of the Attorney General's Department explained that:

the ACC model, through its board structure, has been able to utilise the views of the main law enforcement agencies in Australia and by so doing make sure that the ACC is very much focused on issues that are of immediate concern to policing in Australia, ... ensuring a level of cooperation with the state and territory bodies.¹²

4.17 As Mr Jordana further noted, by ensuring it is of interest to the Australian police forces, you are going to secure levels of cooperation.¹³

4.18 A second factor favouring the existing Board structure is the advantage of having the combined 'wealth of information and experience that the police commissioners can bring together'.¹⁴ This keeps the ACC operating on issues of relevance to national policing:

The existence of senior police people on the Board is ensuring that the main issues of concern to Australian policing are at the forefront of the ACC's activities.

... The kind of decision-making process at Board level assures that you are getting not just a state-centric or individual-jurisdiction-centric take on it; you are getting a collective view from Australia's senior police authorities.¹⁵

4.19 However, as an officer of the Attorney General's Department pointed out, this process goes both ways:

the existence of the ACC board in its present form serves a bit of a dual function in that it not only allows the various heads of police forces and other law enforcement-related agencies to pool their collective experience in making judgments but it also to some extent serves as an educative force in developing a collective and collegiate view among those people as to the law enforcement situation in Australia. So in that sense I think it actually contributes more, in the long run, to national thinking as opposed to parochial thinking.¹⁶

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

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

14 The Hon. Bruce Baird MP, *House Hansard*, 13 November 2002, p. 8958

15 Mr Miles Jordana, *Committee Hansard*, Canberra, 7 October 2005, p. 7. see also Law Council of Australia, *Submission 18*, p. 3; and Bottom, *Committee Hansard*, Brisbane, 19 August 2005, p. 7

16 Mr Michael Manning, *Committee Hansard*, Canberra, 7 October 2005, pp 8-9

4.20 The Committee considers that on the evidence presented, the ACC Board has been successful in its fundamental structure and its emerging working culture. As noted in Chapter 1, the Committee would have appreciated the opportunity to meet with more Board members, and the conclusions it draws here are necessarily limited by the fact that only two Board members gave evidence.

Issues relating to the ACC Board

4.21 Four issues have emerged from the evidence to the inquiry that relate to the structure and workings of the Board:

- The extent of police domination of the Board
- Proposals for extending the Board membership
- Sending delegates to Board meetings
- Allocating roles between the Board and the CEO

Police domination of the Board

4.22 A recurring concern of some commentators, which has existed since early debates on the ACC legislation, is the extent of perceived police domination of the Board. As detailed above, with each of the Australian police commissioners – including the Chief Police Officer of the ACT (who is a member of the AFP) – represented on the Board, police account for nine out of the thirteen member voting Board (not counting the non-voting CEO). Compared with the earlier NCA, whose top leadership were all lawyers, the change to the ACC structure certainly amounted to ‘a “blueing” of the organisation’.¹⁷

4.23 This concern focuses on two matters.

4.24 The first centres on the implications that a police dominated Board has for the strategic directions of the ACC. Critics suggest that the direction of the ACC will inevitably reflect the focus of state police commissioners on provincial concerns and on the clean-up rates for routine crime against which they are judged. This would see a shift in the ACC’s priorities away from its strategic roles and into providing support for more routine policing activities. To this extent that this happens and the ACC becomes a body whose principal task is to support state police in particularly difficult areas, the entire rationale for the organisation is lost.

4.25 A further and opposite aspect of the same problem is if the commissioners are able to use their presence on the Board to keep the ACC out of matters in their own jurisdictions. Mr Mellick SC, a former NCA Member, explained that:

I was always concerned that the organisation changed its nature and structure, because I think it lost, when we did that, the ability to have an organisation that is proactive and acting independently of police forces,

17 The Hon. Bruce Baird MP, *House Hansard*, 13 November 2002, p. 8958

although in conjunction with them, and dealing with matters that may not be strictly policing in such a way that its operational effectiveness would not be impeded by the exigencies of police forces having the necessity of being reactive to whatever political hot potato is going on at any particular time.¹⁸

4.26 As Mr Mellick noted, the NCA ‘got involved in some interesting investigations, which were conducted despite the reluctance of the police to get involved in any way.’¹⁹ Mr Mellick concluded that ultimately, the value of the ACC's structure:

depends what you want the model to achieve. I think the current model is actually achieving extremely good results for police forces. ... But I really think that, if you want a model that is going to be truly independent, able to think outside the box and deal with matters which may not necessarily be part of what is occurring in the criminal milieu vis-a-vis police forces, the current model will not work.²⁰

4.27 Responding to the first matter – the implications for the ACC's strategic directions of a police dominated Board – Mr Milroy argued that:

it is unfortunate that this sort of perception is around and I think it is totally unwarranted, because I believe that the non-police members of the board would not take too kindly to the suggestion that the board is being run by one particular body over another.²¹

4.28 Thus, while nine members of the Board are police, their views are presumably tempered to at least some degree by those of other Board members from the Attorney General's Department, ASIC or ASIO. Further, as Mr Jordana put to the Committee, there is no evidence to suggest that the Board is police dominated. On the contrary, he asserts that the system is working because they are focusing on the right things:

as we look at the kinds of issues that they have focused on, they are the kinds of issues that we would have expected or hoped to have been the kinds of issues that they would be looking at – those of major national importance that relate to organised crime.²²

4.29 The second concern lies in the perception that an ACC leadership dominated by a police culture may have less concern for the protection of civil liberties, due process, and privacy. As the Chair of the Committee, Senator Santoro noted, there is a possibility that:

18 Mr Aziz Mellick SC, *Committee Hansard*, Sydney, 9 September 2005, p. 24

19 Mr Aziz Mellick SC, *Committee Hansard*, Sydney, 9 September 2005, p. 26

20 Mr Aziz Mellick SC, *Committee Hansard*, Sydney, 9 September 2005, p. 25. see also Mr Bob Bottom, *Committee Hansard*, Brisbane, 19 August 2005, pp 5 & 8

21 Mr Alastair Milroy, *Committee Hansard*, Canberra, 7 October 2005, p. 63

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

people who have been trained to be law enforcement officers are probably keener to pursue the investigative function with reasonable and sometimes excessive zeal. In doing so, there might be a willingness, perhaps unconsciously, to have some disregard for individual rights and civil liberties.²³

4.30 Critics therefore contrast the ACC Board structure with the NCA, which was led by senior criminal lawyers. Mr Frank Costigan QC explained the value of lawyers in investigatory agencies of this type:

Lawyers are not trained as police investigators and one must always remember that. On the other hand, they have a very valuable role in an organisation in terms of their experience in the criminal justice system, their understanding of the analysis of evidence and the conclusions to be drawn from it and also their understanding of the basic principles behind the system of criminal justice and the basic rights of individuals who appear before tribunals and courts.²⁴

4.31 In considering this issue, the Committee was mindful that the Act creates a separation between the authorisation of the use of coercive powers (which is done by the Board) and the exercise of those powers, which remains the responsibility of the Examiners who are lawyers.

4.32 The Committee evaluated these concerns carefully and its response is twofold. Overall, the structure of the Board membership reflects a fundamental policy decision as to the nature of the ACC, its role and management. Accordingly, the membership of the Board is consistent with the ACC's function as a national criminal investigative and intelligence agency, that is designed to work closely with law enforcement agencies across all Australian jurisdictions. This structure is unlikely to be substantially altered.

4.33 Second, the Committee is not convinced that the concerns are borne out by the facts at this time. Notwithstanding the significant police presence on the Board, the Committee has not seen any appreciable skewing of the ACC's operations into more politicised or routine policing matters: as Mr Jordana stated, the ACC is doing what it would be expected to be doing.

4.34 Similarly, the Committee has not seen any evidence to suggest that the ACC Board ought to be restructured to minimise police numbers and perhaps increase the influence of lawyers. In practice, the operation of the coercive powers is in the hands of lawyers, since the Board function is to approve their use.

4.35 These criticisms must also be balanced against the very real advantages of having the Board structured as it is. The close involvement of the state and territory police commissioners has done much to advance a more genuinely collaborative

23 Senator Santo Santoro, *Committee Hansard*, Canberra, 7 October 2005, p. 63

24 Mr Frank Costigan QC, *Committee Hansard*, Canberra, 7 October 2005, p. 54

cross-jurisdictional approach to the investigation of organised crime. The reality is that organisations such as the ACC operate in a highly political environment and depend on the goodwill and cooperation of police forces. In contrast, this is an area in which the NCA always struggled.

Changing the Board membership

4.36 Several submissions to the review have argued in favour of expanding the Board membership to include the CEO of the Australian Tax Office (ATO)²⁵ and the Director of the Australian Transaction Reports and Analysis Centre (AUSTRAC)²⁶ and amending subsection 7G(3) of the Act to give the CEO voting rights.

4.37 There seems to be general acceptance by the current Board membership that the CEO of the ATO should be represented. As Mr Keelty told the Committee:

At the time of the creation of the ACC there was care taken not to have an overbalance of Commonwealth agencies over the state and territory agencies. We have worked through that. The board unanimously supports the Commissioner of Taxation being a member of the board, which is an indication of the maturity of the board and how far we have moved.²⁷

4.38 In explaining the rationale for this addition, Mr Keelty stated:

The benefit of the Commissioner of Taxation being on the board would be to have direct insight. Most of the major operations undertaken by the ACC are underwritten by investigations into finances and typically of organised crime. Even in the days of the NCA, typically in organised crime, one of the best ways to attack it has been through attacking the finances. There are not many organised crime entities that do not in some way or another affect our taxation system either through defrauding the taxation system or using the taxation system in a variety of ways to benefit themselves. It would be of enormous benefit to have the Commissioner of Taxation on the board to see the range of operations that are coming to the board and to look for opportunities to improve the performance of both the board and the ACC.²⁸

4.39 The Attorney General's Department showed cautious support:

We see some advantages in this proposal, but we would only support it if there was general agreement amongst the jurisdictions and it was understood that it was not a precedent for the further expansion of the board.²⁹

25 AFP, *Submission 10*, p. 9

26 Law Council of Australia, *Submission 18*, paras 45-47

27 Mr Mick Keelty, *Committee Hansard*, Canberra, 7 October 2005, p. 23

28 Mr Mick Keelty, *Committee Hansard*, Canberra, 7 October 2005, p. 23

29 Mr Miles Jordana, *Committee Hansard*, Canberra, 7 October 2005, p. 3

4.40 In contrast, the case is less clear in relation to AUSTRAC. In responding to this proposal, Mr Keelty noted that the Board itself has not formally considered the matter, although in his personal view, suggested there could be advantages in having AUSTRAC on the Board as it 'is a rich database providing enormous potential and opportunity for [...] the operations conducted by the ACC to be enhanced.'³⁰

4.41 However the Committee notes that, based on the evidence of the Director, Mr Neil Jensen, AUSTRAC has a somewhat different relationship with the ACC compared to, for example, the ATO:

We are one intelligence source to them. We are not a law enforcement agency as such, so our role is perhaps not dissimilar to Crimtrac, for example, which is a source of intelligence.³¹

4.42 In considering these proposals, it is relevant to consider the effect that the changes would have on both the balance of representation of various jurisdictions on the Board, as well as the workability of the Board as its membership increases. These concerns are reflected in the submission of the Attorney General's Department:

The proposal settled between the Commonwealth and state and Territory governments, which was carried through to the legislation as enacted, represented a balance among several considerations. It was desirable to include a broad range of law enforcement agencies without having a board with too many members for effective discussion, and it was important to avoid giving any jurisdiction representation that would be perceived by others as excessive.³²

4.43 The existing Board membership numbers thirteen, which is already a substantial number, and the Committee is aware that as a matter of practicality, there are limits to the numbers you can effectively have on a committee before it becomes unworkable.³³

4.44 A further consideration is that the Board is already able to invite the heads of other agencies to attend Board meetings as an observer, where it feels that it would benefit from getting information or experience in those relevant matters.³⁴ The ATO has had such an observer role in past meetings.

4.45 The remaining issue to consider in relation to the Board membership is the proposal to extend voting rights to the CEO of the ACC.³⁵ The Law Council argues that:

30 Mr Mick Keelty, *Committee Hansard*, Canberra, 7 October 2005, p. 23

31 Mr Neil Jensen, *Committee Hansard*, Sydney, 9 September 2005, p. 17

32 AGD, *Submission 17*, p. 6

33 Noted by Mr Miles Jordana, *Committee Hansard*, Canberra, 7 October 2005, p. 12

34 Mr Alastair Milroy, *Committee Hansard*, Canberra, 7 October 2005, p. 64

35 Mr Ross Ray QC, *Committee Hansard*, Canberra, 7 October 2005, pp 37 & 47

Notwithstanding the pivotal role of the CEO, the CEO is unable to vote as a member of the ACC board pursuant to s 7G(3). This means that, although the operational role of the CEO is critical in giving effect to Board decisions, the CEO does not directly play a part in making those decisions.³⁶

4.46 The agencies concerned generally did not see the need for any change.³⁷ As Mr Milroy noted, the change would have little impact in practice:

because I am allowed by the board to brief them in detail not only in board meetings but also in my regular face-to-face meetings with them around the country between board meetings...³⁸

Conclusions and recommendations

4.47 The Committee notes the unanimous support for the inclusion of the Commissioner of Taxation onto the Board, and agrees that there is considerable merit in the idea.

Recommendation 6

4.48 The Committee recommends that the ACC Act be amended to provide for the appointment of the Commissioner of Taxation to the ACC Board.

4.49 The Committee has not received sufficient evidence to support a similar appointment of the Director of AUSTRAC. As discussed above, AUSTRAC is essentially a provider of information to the ACC, and where necessary, the Board is able to invite the Director to attend Board meetings as an observer. At the same time, the Director of AUSTRAC heads an organisation that is central to Australia's efforts to counter money laundering, and would bring a valuable knowledge and perspective to the Board deliberations.

4.50 Although the Committee does not propose a change in these arrangements at the current time, it is also aware that the growing importance of money laundering and transnational cash flows may lead to change in this assessment; the Committee will continue to review the issue. It is also a matter which both the ACC Board and the Minister may wish to consider.

4.51 Finally, the Committee considered the proposal to amend the Act to provide the CEO with voting rights.

4.52 The Committee does not agree with this proposal. As Mr Milroy himself pointed out, in practice such a change would have little appreciable effect. On the contrary, the Committee considers the current arrangement appropriate from both a

36 Law Council of Australia, *Submission 18*, para 34

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

38 Mr Alastair Milroy, *Committee Hansard*, Canberra, 7 October 2005, p. 63

symbolic and practical level: the CEO, as administrative head of the ACC, reports to the Board. Whilst the CEO attends Board meetings to advise the Board in its deliberations, this does not imply that the CEO ought to have voting rights. To have the CEO as a voting member would involve the CEO voting on his own proposals.

4.53 The Committee also does not agree with the views put by the Law Council of Australia, that making the CEO a voting member would counteract the police influence on the Board. As argued above, the Committee does not accept that this constitutes a problem. However, even were it considered a problem, the Committee is not convinced that the change proposed by the Law Council would be an effective remedy.

Sending delegates to Board meetings

4.54 The Hon. Michelle Roberts MLA, West Australian Minister for Police and Emergency Services, proposed an amendment to the Act to enable delegates to attend ACC Board meetings instead of the Commissioner:

It would be of great assistance to the Commissioner if provision could be made to allow for a suitable proxy to be nominated to replace the Commissioner at Board of the ACC meetings where his absence is unavoidable. It is the view of the Western Australia Police that a person of a rank such as Deputy Commissioner could adequately fulfil the role of the Commissioner ...³⁹

4.55 The Board membership is established in section 7B of the Act, and no provision is made for delegating attendance to others, although Mr Keelty, the Chairman of the Board, noted that an acting commissioner is able attend if the Commissioner is on leave.

4.56 Mr Keelty told the Committee that he remains opposed to the proposed change:

if we delegate we could end up with the lowest common denominator on the Board. That would be an injustice not only to the ACC as an entity itself but also to the wider community, because the ACC has vested in it some extraordinary powers not vested in any other agency of its type.

4.57 According to Mr Keelty, there is also little real need for such a solution since the Board has been able to meet and conduct business effectively even in the occasional absence of certain members:

without doing an injustice to my state and territory colleagues: if one or a number of board members are not present, we do not seem to have lost where the majority of the board people wanted to go. There has been enormous consensus in board meetings ...⁴⁰

39 WA Minister for Police, *Submission 9A*, p. 1

40 Mr Mick Keelty, *Committee Hansard*, Canberra, 7 October 2005, p. 24

4.58 The Committee further notes that in practice this does not appear to be a major issue, based on the attendance at meetings in the previous financial year, at which the majority of members were consistently able to be present.⁴¹

4.59 The Committee declines to accept the Hon. Ms Roberts' recommendation. The Committee strongly believes that the ACC Board is not simply another management or steering committee to which member organisations need send a representative – even one of such rank as deputy commissioner.

4.60 The importance of the decisions made by the ACC Board, based on its determinations and setting of the National Criminal Intelligence Priorities as well as commitment to operations in various jurisdictions represented by those on the Board, requires the personal authority of the statutory members, and this power should not be delegated.

Allocating roles between the Board and the CEO

4.61 A criticism of the existing Board arrangements was made by the Australian Federal Police Association (AFPA), who commented on the relationship between the CEO and the Board, and an inappropriate lack of autonomy by the CEO:

The CEO does not have the resources or managerial independence needed to run the ACC in the manner that was initially expected by the Parliament. ... Unlike the Director-General of ASIO, the CEO is answerable to [the] Board on which he does not even have voting rights. Moreover on simple day to day matters such as sending ACC officers overseas the CEO first has to obtain the permission of the AFP Commissioner.⁴²

4.62 This view is disputed by both Mr Keelty as Chairman of the Board, and Mr Milroy, the CEO. According to Mr Keelty:

in a practical sense Alastair runs the ACC on a daily basis. There is very little interference from the board.⁴³

4.63 Mr Milroy concurred:

They do not intervene in my responsibility in terms of day-to-day management, administration and coordination of operations and investigations.

4.64 In Mr Milroy's view, the ACC Board focuses on the matters that it is intended under the legislation to focus on: making decisions on the National Criminal Intelligence Priorities, and determinations on operations and investigations. Mr Milroy explained the operation of these processes:

41 ACC, *Annual Report 2003-04*, p. 14

42 AFPA, *Submission 16*, p. 2

43 Mr Mick Keelty, *Committee Hansard*, Canberra, 7 October 2005, p. 2

To understand the processes, let me say that we prepare submissions based on intelligence. Those submissions go to the board as statements in support of other intelligence operations, special intelligence operations and special investigations. We will put forward a submission suggesting a certain course of action. Quite rightly, the board brings further knowledge and policy understanding. ... That is the board in their role of setting strategic directions and priorities. ...

On the basis that the board deals with the menu of work, they have a discussion about the submissions. The board may decide that the decision, because of certain factors, should not be as the submission recommended. Then the determination will be changed, or there may be a requirement for us to collect intelligence in another area and come back to the board and advise them on that ...⁴⁴

4.65 Evidence suggests that only on a couple of occasions has the Board differed from the ACC's submissions, such as – in one example – to focus more narrowly the proposed Board determinations on aviation security.

4.66 There is also a distinction that should be made between formal decision making by Board members, and more informal and frequent consultations between Board members and the CEO. Mr Keelty noted that he and Mr Milroy have regular meetings on a range of issues requiring his input, and he also communicates routinely with Board members out of session.⁴⁵

4.67 The Committee further notes the comments of Mr Jordana of the Attorney General's Department:

The separation of the roles of the chief executive officer and examiners in the ACC has in our view proved successful. The CEO has been able to effectively manage the ACC while the examiners have been able to exercise their independent use of the ACC's coercive powers on a full-time basis.⁴⁶

4.68 The Committee is not convinced that there is a current problem in relation to the allocation of roles between the CEO and the Board or its chairman. As a matter of legislation, the Committee believes that the separation of roles is clear and appropriate, giving the CEO considerable authority in relation to the operational control over the ACC, but involving the Board in significant strategic directions.

4.69 It is also evident to the Committee that in practice there is a strong and effective working relationship between the current CEO and Board chairman, and there is no substantial evidence that this relationship is in any way dysfunctional.

44 Mr Alastair Milroy, *Committee Hansard*, Canberra, 7 October 2005, p. 70

45 Mr Mick Keelty, *Committee Hansard*, Canberra, 7 October 2005, p. 21; see also Mr Alastair Milroy, *Committee Hansard*, Canberra, 7 October 2005, p. 71

46 Mr Miles Jordana, *Committee Hansard*, Canberra, 7 October 2005, p. 2

4.70 The Committee also reiterates the point that there is a difference between seeking the Board's approval in relation to a particular matter, and – as a matter of practice – providing information to, and consulting widely with, Board members.

4.71 Evidence to the review suggests that Mr Milroy has been extremely active in liaising and consulting with Board members in and out of session. While this may appear to some critics as excessively cautious, it also reflects the political realities of establishing the strong working relationships and understandings with partner law enforcement agencies that are crucial to the ACC's effectiveness. This is particularly the case during its first few years. Rather than a matter that needs repair, the Committee considers that this is something for which the CEO and his officers should be commended.

Chapter 5

Accountability

Introduction

5.1 An essential element of the governance of any public sector body, is a proper accountability regime: public agencies exist to implement public policy and administer legislation, and in doing so, expend considerable amounts of public money. The public is therefore entitled to satisfy itself that these tasks are being performed properly and that best use is being made of those public funds.

5.2 However, agencies such as the ACC have a special accountability burden by reason of the special and extensive powers they are entrusted with.

5.3 This chapter begins with an overview of the accountability regime under which the ACC operates. The chapter then examines several aspects of the operation of these accountability mechanisms.

Reviewing the need for accountability of the ACC

5.4 The special powers of the ACC are the subject of the previous chapter. However, in this context, it is worth considering the implications of these special powers to the ACC's accountability regime. With the passage of time, it is easy to take for granted these extraordinary powers, and it is worth reassessing how far they depart from the protections traditionally afforded to citizens by the criminal law.

5.5 All governments must be bound by the rule of law:

In a government of laws, the existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good or ill it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to be a law unto himself; it invites anarchy.¹

5.6 However, this requirement is particularly strong for law enforcement agencies, as Commissioner Keelty stated:

integrity is the ACC's stock in trade. ... The ACC, just like a police force, needs to be beyond corruption. The government and the community will have no confidence in the ACC, or indeed the AFP, if we cannot account for the activities of our people.²

1 Brandeis, (1928)

2 Mr Mick Keelty, *Committee Hansard*, Canberra, 7 October 2005, p. 33

5.7 The AFP submission concluded that:

...the accountability burden placed on the ACC is an onerous one, particularly when compared to other agencies, however the ACC is a Commonwealth agency with a unique role in domestic criminal intelligence and its access to a suite of coercive powers necessitates a correspondingly high level of scrutiny and oversight.³

5.8 The Committee also notes the comments of Mr Frank Costigan QC, a former Royal Commissioner, who argued that while we live in a community with great traditions of individual liberty:

we are also living in a community where organised crime has become more sophisticated and more difficult to follow. It is transnational and it is deliberately hiding what it is doing. ... We are living in a community which I think properly recognises that exceptional powers need to be given to try and solve these problems.

5.9 However, he cautions that:

the Parliament has to be constantly aware of the fact that every time you give additional powers you are changing the community you live in, so you have to be constantly alert to whether it is the right way to go.⁴

5.10 It must also be recognised that accountability systems must be based on the worst and most pessimistic assumptions about human behaviour. They cannot be made based on judgements of the merits and integrity of particular incumbents of office. Whilst all the evidence indicates that officers of the ACC, from the CEO down, have maintained the highest standards of transparency and accountability, it may not always be so. As Mr Costigan QC argues:

inevitably the first appointments to it are people of integrity, capacity and intelligence. One is not concerned – certainly with the current composition of the ACC – that there is going to be any corruption or problems. But if you set up the institution, one must never forget that it is a feature of police forces over a significant period that corruption occurs, and we have seen it in Australia. ...

The greater the powers and the greater the secrecy you give to bodies that are involved in those activities, the more important it is that you have appropriate accountability and the more important it is that you introduce into those structures appropriate accountability and appropriate protection of the rights of people who are affected by it.⁵

5.11 The critique that follows should be read in this light.

3 AFP, *Submission 10*, p. 10

4 Mr Frank Costigan QC, *Committee Hansard*, Canberra, 7 October 2005, p. 59

5 Mr Frank Costigan QC, *Committee Hansard*, Canberra, 7 October 2005, p. 52

Overview of accountability mechanisms

5.12 The ACC is subject to a range of accountability mechanisms, comprising both internal and external bodies. The two matters of greatest public concern relate to the ACC's use of its coercive and investigative powers, and its expenditure of public funds.

Internal accountability

5.13 The ACC has incorporated a number of internal procedures and governance groups that provide the foundations for the proper use of its powers and public funds. Key management groups include: the senior executive team, the Governance Operations Committee (GOC) and the ACC Audit Committee.

5.14 Key accountability documents include:

- ACC Corporate Plan 2004-07
- ACC Business Plan 2003-2004
- APS Values and Code of Conduct
- ACC Professional Standards and Integrity Management Plan
- ACC risk management plans
- ACC Policy and Procedures

5.15 The ACC is also bound by a detailed set of reporting requirements governing the Annual Report, which are provided by the Department of the Prime Minister and Cabinet. Financial reporting requirements derive from the ACC Act itself, together with the *Financial Management and Accountability Act 1997*.

5.16 The ACC also provides monthly activity reports (of slightly varying content) to the Board, the IGC and the PJC.

5.17 A critical issue for the accountability of the organisation is the management of allegations of misconduct by, or complaints against, ACC staff, contractors or secondees from partner agencies.

5.18 All categories of staff are bound by a common code of conduct, and must go through a vetting process and be cleared to a 'highly protected' level.⁶ It is also notable that secondees to the ACC have a dual accountability, in that they are accountable to both the ACC rules and those of their home agency.⁷

6 Mr Alastair Milroy, *Committee Hansard*, Canberra, 11 October 2005, p. 9

7 Mr Mick Keelty, *Committee Hansard*, Canberra, 7 October 2005, p. 28; Mr Alastair Milroy, *Committee Hansard*, Canberra, 11 October 2005, p. 9

5.19 Mr Milroy, CEO of the ACC, explained the process for handling cases in which alleged misconduct is discovered:

To give a practical example, if an officer on secondment breached our code of conduct, or was detected in any sort of behaviour that was inappropriate under our terms and conditions, then we would initiate an investigation and immediately advise the commissioner or the head of the agency concerned, and either jointly pursue the investigation or have it investigated by the parent force.⁸

5.20 In addition, immediately a matter is detected, it is the practice of the ACC to advise the PJC, the Board, the Minister, and the Commonwealth Ombudsman and keep them advised on the conduct of the investigation even though this goes beyond the technical requirements of the Act.⁹

5.21 Mr Milroy further noted that his policy has been to not investigate serious matters internally, preferring to engage a suitably qualified external investigator to deal with the matter.¹⁰

Intergovernmental Committee

5.22 The IGC is established under section 8 of the Act to monitor the work of the ACC and Board, and in particular, the authorisation of the use of the ACC's coercive powers. This includes a power under sub-section 9(7) to revoke determinations of the Board that authorise the use of such powers. The IGC has met five times since the ACC's inception.¹¹

Parliamentary Joint Committee

5.23 As noted in Chapter 1, the Parliamentary Joint Committee (PJC) on the Australian Crime Commission (ACC) is established under section 53 of the *ACC Act 2002*, and its duties set out in section 55.

5.24 In essence, these duties imply three tasks: to monitor the expenditure of Commonwealth funds by the ACC, to scrutinise the use by the ACC of its investigative and special coercive powers; and to examine the evolving environment of organised crime, particularly with a view to recommending amendments to legislation to ensure the continued effectiveness of law enforcement activities.

5.25 The membership, role and functions of this Committee largely mirror those of its predecessor, the PJC on the National Crime Authority and are set out at the beginning of this report.

8 Mr Alastair Milroy, *Committee Hansard*, Canberra, 11 October 2005, p. 9

9 Mr Alastair Milroy, *Committee Hansard*, Canberra, 11 October 2005, p. 10

10 Mr Alastair Milroy, *Committee Hansard*, Canberra, 11 October 2005, p. 10

11 ACC, *Submission 14*, p. 20

5.26 In the time since the creation of the NCA, these two supervisory committees of the Parliament have tabled a total of thirty three reports, including the reports on the Annual Reports as well as the results of inquiries into particular areas of criminal activity – for example, Money Laundering, Cybercrime, or the administration of the Authority's or Commission's powers – for example, the reports into the involvement of the NCA in controlled operations or witness protection.

5.27 It should also be noted that the ACC is subject to further parliamentary scrutiny by the Senate Legal and Constitutional Legislation and References Committees, which have general portfolio responsibility for law enforcement, via the Senate Estimates process and more general inquiries.

Commonwealth Ombudsman

5.28 The Ombudsman's jurisdiction in relation to the ACC is to:

- investigate complaints made about the ACC;
- conduct own motion investigations into a matter of ACC administration, and
- conduct inspections of the ACC's records relating to its use of intrusive powers (such as telecommunications interception, controlled operations and surveillance devices).¹²

5.29 Of particular relevance is section 55AA of the Act, which requires the Ombudsman to brief the Committee each year on the ACC's involvement in controlled operations under Part 1AB of the *Crimes Act 1914*.

5.30 The Ombudsman's submission notes that he has undertaken three own motion investigations in the past 18 months, relating to the ACC's handling of alleged criminal activity by two former secondees; controlled operations conducted by the ACC under state legislation; and the ACC's handling of a registered informant.¹³

Other external accountability

5.31 In the overall accountability framework, there are two further important external institutions that play a significant part in ensuring the proper administration of the organisation.

5.32 The first of these is the Australian National Audit Office (ANAO), which carries out audits of all Commonwealth government agencies pursuant to the *Auditor General Act 1997*, and reports directly to Parliament. The ANAO aims to assess and improve public sector standards by conducting both performance audits and financial statement audits.¹⁴

12 Commonwealth Ombudsman, *Submission 4*, p. 1

13 Commonwealth Ombudsman, *Submission 4*, pp 2-3

14 www.anao.gov.au accessed 18 October 2005

5.33 Second are the courts, which affect the ACC in two ways. Decisions made by Examiners during ACC examinations are subject to review by the Federal Court or the Federal Magistrates Court, pursuant to section 5 of the *Administrative Decisions (Judicial Review) Act 1977*.¹⁵ To date, there have been a number of challenges to the exercise of the Examiners' powers, relating to issuing summonses, the approval of a nominated legal representative, and the scope of permissible questioning in an examination. These matters are discussed in greater detail in chapter 4.

5.34 To the extent that matters investigated by the ACC lead to the laying of criminal charges, the Federal Court and State Supreme Courts also test the quality of the evidence produced by the ACC (and its partner agencies) as well as the legality of the means by which that evidence is produced. Defendants in a criminal trial may seek to have evidence excluded from the trial where it can be shown to have been illegally obtained, or to be a privileged communication.

Effectiveness of the ACC accountability mechanisms

5.35 It is evident that the ACC is subject to a complex and multi-faceted integrity system, that involves scrutiny by both internal and external agencies. As Mr Costigan QC observed, the ACC is possibly the most examined agency in the country.¹⁶ The Committee also notes the comments of the Commonwealth Ombudsman that 'the CEO, Mr Milroy, is committed to administrative best practice in the ACC's accountability regime',¹⁷ which includes the pro-active disclosure of any matters arising to the Ombudsman, the PJC and the IGC as noted above.

5.36 Nevertheless, the Committee is mindful that no system is foolproof. As Mr Keelty, Chairman of the Board of the ACC, told the Committee:

No agency can make itself immune from corruption, especially an agency that draws its investigative strength from such a large number of other agencies, as the ACC does.¹⁸

5.37 The experience of police agencies has demonstrated that problems are almost certain to occur over time. The task of the Committee is to ascertain whether there are any gaps in the present accountability regime that limit the capacity to effectively detect, investigate and prosecute misconduct.

5.38 Evidence to the Committee has raised six areas of possible weakness:

- The lack of proactive investigations
- Limited resources for complaints investigation

15 Note also section 57 of the ACC Act 2002

16 Mr Frank Costigan QC, *Committee Hansard*, Canberra, 7 October 2005, p. 58

17 Commonwealth Ombudsman, *Submission 4*, p. 3

18 Mr Mick Keelty, *Committee Hansard*, Canberra, 7 October 2005, p. 22

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- Cross-jurisdictional uncertainties
 - Accountability of secondees
 - Gaps in the external procedural scrutiny
 - Weaknesses in the Code of Conduct

The lack of proactive investigations

5.39 The experience from royal commission inquiries such as that of Mr Justice Wood into the NSW Police Service, shows that complaint handling alone is not sufficient to unearth systemic corruption or malpractice. Effective anti-corruption activities need to be carried out by an organisation separate from the police agency concerned, and must have proactive investigative powers: extensive physical and electronic surveillance, public and private hearings at which suspect officers are examined, financial and intelligence analysis, coercive powers, and capacity to obtain search warrants.¹⁹ The Commonwealth Ombudsman, responsible for managing complaints against the ACC, himself noted these limitations,²⁰ while Mr O'Gorman, President of the Australian Council for Civil Liberties (ACCL), argued against any expectation that the Ombudsman perform this role. Referring to an Australian Law Reform Commission Report,²¹ he argued that:

You need a body to investigate complaints against police which has in it people who have had a policing background – not ones who jump from the police service to the external complaints body and then go back – who know how to catch police and who know the system better than most.²²

5.40 Recognition of this fact has resulted in the creation of independent watchdog agencies around Australia, such as the Police Integrity Commission in NSW. The PIC's recent report on 'Operation Abelia' on illegal drug use by some NSW police officers, is a timely example of the nature and scope of the investigations needed to unearth systematic misconduct in a police type agency.²³

5.41 The Committee notes that the proposed Australian Commission for Law Enforcement Integrity (ACLEI), the legislation for which is expected to be introduced into the Parliament this year, is likely to remedy this issue.

5.42 The Committee looks forward to examining the legislation upon its introduction.

19 Wood, The Hon. Justice J., *Royal Commission into the New South Wales Police Service*, p. 1

20 Prof. John McMillan, *Committee Hansard*, Canberra, 11 October 2005, p. 29

21 Australian Law Reform Commission, *Integrity: but not by trust alone. AFP and NCA complaints and disciplinary system*, 82nd Report, 2003

22 Mr Terry O'Gorman, *Committee Hansard*, Brisbane, 19 August 2005, p. 36

23 NSW Police Integrity Commission, *Operation Abelia – Research and investigations into illegal drug use by some NSW police officers*, September 2005

Limitations in complaints investigation

5.43 Several commentators raised concerns at the practical effectiveness of current complaint handling by both the ACC itself, and the Commonwealth Ombudsman. The AFP Association submission stated that:

Due to its small size the ACC also lacks the resources needed to efficiently and effectively manage allegations of corruption, mismanagement and fraud against the organisation. The ACC has a single internal auditor to cover both financial and performance audit issues. Clearly one officer cannot provide adequate services even to an organisation of the ACC's size. [in contrast]... the AFP has a well resourced Professional Standards Unit ...²⁴

5.44 Even where complaints are instead raised with the Commonwealth Ombudsman, Mr O'Gorman of ACCL questioned the extent of his capacity to meet the requirements of investigation:

the general criticism of the Ombudsman's office has been that it is so widely stretched across so many aspects of the bureaucracy that it cannot properly take on the role of investigating the Australian Crime Commission.²⁵

5.45 The Committee notes several factors that suggest that current complaint handling resources are adequate. First, as noted above, even in cases where the ACC chooses to investigate an allegation itself, the ACC brings in an external investigator to conduct inquiries into allegations of misconduct. The available resources are therefore wider than the one officer suggested by the AFP Association submission. It is also reasonable to assume that the ACC would engage additional investigators to deal with additional matters as they arise.

5.46 Second, a full assessment of the adequacy of the Commonwealth Ombudsman's investigative resources is probably unnecessary, given that there were only twelve complaints in 2004-05, of which only three necessitated further inquiries.²⁶

5.47 Perhaps a more fruitful avenue of inquiry is the matter of which organisation should conduct an investigation: the ACC itself, the ombudsman or the proposed ACLEI.

5.48 Experience to date suggests that instances of misconduct are most likely to be discovered by the ACC's own internal processes, and it is appropriate that initial investigations are carried out internally. However, the Committee notes Mr

24 AFP Association, *Submission 16*, p. 2

25 Mr Terry O'Gorman, *Committee Hansard*, Brisbane, 19 August 2005, p. 32

26 Commonwealth Ombudsman, *Submission 4*, p. 2. The number of matters investigated as a proportion of total complaints is consistent with the figures provided to the Committee by the NSW ICAC, *Committee Hansard*, Sydney, 9 September 2005, p. 3

O'Gorman's caution that internal investigations must never displace the role of external investigators. Drawing on his experience with the Crime and Misconduct Commission in Queensland, which handed back the role of investigating all but serious complaints to the Queensland police, he stated:

you can only deal with corruption or misconduct, particularly misconduct, if you have a pattern of picking up errant behaviour by individual police as represented by an unusually large number of complaints or systemic behaviour arising from the activities of particular squads. If you hand back, as the CMC has, all of its investigation powers of complaints against the police to the very police service it is supposed to oversight, where does the pattern and where do the facts that constitute a trend start to come from, are they being analysed and do they emerge? My observation is no.²⁷

5.49 Mr O'Gorman further recommends adopting a recommendation of the 1977 Lucas inquiry into enforcement in criminal law in Queensland:

that prosecutors be obliged to report to a complaints mechanism all allegations of misconduct made against police in court so that at least the pattern and the trends that I talked about could be centralised and examined.²⁸

5.50 The Committee agrees with this view. While most allegations of misconduct will – appropriately – be investigated within the ACC, it is essential that external bodies have information on all complaints and allegations of misconduct. As noted above, it has been the ACC's practice to inform relevant agencies of all such allegations, and the Committee commends Mr Milroy for this approach. However, there is merit in both formalising this arrangement and in extending the reporting obligation to the Director of Public Prosecutions.

Recommendation 7

5.51 The Committee recommends that formal arrangements be instituted to confirm the current practice of reporting allegations of misconduct to relevant accountability organisations, including the PJC, the IGC, the Commonwealth Ombudsman, and the proposed Australian Commission for Law Enforcement Integrity.

Recommendation 8

5.52 The Committee recommends that formal arrangements be put in place to require the Commonwealth Director of Public Prosecutions to notify the Commonwealth Ombudsman, and the proposed Australian Commission for Law Enforcement Integrity of any allegations of misconduct by officers of the ACC.

27 Mr Terry O'Gorman, *Committee Hansard*, Brisbane, 19 August 2005, p. 32-33

28 Mr Terry O'Gorman, *Committee Hansard*, Brisbane, 19 August 2005, p. 33

Cross-jurisdictional uncertainties

5.53 A further complex accountability issue arises from the nature of the ACC as a national law enforcement body; this body operates across all Australian jurisdictions, and routinely uses investigative teams comprising officers seconded from various police forces, and as such, has the capacity to access a range of investigative powers. A long standing concern of the Committee has been that this could enable ACC officers to pick the regulatory regime that offers the greatest powers, the widest discretion or the most lax accountability regime.

5.54 This could conceivably occur in matters relating to search warrants, the use of surveillance devices, and controlled operations, and could arise where a state police officer is either seconded to the ACC, or is in a joint task force or investigation.

5.55 At first glance, this may not seem to be a problem, since the actions involved would be lawfully authorised by a relevant statutory authority. However, there are two principal concerns. First, if a decision were made to access investigatory powers under state legislation that has a lower standard of accountability than the equivalent Commonwealth statute, it would amount to a Commonwealth agency operating contrary to the intent of the Commonwealth Parliament.

5.56 Second, where officers seconded to the ACC from a state agency are using powers derived from state legislation but in a Commonwealth context, there is a possibility that neither Commonwealth or state accountability regimes fully capture the use of the power.

5.57 This latter issue was examined in detail in an own-motion investigation by the Commonwealth Ombudsman in relation to controlled operations. According to the Ombudsman's submission:

My own motion investigation into the ACC's assurance framework for controlled operations conducted under state legislation has illustrated the differing legislative regimes across the jurisdictions. Whilst there is no indication that the ACC is choosing to conduct and/or participate in controlled operations authorised under state legislation to take advantage of the different accountability regimes, the ability to do so represents a potential accountability gap.²⁹

5.58 The Committee agrees that there is no evidence to suggest any 'mix and match' activities by the ACC to exploit this area. However, as Professor McMillan identifies, there is a potential gap in accountability.

5.59 There has not been sufficient time within this review to fully address the detail of this complex issue and as such, it is one that the Committee will return to in the future. The Committee endorses the Ombudsman's suggestion that the ACC continue to develop its administrative systems 'to capture the highest standard of

29 Commonwealth Ombudsman, *Submission 4*, p. 4

transparency in the period while these powers are being harmonised, and maintain those standards in the future.'³⁰

5.60 However, this harmonisation process could take many years, and it is important that uncertainties in this matter do not remain unresolved. For this reason, the Committee would go further than the Commonwealth Ombudsman, and considers that clear benchmark obligations be set. In order to ensure this clarity, the Commonwealth standard should be used.

Recommendation 9

5.61 The Committee recommends that the CEO of the ACC direct, in the ACC Policy and Procedures, that in any case where the ACC procedurally has a choice of regulatory regime for the use of investigatory powers, it adopts as a matter of practice, the Commonwealth protocols.

Accountability of secondees

5.62 The accountability of secondees from other police forces and partner agencies is a significant one: of the total ACC staff of 518, 117 are seconded police, with a further 54 attached to various taskforces.³¹ Two matters arise in relation to secondees from other agencies.

5.63 First, complexities of accountability arise from the fact that secondees have access to the powers of both the ACC and their home agency, as well as being bound by both integrity regimes.

5.64 Professor McMillan notes in relation to the former, that:

It is my understanding that while on secondment, law enforcement officers are both a member of the ACC and their 'home' law enforcement agency. As this arrangement allows secondees to exercise powers and functions of both the ACC and their home law enforcement agency, it is important that secondees:

- (a) Are conscious of which agency's powers and functions they are relying on, and
- (b) Ensure that they comply with the relevant agency's policies, practices and procedures.³²

5.65 This matter also raises the wider issue of differing accountability regimes across jurisdictions which is discussed below.

30 Commonwealth Ombudsman, *Submission 4*, p. 4; see also Prof McMillan, *Committee Hansard*, Canberra, 11 October 2005, pp 26-27

31 ACC Annual Report 2003-04, pp 132-133

32 Commonwealth Ombudsman, *Submission 4*, p. 4

5.66 Second, it must be considered whether this dual accountability of secondees constitutes a strength or a weakness of the system. Ideally, it would mean that the highest of the two standards in any case would be the effective one. Alternatively, there is the concern that conduct may somehow slip between the two regimes.

5.67 Professor McMillan gave a practical example of how these matters can occur:

In one of the own-motion reports referred to in the submission that became a fairly high-profile public issue about the conduct of two state secondees to the commission, against whom allegations of corruption had been made, one of our findings in our own-motion investigation was that the commission, as well as investigating how those events occurred, should also look closely at the activities of the commission staff who had been supervising these two officers. As it transpired, two of the staff who had been in a supervisory position moved back to state offices. The commission responded to our recommendation by saying that the commission had transferred the response follow-up responsibility back to the state police forces.³³

5.68 This concern was put to Assistant Commissioner Walshe, who is the Officer in Charge of the Victoria Police Ethical Standards Department. His strong view was that of there were to be investigations undertaken of Victoria Police on secondment to the ACC, then Victoria Police would like to participate, but that the ACC should be allowed to complete its investigation relative to the issues that concern it.³⁴ Similarly, in relation to the Commonwealth Ombudsman, Mr Walshe stated that the Victoria Police would co-operate fully, providing evidence as required.³⁵

5.69 There is also the practical matter of properly addressing performance issues after the seconded has returned to their home law enforcement agency:

Recent reports from my office have discussed the need for management systems between the ACC, the ACC Board and the agencies seconding their members to the ACC to develop and implement a performance management structure that is able to deal effectively and efficiently with performance issues. In my view, the absence of these structures can create an 'accountability gap' within which neither the ACC, nor the seconding body, will necessarily assume responsibility to address performance issues.³⁶

5.70 Professor McMillan gave an example of a related matter:

One of our tasks in the inspection role is to ensure that documentation is signed and recorded and files are closed. Some of the deficiencies to which

33 Prof John McMillan, *Committee Hansard*, Canberra, 11 October 2005, p. 26

34 Assistant Commissioner Kieran Walshe, *Committee Hansard*, Melbourne, 28 October 2005, pp. 8 & 9

35 Assistant Commissioner Kieran Walshe, *Committee Hansard*, Melbourne, 28 October 2005, p. 10

36 Commonwealth Ombudsman, *Submission 4*, p. 4

we have pointed arose from the fact that the person who did not close the file was a secondee who had moved back to a state police force. The commission said that that was not a justification, but it is an explanation as to why the record keeping requirements have not been followed strictly.³⁷

5.71 In the Committee's view, these issues are inherent in an organisation of this nature and extremely difficult to conclusively resolve. However, it is a matter that both the PJC, the Commonwealth Ombudsman and the management of the ACC itself, is alert to. The PJC intends to closely monitor how these issues are handled both procedurally and in practice, and will make recommendations as appropriate, in consultation with the ACC and the Ombudsman.

Gaps in the external procedural scrutiny

5.72 The Committee has also identified several areas of ACC operations which do not appear to be subject to any routine scrutiny by external agencies. These include the traditionally corruption prone matters of the management of informants and the handling of seized items including drugs and cash.

5.73 In response to this, the Commonwealth Ombudsman stated that this is an area in which his office is likely to further develop its oversight role in a more coherent and planned way:

An obvious way to do that would be to pick some topics for own motion investigations occasionally like management of exhibits, dealing with informers and so on. The New South Wales Ombudsman's office is a good model in this respect. ... We formerly just had a complaint handling role but, as a result of foreshadowed legislative changes and a substantial new budgetary increase, we are developing a quite different oversight function in which complaint handling will be one element only and we will be much more active in looking at compliance activity, arranging our own kind of audit inspections and other periodic oversight activities.³⁸

5.74 The Committee considers that it is important for the administrative practices and procedures used for these operational matters to be audited, and urges the Commonwealth Ombudsman to make them the subject of priority own-motion investigations over the period of the coming year.

Weaknesses in the code of conduct

5.75 A final matter, raised by the AFP submission, contrasts the powers of the CEO of the ACC in relation to ACC employees, who are bound by the provisions of the *Public Service Act 1999* and the accompanying APS Code of Conduct, and the powers of the Commissioner of the AFP:

37 Prof John McMillan, *Committee Hansard*, Canberra 11 October 2005, p. 26

38 Prof John McMillan, *Committee Hansard*, Canberra 11 October 2005, p. 29

The Public Service Act does not provide for the suite of investigative and discretionary powers available to the Commissioner of the AFP under the AFP Act to address misconduct or corruption. Directing officers to answer questions and random drug testing are two measures open to the Commissioner of the AFP which are not available to the CEO ACC due to the constraints of the ACC's employment framework.³⁹

5.76 The Committee has not had sufficient evidence on this matter to form any definitive view. In principle, it would seem appropriate that the CEO of the ACC should have similar powers to investigate misconduct as the Commissioner of the AFP. However, the Committee also appreciates that, given the significance of the powers proposed, these are matters that the agency staff would wish to negotiate.

5.77 The Committee urges the ACC to give active consideration to introducing such measures.

PJC on the ACC

5.78 The statutory role and jurisdiction of the PJC are set out above. This section evaluates the role of the Committee, how it fits into the wider accountability framework and examines several areas in which its effectiveness is limited.

Need for the PJC

5.79 Earlier sections of this chapter set out the numerous procedures and organisations to which the ACC is accountable across all of its various activities. In this context, Chief Commissioner Nixon of the Victoria Police questioned the need for the PJC. Noting that the ACC reports to the Minister for Justice, the ACC Board, and the IGC, (and in all probability, to the proposed ACLEI), Ms Nixon considers that there are sufficient reporting obligations, legislative requirements and oversight without the need for an additional layer of accountability through the PJC, which:

limits the effectiveness of the ACC through additional and unnecessary reporting. The IGC-ACC is comprised of State and Commonwealth ministers and can effectively monitor the performance of the ACC.⁴⁰

5.80 This is an issue that arose in relation to this Committee's predecessor, the PJC on the NCA,⁴¹ and was also canvassed briefly in this Committee's last Examination of the Annual Report of the ACC.⁴²

39 AFP, *Submission 10*, p. 10

40 Victoria Police, *Submission 8*, p. 2

41 PJC on the NCA, *Who is to guard the guards: an evaluation of the National Crime Authority*, November 1991, p. 125 *et seq*

42 PJC on the ACC, *Examination of the Annual Report for 2003-2004 of the Australian Crime Commission*, para 2.31

5.81 Ms Nixon's question is a legitimate one. This review evaluates all aspects of the ACC Act, and since the Committee is itself established by the Act, it is appropriate that the effectiveness of the Committee be considered as well. It is for this reason that the Committee commissioned Professor Davis, Emeritus Professor at the Australian National University, to conduct an independent review of the Committee's role and effectiveness. His separate report is at Attachment 3.

5.82 In an 'accountability rich' environment, does the Committee add value? Are there aspects of the Committee's statutory roles that duplicate the efforts of other bodies, and are perhaps done better? In answer to these questions, the Committee sees three principal reasons for its existence: to contribute to the accountability of the ACC; to develop Parliamentary expertise on organised crime; and to provide a forum for informed public debate.

Accountability

5.83 In the matter of accountability, the Committee does not consider its role to be duplicated by any of the other existing accountability mechanisms. Both the IGC and the ACC Board are focused primarily on the management and strategic direction of the ACC. Therefore, they cannot act in an independent scrutiny role. As a previous report of the Committee pointed out:

To use an analogy, the control of a public company by a competent and effective Board is not a substitute to the accountability of both the company and the board to the shareholders. In this case, the 'shareholders' are the Australian taxpaying public, represented by the Parliament.⁴³

5.84 There is also a substantial difference, in theory and practice, between executive and parliamentary scrutiny. Consistent with the concept of the separation of powers, ministers of the executive do not constitute independent scrutiny of their executive agencies:

These rules are based on sound experience. History shows that the instinctive reaction of government agencies, when confronted with corruption, malpractice or incompetence, is to keep the matter private. Bureaucracies, and police bureaucracies in particular, are notoriously reluctant to allow external scrutiny. A strict application of this separation of powers is even more essential given that the ACC wields powers equivalent to a Royal Commission – powers that were previously granted only to the judiciary, for a limited purpose and duration.⁴⁴

43 PJC on the ACC, *Examination of the Annual Report for 2003-2004 of the Australian Crime Commission*, para 2.31

44 PJC on the ACC, *Examination of the Annual Report for 2003-2004 of the Australian Crime Commission*, para 2.33

Parliamentary expertise

5.1 The Committee also provides a forum for the development of a group of Parliamentarians with a detailed understanding of the organised crime environment and the laws that are designed to combat it. Underpinning this factor must be the constant awareness of the Parliament's role: that in the Australian constitutional system, it is the role of parliaments to make law and that of the executive.

5.2 It is self evident that the core of this role is the creation of legislation, but less obvious, particularly in relation to the law enforcement activities of ASIC and the ACC, is the subtle and complex balancing act that Parliamentarians must perform in drafting this legislation and amending it over time. This balance has two principal dynamics.

5.85 The first could be thought of in terms of individual rights versus common rights. In a free society, individuals are entitled to pursue their lives free from interference, invasions of privacy, incarceration or police harassment. Similarly, companies should be free to pursue business opportunities and maximise shareholder value within as free a market as possible without unduly onerous reporting obligations. Both the freedom of the individual and the free conduct of trade and commerce are fundamental principles of our free democratic society.

5.86 However, these must be balanced against the need of society to create and enforce rules of personal and corporate behaviour for the common good. Given the particularly violent and pernicious nature of organised crime, history has shown the need to create specialist crime fighting bodies with significant powers to combat these organised crime networks. However, it is evident from the description of the ACC's powers set out above, that the actions of the ACC have the potential to impact profoundly on the individual citizen's freedom and privacy.

5.87 The second dynamic lies in the relationship between Parliament and the agency: the regulator and the regulated. The tension here lies in balancing an effective regulatory and accountability structure with an agency that has room for tactical flexibility and innovation and that does not need to spend an inordinate proportion of its time or resources complying with paperwork.

5.88 Again, history has shown the need for strict accountability regimes for law enforcement agencies, since left to their own devices, agencies have a tendency to become corrupt or self serving. Thus, the greater the powers possessed by these agencies, the greater the accountability mechanisms must be. But conversely, both corporate and underworld criminals are adept at finding and exploiting loopholes and circumventing the law. Now, more than ever before, law enforcement agencies must be capable of rapidly adapting to the evolving tactics of their targets. Agencies that are bound in rigid procedures and rules will lack this necessary flexibility and will rapidly lose their effectiveness.

5.89 To craft legislation that finds an appropriate balance in these relationships, the Parliament must have experts who understand both the subject matter of the

regulation – organised crime – and the detail of how their agencies do their work. This includes their policies, procedures, funding and culture, all of which is also vitally important in performing the accountability function.

Public debate

5.90 The final rationale for the Committee's role is to provide a forum for informed public debate on organised crime, and the legislative balance between investigative powers and the checks and balances on those powers. The public is entitled to participate actively in making these judgements. Conversely, these are not matters that should be left to agencies and ministries. Driven by the priorities and circumstances of their jobs, they are prone to develop a world view and associated priorities that may not accord with the values of the wider community. This is particularly evident in relation to law enforcement officials, whose thinking is understandably driven by their experience of criminality and their desire to combat it.

5.91 The Parliament provides one of the few forums for such an informed public debate, particularly given that many of the ACC's operations are – necessarily – conducted in secret, and bodies such as the ACC Board and the IGC do not report publicly. Virtually all key debates in relation to organised crime occur behind closed doors among executive agencies, within the confines of Board discussions, or at ministerial meetings.

5.92 Informed public debate is further restricted by the secrecy provisions relating to ACC Examinations, which prohibit disclosing the goings-on within an Examination or even the existence of a summons to such a hearing.

5.93 In this context, the authority of the Committee to call for evidence, combined with the capacity for witnesses to provide evidence under the protection of Parliamentary privilege is an important mechanism to ensure that critical information is made available to the public.

Success of the PJC

5.94 It is against these criteria that the Committee seeks to make some comment on its own performance.

5.95 A starting point for this analysis is the extent of the Committee's activities. Since its inception in 2003, the Committee has undertaken the following five inquiries and reports:

- Supplementary report on the trafficking in women for sexual servitude (tabled in August 2005)
- Report on the Examination of the Annual Report for 2003-2004 of the Australian Crime Commission (tabled in June 2005)
- Report on the Examination of the Annual Report for 2002-2003 of the National Crime Authority and the Australian Crime Commission (tabled in August 2004)

- Australian Crime Commission's response to trafficking in women for sexual servitude (tabled in June 2004)
- Cybercrime (tabled in March 2004)
- Report of the Examination of the Annual Report for 2001-2002 of the National Crime Authority (tabled in October 2003)

5.96 In the course of these inquiries, the Committee has held fifteen public hearings in various locations around the country.

5.97 It is important to note that the Committee conducts a considerable amount of further work in private meetings, of which there have been sixty-three, which include the annual briefings from the Commonwealth Ombudsman on the ACC's use of controlled operations. On occasions, the Committee has also sought and received briefings from the ACC and other relevant agencies such as the AFP, in relation to developments in patterns of criminal activity, and management or accountability issues. While it is recognised that as much of the Committee's work as possible should be conducted in public, it is also important that the Committee give agencies the opportunity to give greater detail in private.

5.98 In considering the effectiveness of the PJC, it is also material to note that the Committee's activities have been – and continues to be – marked by a very high degree of bi-partisanship. This is reflected in the invariably unanimous reports of the Committee and an approach to the conduct of inquiries that focuses on the substance of issues and constructive analysis. In the Committee's view, this gives greater weight to the findings of these inquiries, particularly in the national context in which the ACC itself answers (indirectly) to governments of both persuasions.

5.99 Measuring the effectiveness, quality or impact of these activities is more difficult for the Committee to judge.

Limits to the effectiveness of the PJC

5.100 The Committee is aware of certain limits to its capacity to fulfil its duties. The more significant of these limitations is in respect to the accountability function; the second is access to information.

5.101 As stated above, a core rationale for the Committee is to supervise the ACC's use of its various investigative powers, and in particular, its coercive powers. The Committee may well become aware of instances of the ACC acting beyond its powers by reason of these actions generating public complaints or court appeals from those affected. However, examination of instances of entrenched corruption and misconduct within other similar agencies to the ACC, suggests that the PJC is unlikely to discover such patterns of behaviour were they to occur in the ACC. Several witnesses to the inquiry voiced this concern. Mr Terry O'Gorman, an experienced lawyer and president of the Australian Council for Civil Liberties, told the Committee that:

your ability to supervise is very restricted unless you have a body like the proposed ALRC oversight body doing the work for you. Experience has

shown ... that, because of lack of time, resources and law enforcement experience by committee members and the constant turnover of committee members, a parliamentary committee just simply cannot by itself, without having an external agency positioned between the ACC and itself, do its job.⁴⁵

5.102 Similarly, Mr Peter Faris QC, a former Chairman of the NCA, observed that:

[T]he parliament has given these coercive powers to the Crime Commission, and the trade-off is that there will be a parliamentary committee which supervises. I do not think any committee has a hope in hell, in reality, of supervising it at all.⁴⁶

...

I was not trying to belittle the committee. The point I was trying to make was that committees are not the proper method for the supervision of what is happening on the ground.⁴⁷

5.103 The reasons for this assessment are twofold. First, as the experience of the Wood Royal Commission into the NSW Police Service demonstrated, successful anti-corruption investigations require aggressive, proactive investigations that make full use of the surveillance, informants, undercover operations and coercive powers that the ACC itself uses.⁴⁸ Clearly, the PJC has neither the expertise, resources or remit to undertake activities of this order – rather, these are tasks for specialist organisations such as the proposed Australian Commission for Law Enforcement Integrity, discussed above.

5.104 The second matter is access to information.

5.105 Under by the Resolutions establishing the Committee, the Committee has a general power to 'call for witnesses to attend and for documents to be produced'.⁴⁹ This power, which is common to most Parliamentary committees, is quite broad, but is limited by the provisions of Section 55(2) of the ACC Act:

- (2) Nothing in this Part authorises the Committee:
 - (a) to undertake an intelligence operation or to investigate a matter relating to a relevant criminal activity; or
 - (b) to reconsider the findings of the ACC in relation to a particular ACC operation/investigation.

45 Mr Terry O'Gorman, *Committee Hansard*, Brisbane, 19 August 2005, p. 34

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

47 Mr Peter Faris QC, *Committee Hansard*, Melbourne, 16 September 2005, p. 13

48 The Hon. Justice James Wood, *Royal Commission into the New South Wales Police Service*, speech to the 8th International anti-corruption conference, p. 6

49 Resolution of the Senate, 18 November 2004, para (k)

5.106 As a result of previous disagreements over access to information, these general powers are bolstered by specific provisions of Section 59 of the ACC Act:

- (6A) Subject to subsection (6B), the Chair of the Board:
 - (a) must comply with a request by the Parliamentary Joint Committee on the Australian Crime Commission for the time being constituted under Part III (the PJC) to give the PJC information relating to an ACC operation/investigation that the ACC has conducted or is conducting; and
 - (b) must when requested by the PJC, and may at such other times as the Chair of the Board thinks appropriate, inform the PJC concerning the general conduct of the operations of the ACC.
- (6B) If the Chair of the Board considers that disclosure of information to the public could prejudice the safety or reputation of persons or the operations of law enforcement agencies, the Chair must not give the PJC the information.
- (6C) If the Chair of the Board does not give the PJC information on the ground that the Chair considers that disclosure of the information to the public could prejudice the safety or reputation of persons or the operations of law enforcement agencies, the PJC may refer the request to the Minister.
- (6D) If the PJC refers the request to the Minister, the Minister:
 - (a) must determine in writing whether disclosure of the information could prejudice the safety or reputation of persons or the operations of law enforcement agencies; and
 - (b) must provide copies of that determination to the Chair of the Board and the PJC; and
 - (c) must not disclose his or her reasons for determining the question of whether the information could prejudice the safety or reputation of persons or the operations of law enforcement agencies in the way stated in the determination.

5.107 The practical import of these provisions is that the Committee cannot require the ACC to divulge any information relating to operational matters. There are obvious practical reasons for this limitation, as Mr Crooke QC, a former Chairman of the NCA pointed out:

We are talking concrete boot stuff in relation to the things that the [ACC] does – organised crime et cetera – and it is not overstating the situation to say that if some of the information got out in the course of an operation, or even afterwards, people could be killed. There is an issue for the good people on the committee as to whether they want to be burdened with the responsibility of having that information in their possession or even in their heads. If anything goes wrong, do they really want to be part of an investigative loop to see whether it could possibly have been them, either

deliberately or through some sort of inadvertence, who let information go?⁵⁰

5.108 Nevertheless, it must be recognised that, in the absence of operational information, it is difficult (if not impossible) to scrutinise whole areas of the ACC's operations. The sceptic would also be aware that the ACC itself remains the arbiter of what constitutes 'operational'. Mr O'Gorman argued that:

Operational secrecy is something behind which errant ... law enforcers have long hidden in order to hide their misdeeds or avoid accountability.⁵¹

5.109 The AFP Association also put it to the Committee that:

The ACC has developed a culture of answering Committee questions in limited terms and if possible avoiding answering questions at all.⁵²

5.110 A further aspect of this issue is the workings of the examination process and the extent to which the Committee and its inquiries are subject to the constraints imposed by secrecy notations made by Examiners under sections 29A and 29B. Pursuant to these provisions, it is an offence to disclose a summons, a notice, or 'any official matter' connected with the summons or notice. On several occasions during this inquiry, potential witnesses have declined to give evidence relating to the conduct of examinations on the basis that they may be subject to prosecution for breach of these sections.

5.111 It is the Committee's strong view that this provision does not operate to inhibit the Committee's capacity to take evidence, which has precedence by reason of overriding Parliamentary Privilege. According to Odgers' Australian Senate Practice 'Parliamentary privilege is not affected by provisions in statutes which prohibit in general terms the disclosure of categories of information'.⁵³ Thus, Parliamentary privilege is only limited by specific words in the legislation. There are no such limiting words in the relevant provisions of Sections 29A or B, and as such, potential witness cannot be found criminally liable for disclosing information to this Committee, notwithstanding the provisions of the ACC Act 2005.

5.112 The Committee notes that this interpretation is consistent with the view of the PJC on ASIO, ASIS and DSD, which is based on the advice of the Clerks of both Houses of Parliament and the formal opinion of Mr Brett Walker QC.⁵⁴

50 Mr Gary Crooke QC, *Committee Hansard*, Brisbane, 19 August 2005, pp. 48 - 49

51 Mr Terry O'Gorman, *Committee Hansard*, Brisbane, 19 August 2005, p. 37

52 AFPA, *Submission 16*, p. 4

53 11th Edition, p. 49

54 Swieringa, M., *Intelligence oversight on the war on terrorism*, speech to the Australasian Study of Parliament Conference, Sydney 2005, p. 4

5.113 This interpretation is also essential to the capacity of the Parliament generally, and the Committee in particular, to consider the operations and effectiveness of the ACC Act.

5.114 To clarify this issue, the Committee has determined to adopt an advice for potential witnesses that is closely modelled on the practice of the PJC on ASIO, ASIS and DSD:

Submissions made to or evidence given before the Joint Parliamentary Committee on the Australian Crime Commission in respect of its statutory oversight of examinations carried out pursuant to Division 2 of the *Australian Crime Commission Act 2002*, are protected by the provisions of the Parliamentary Privileges Act 1987 relating to the protection of witnesses, namely subsections 12(1) and (2) and 16 (3) and (4). Furthermore, anybody threatening such a prosecution may be committing an offence.

The Committee advises persons who intend to give evidence or make submissions to the Committee that sections 29A and 29B of the ACC Act do not apply. Potential witnesses must note, however, that the committee does not wish to examine the intelligence or the subject matter(s) discussed in the course of an Examination, except where specifically otherwise stated. It wishes to pursue only those procedures used in the operation of the Examination under the ACC Act.

The Committee may choose to take such evidence in-camera and witnesses are reminded that any unauthorised disclosure of evidence taken in-camera by a witness or other person could be proceeded against as a contempt of Parliament and prosecuted as an offence under section 13 of the *Parliamentary Privileges Act 1987*.

5.115 In adopting this procedure, the Committee stresses that it recognises the sensitivity of such information and would, in almost all cases, hear such witnesses in private and that most of the evidence would not be publicly reported.

5.116 In assessing these issues, the Committee emphasises that, during the life of the current Parliament at least, it has found the ACC extremely cooperative in its provision of information. A sensible approach by both the Committee and the ACC that recognises the need for accountability on the one hand and operational security on the other, has seen this matter negotiated to the Committee's complete satisfaction. However, as stated at the beginning of the chapter, accountability systems must be grounded not on current incumbents or existing strong relationships, but rather on a pessimistic assessment of possible future problems.

Increasing the effectiveness of the PJC

5.117 Several solutions can be advanced to enhance the effectiveness of the PJC.

5.118 The first option is to amend the Act to further broaden the power of the Committee to access information relating to operational details, in association with an increase in the formal arrangements for the security of that information. The

Committee notes the example of the related Parliamentary Joint Committee on ASIO, ASIS and DSD – the three intelligence collection agencies.

5.119 Under the *Intelligence Services Act 2001*, this Committee has significant restrictions on its operations, including:

- The intelligence agencies have a say over the suitability of meeting places (section 17(3) of Schedule 1)
- The Minister must approve the holding of any public hearings (section 20(2))
- Ministers can prevent persons from giving evidence or documents being provided (on operationally sensitive matters) by giving a certificate to the Presiding Officers. (section 4)
- The staff of the committee must be cleared to the level of an ASIS officer – TSPV
- The intelligence agencies must approve the arrangements for the security of documents (section 22(1)) – safes, swipe pass entry to suites, protocols for handling, safe hand and registration of documents, Hansard recording and transcript production, isolated copiers, safe phones etc.
- The secrecy provisions in the Intelligence Services Act (reinforced by the Crimes Act and the ASIO Act) are onerous and carry heavy penalties. (See Schedule 1 Part 2, particularly section 12)
- Committee reports cannot be made to the Parliament until they are expressly cleared by the responsible ministers. (section 7)⁵⁵

5.120 The Committee is reluctant to recommend this approach. At this time, the balance between the Committee's access to information and operational security is considered workable. Adopting procedures similar to the PJC on ASIO, ASIS and DSD would impose a degree of restriction on the activities of this Committee that would considerably hamper its capacity to undertake its public accountability role.

5.121 The second is to create for the ACC a Parliamentary Commissioner similar to those used by the PJC's state parliamentary equivalents – the Queensland Parliament's Crime and Misconduct Committee, the WA Parliament's Committee on the Corruption and Crime Commission, or the NSW Parliament's Committee on the Independent Commission Against Corruption. In these jurisdictions, recognition of the limits to the parliamentary committees' capacity to access information led to the appointment of a senior independent lawyer, who is guaranteed complete access to all operational information:

When the committee have concerns about whether the CMC has done something right or wrong, they use that legally trained, usually quite experienced, barrister to go and do the investigative work for them.⁵⁶

55 This explanation is taken from Swieringa, M., *Intelligence oversight on the war on terrorism*, speech to the Australasian Study of Parliament Conference, Sydney 2005, p. 2

5.122 Mr O'Gorman argued that the parliamentary commissioner should have unrestricted powers to access all operational intelligence material: 'If accountability is going to mean anything, then we have to get away from this shield behind which these law enforcers constantly hide called "operational secrecy".'⁵⁷

5.123 Mr Crooke QC explained that this enables the Committee to satisfy itself, by means of an independent investigator, that there is nothing untoward going on, while members of the committee are not burdened with the responsibility and risk of being privy to the detailed operational information.⁵⁸

5.124 The Committee sees considerable advantages in this proposal. It solves the vexed problem of access to information, while at the same time provides the Committee with its own independent investigator capable of penetrating the veil of operational secrecy. However, the Committee concludes that consideration of the adoption of a Parliamentary Commissioner should be deferred until after the introduction of ACLEI. Once ACLEI is in place, the Committee will be able to reconsider the issue, based on the extent of ACLEI's legislated powers, the nature of the Committee's relationship with ACLEI, and a correspondingly clearer view of any resulting gaps in the overall accountability regime.

5.125 A second suggestion is put forward by Professor McMillan, the Commonwealth Ombudsman, which would also enhance the Committee's access to information:

I consider that the accountability framework under the Act could be strengthened by amending section 55AA of the Act to broaden the scope of my briefing to the PJC to any matter relating to the ACC. This would enable my briefing to cover the ACC's performance across all areas inspected, complaints received, and any other matter coming to the attention of my office...⁵⁹

5.126 As Professor McMillan pointed out in evidence to the Committee:

It is simply that in our annual meeting with the parliamentary joint committee we could comment upon any complaints that we had received and any own motion investigations we have undertaken. In fact, that has tended to occur in practice. ... So to some extent I am proposing that we formalise what has been occurring informally.⁶⁰

5.127 The Committee agrees with the Commonwealth Ombudsman's assessment.

56 Mr Terry O'Gorman, *Committee Hansard*, Brisbane, 19 August 2005, p. 34

57 Mr Terry O'Gorman, *Committee Hansard*, Brisbane, 19 August 2005, p. 39

58 Mr Gary Crooke QC, *Committee Hansard*, Brisbane, 19 August 2005, pp. 48-49

59 Commonwealth Ombudsman, *Submission 4*, p. 3

60 Prof. John McMillan, *Committee Hansard*, Canberra, 11 October 2005, p. 28

Recommendation 10

5.128 The Committee recommends that section 55AA of the Australian Crime Commission Act 2002 be amended to broaden the scope of the Commonwealth Ombudsman's briefing to the PJC to include any matter relating to the operations of the ACC.

5.129 The final matter reflects the Committee's view of its jurisdiction.

5.130 The Committee recognises the limits to which it can scrutinise the ACC's operational use of its investigatory powers, as discussed above. Nevertheless, the PJC has a wide capacity to perform effective 'strategic' scrutiny of the ACC in relation to its overall directions, management, and expenditure of public funds. The Committee's weakness in scrutinising operational detail is also its strength in having a 'view from the mountaintop' that other elements of the accountability framework do not. Further, contemporary practice has reinforced the need for interlocking systems of accountability, based on the experience that no one watchdog agency can be expected to cover the field. The Committee is in a good position to assess how all the elements of this picture fit together, searching for anomalies, inconsistencies, or gaps.

5.131 This strategic view is enhanced by its other roles in relation to legislative policy, and the public debate. It is in this respect that the Committee has identified some frustration at the limits of its jurisdiction.

5.132 As has been observed, the ACC is a national law enforcement agency that operates across several jurisdictions in close partnership with a number of other agencies, both state and Commonwealth. To perform properly any of the Committee's three functions, it must be able to gather effectively evidence from all of these agencies to the extent that their operations relate to combating organised and serious crime. Thus for example, during the Committee's inquiry into the trafficking of women for sexual servitude, it was necessary to take evidence from agencies such as the AFP and the Department of Immigration, Multicultural and Indigenous Affairs (DIMIA).

5.133 In most cases, agencies have been very cooperative and have afforded the Committee every assistance. However, particularly in the current review, the lack of assistance from some state and territory agencies has been noteworthy.

5.134 For this reason, the Committee considers that its effectiveness would be improved if its powers under the Act were amended to specify an obligation for agencies represented on the ACC Board to co-operate with the Committee in matters that relate to the ACC's work.

5.135 Further, the Committee's terms of reference should also be expanded to include the Australian Commission for Law Enforcement Integrity, as and when this body is created. As noted above, the PJC, ACLEI, and the Commonwealth Ombudsman, will together form a coherent integrity structure, not only in relation to the ACC, but other agencies such as the AFP and the Australian Customs Service. For

this reason, it will be important to consider in detail the relationship established by the legislation between the proposed ACLEI and the Committee. Approaches that could be appropriate include: that the ACLEI report to this Committee on both its scrutiny over the ACC and for the use of its special investigatory powers; or that the Committee is able to request ACLEI to investigate matters; or that ACLEI have stipulated reporting obligations to the Committee.

Recommendation 11

5.136 The Committee recommends that the ACC Act 2002 be amended to provide explicit requirements to Board agencies to provide enumerated classes of information to the PJC on the ACC.

Recommendation 12

5.137 The Committee recommends that the Australian Commission for Law Enforcement Integrity Bill, when introduced, include provisions that provide for scrutiny of the agency's operations by this Committee.

5.138 The creation of ACLEI will also raise wider questions about the overall structure of accountability arrangements and their relationship with the Parliament. The Committee notes that unlike the ACC, ASIO, ASIS, DSD and ASIC, the AFP has no formal Committee oversight. A second point is that if ACLEI has the responsibility for integrity issues in the AFP, ACC and ACS, it may result in a jurisdictional mismatch in which the Committee is unable to oversee the system as a whole.

5.139 A solution that the Parliament may consider, in parallel to the establishment of ACLEI, is the amendment of this Committee's statutory terms of reference to create a Parliamentary Joint Committee on Commonwealth Law Enforcement. Such a Committee would have oversight of the AFP, ACC, ACLEI and ACS to the extent of its involvement in Commonwealth law enforcement activities.

Recommendation 13

5.140 The Committee recommends that the Parliament create a new Parliamentary Joint Committee on Commonwealth Law Enforcement, with jurisdiction to supervise the operations of the Australian Crime Commission, the Australian Federal Police and other Commonwealth law enforcement agencies.

Recommendation 14

5.141 The Committee recommends that the legislation for the creation of the Australian Commission for Law Enforcement Integrity includes provision for the Committee to refer matters to the Commission for investigation, with a requirement to report to the Committee on the results of such investigations. This ensures the completeness and effectiveness of arrangements for scrutinising the operations of agencies, and - were its jurisdiction expanded as recommended above - prevents the Committee's workload from becoming too great for effective Parliamentary supervision of the relevant agencies.

Chapter 6

Resources

Introduction

6.1 Chapter six examines the extent of the resources that are available to the ACC in terms of the two areas of budget and staff. Assessments of both matters assume a particular complexity in the case of the ACC by reason of the combination of contributions from both the Commonwealth and the states and territories.

Budget

6.2 In its first full year of operation (2003-2004), the Australian Crime Commission's total budget was \$73.6m, which included a government revenue component of \$65.8m.¹ In the current budget cycle, this grew to \$76.302m, which consists of an appropriation of \$69.173m and additional revenue from other sources amounting to \$7.129m.² The 'other sources' includes revenue of \$1.770m from the States and territories, comprising reimbursement of salaries in accordance with agreements for intelligence services with partner law enforcement agencies.

6.3 The remaining \$5.359m is not specifically identified as being from any particular source, nor does it appear to have any particular application. From the experience of past years it is possible that this represents tied funding for particular ACC operations or investigations.

6.4 Following the release of the 'Wheeler Review' into security at Australian airports, the government has allocated additional funds to the ACC, as Mr Milroy told the Committee, amounting to:

\$20 million over five years, which will allow us to increase staff numbers by 16 or 19 in the intelligence collection, research statistics and other areas that deal with crime at airports. We also received quite substantial funding for the 2007 financial year to really enhance the intelligence database and some of the other systems and analytical tools that we need and identified.³

6.5 The Committee has examined two issues concerning the ACC's budget:

- the adequacy of the overall budget resources; and
- control over funds allocation.

1 *Australian Crime Commission Annual Report 2003-2004*, p.95

2 Australian Crime Commission Portfolio Budget Statements for 2005-2006, p. 84
viewed online on 19 October 2005 at <http://www.ag.gov.au/agd>

3 Mr Alastair Milroy, *Committee Hansard*, Canberra, 7 October 2005. p.73

Adequacy of the ACC budget

6.6 Does the ACC has sufficient funds to properly fulfil its statutory tasks? Consideration of this question relies on both an assessment of current workloads and a prediction of the impact of future trends in the organised crime environment. However, answering this question is complicated by not only the inherent uncertainty of any such predictions, but by two further factors. First, the funds that the ACC *could* expend in pursuit and prosecution of organised crime is almost limitless. It is therefore necessary to balance this criteria against what they *should* be doing, given the perceived nature of the threat.

6.7 A second complication is that without exception, agencies have proven reluctant to discuss any budget issues with the Committee on the grounds that such matters relate to confidential advice to the minister, that will itself lead into the overall budget process.⁴

6.8 In general terms, the ACC considers that it is adequately funded to perform its current menu of work, as set by the ACC Board.⁵ Indeed, Mr Melick considered that the ACC was better funded than was the NCA at the time he was involved, although it is not clear whether he took into consideration either inflation over time or the expanded role of the ACC compared to the NCA.⁶

6.9 In contrast to Mr Mellick, Mr Bob Bottom made the following comparison between the NCA and the ACC funding levels, suggesting that the current budget for the ACC is 'hardly any different' to that of the NCA in the late 1980s:

I am sure that Mr Duncan Kerr, who has been a long-serving member of the committee, will remember that it used to be around about \$50 million a year; it is now \$69 million a year. This year's budget was allocated only an extra \$1.1 million, taking the total budget of the ACC to just \$69.1 million⁷

6.10 The Committee notes that in its last full year of operation (2001-2002), the National Crime Authority's total budget was \$60.014m., which represented an increase of approximately \$7m over the previous year.⁸ Whilst Mr Bottom's figures are not entirely correct, the essence of his point remains valid: that there has been a surprisingly small increase in budget for the ACC in comparison to historic funding levels, particularly considering the additional intelligence function incorporated into the ACC.

4 Mr Alastair Milroy, *Committee Hansard*, Canberra, 7 October 2005, p. 73

5 Mr Alastair Milroy, *Committee Hansard*, Canberra, 7 October 2005, p. 73

6 Mr Aziz Melick, *Committee Hansard*, Sydney, 9 September 2005, p. 26

7 Mr Bob Bottom, *Committee Hansard*. Brisbane, 19 August 2005, p. 3

8 *National Crime Authority Annual Report 2001-2002*, p. 84

6.11 Mr Bottom also noted that the spending by Australia on policing in the South Pacific far exceeds the ACC's budget. Mr Bottom said:

...an amount of \$840.5 million over four years has been allocated to help authorities restore law and order in the Solomon Islands. ...We have found \$840 million to help that country, and I think it is only logical that we should be able to get a better allocation so that the ACC, which is our peak body for partnership and multidisciplinary type activities, can target what I would regard as serious organised crime and something of an enemy within.⁹

6.12 The Committee notes that the Department of Foreign Affairs and Trade has allocated \$840.6 million over four years to the Australian-led Regional Assistance Mission to Solomon Islands (RAMSI). The Department says:

The funding will ensure our continuing assistance to the Solomon Islands Government in the restoration of law and order and the consolidation of broad-ranging reforms. This benefits Australia's own security and the security of other Pacific countries.¹⁰

6.13 Two further factors are relevant to the consideration of the adequacy of the ACC Budget. In its submission, the Australian Taxation Office highlighted concern at the growing challenges to Australia's revenue system through international tax schemes. The submission continues:

These concerns have been borne out by the current Operation Wickenby, that has also confirmed that these schemes extend to potential criminal activity. Operation Wickenby has highlighted the level of expertise required to [conclude these matters successfully]. Our concern is that we see more rather than less of this type of activity being uncovered. Should this eventuate there will be questions about whether the resources available to the ACC will be sufficient to meet this challenge.¹¹

6.14 The Committee is also aware of the budgetary implications of the counter terrorism initiatives, which have the potential to divert resources within the ACC's partner agencies such as the AFP, away from law enforcement activities and criminal intelligence, and into counter terrorism. If this is the case, the ACC may need additional funding to make up this shortfall and itself undertake a number of tasks that it has previously been able to rely on other agencies for.

9 *Committee Hansard*, Brisbane, 19 August 2005, p. 3

10 Dept of Foreign Affairs and Trade website:
http://www.dfat.gov.au/geo/solomon_islands/solomon_islands_brief.html#aust_relations
viewed 1:45pm, 26 October 2005.

11 Australian Tax Office, *Submission 11*, p. 3

Control over budget allocation

6.15 The Police Commissioner of Victoria considered that the tied funding model was a flawed one. Commissioner Nixon gives the example of the determination on money laundering & tax fraud; \$29.971m over four years was provided, with an expectation that approximately \$53m would be subject to tax assessment and proceeds of crime action.¹² Commissioner Nixon continued:

The current arrangements whereby Commonwealth funding is provided, but tied to a particular crime category ...reduces the flexibility of the ACC and is in conflict with the governance model. Sufficient funds need to be provided by the Commonwealth for the ACC to coordinate intelligence and investigations without the funding being tied to a particular crime category. The ACC provides advice to the ACC Board on how the resources should be allocated, according to the priorities set by the ACC Board. It is then a matter for the ACC Board to determine how the funding should be allocated, having regard to the national priorities, risks and threats. The current funding arrangements usurp the authority of the ACC Board, whereby the Commonwealth sets the agenda and prioritises the allocation of resources through tied funding.¹³

6.16 The Committee notes Commissioner Nixon's submissions. However, the model which she proposes would be at variance with the Commonwealth's budgetary arrangements and responsibilities. The current model also reflects the reality that the overwhelming majority of the ACC's funding is provided by the Commonwealth. The Committee takes the view that provided the ACC is given adequate core funding, there is no difficulty with the Commonwealth retaining control over specific areas of activity by means of tied funding.

Recommendation 15

6.17 The Committee recommends that where priority issues involving the ACC arise, the Commonwealth continue to grant funds on a 'once-off basis' when this occurs between budgetary cycles.

6.18 However, this must be distinguished from adequate core funding. The Committee also considers it is important to recognise that the states must remain an integral part of the ACC's governance and operations.

Staff

6.19 In its last Annual Report, the ACC reported a total of 518 staff at 30 June 2004. The table below shows the breakdown of staff.¹⁴

12 *Submission 8*, p. [2]

13 *Submission 8*, p. [2]

14 *Australian Crime Commission Annual Report 2003-2004*, p. 132

Designation	Number
CEO and Examiners	4
APS Staff	377
Seconded Police Officers	117
Australian Tax Office secondees	7
Australian Customs Service secondees	3
CDPP secondees	1
Agency staff	9
TOTAL	518

6.20 An updated staffing figure at 30 September 2005 gives a total of 501 staff with an additional 66 members of taskforces funded by jurisdictions.¹⁵

6.21 By way of contrast, the table below shows staffing for the National Crime Authority at 30 June 2002: the end of its last full year of operation.¹⁶

Designation	Number
Authority Members	2
APS Staff	277
NCA Act Staff	1
Seconded Police Officers	116
Australian Tax Office secondees	9
Australian Customs Service secondees	1
TOTAL	406

15 *Submission 14C*, p. 9

16 *National Crime Authority Annual Report 2001-2002*, p. 120

6.22 To this figure, it is of course necessary to add the staff of two other agencies, the Australian Bureau of Criminal Intelligence and the Office of Strategic Criminal Assessment.

6.23 This section comments on four issues in relation to staffing and resources:

- Management of staff skill sets
- Secondment issues
- The need for additional examiners
- Allocation of staff to regional offices

Management of staff skill sets

6.24 The Committee notes the policy adopted by the ACC in managing its staff, and maximising the capacities of those staff in a relatively small agency. An example of this was provided by Mr Kevin Kitson, the ACC's Director of National Criminal Intelligence:

the agency has supported my efforts to restructure the nature of the intelligence staffing within the ACC. We inherited an agency with a good number of skilled and experienced people but of a certain seniority. We needed to adjust the staffing profile so that we had a broader base of people with perhaps more contemporary and more diverse skill sets. That has allowed us to expand our numbers and to take people who only want to work in law enforcement for one to two years and who are not necessarily looking for careers in law enforcement.¹⁷

6.25 Mr Milroy explained to the Committee that the balance and mix of resources is a lot different from what it was in 2003:

It is a small organisation that has an ability to shift its resources to meet emerging needs, although there is a quarantined or core group who have key responsibilities for emerging crime and developing the picture of criminality for this intelligence collection.¹⁸

6.26 Mr Milroy cited the capacity of the ACC to respond to the need to increase the collection of intelligence at airports without disrupting the core intelligence work of the organisation.¹⁹ Mr Kitson also told the Committee of strategies to tap into the expertise of other agencies:

Within the scope of the ACC's resources we cannot justify having our own research or analytical chemist onboard, so we have built some very strong relationships with research chemists in Queensland and Victoria, and indeed in most of the states, so that on a very regular basis we can talk to

17 *Committee Hansard*, Canberra, 7 October 2005 p. 67

18 *Committee Hansard*, Canberra, 7 October 2005, p.68

19 *Committee Hansard*, Canberra, 7 October 2005, p.68

them and ask what the impact would be if a particular drug were scheduled. If the scheduling under the drugs and poisons regulations was adjusted, what difference would this make to criminal exploitation? Could they make methamphetamine by the same system? What would they replace it with? If we managed to reschedule or prohibit imports of certain things, where would they go next? That is a very active process that we have going.²⁰

6.27 The Committee commends the Commission for this approach to management of its resources. However, the Committee notes that this flexibility should not be used against the ACC by requiring it to undertake its work with fewer resources than it reasonably requires.

Secondment issues

6.28 The Committee heard considerable comment about the position of the police officers seconded to the ACC, of which there were 117 at the end of the 2003-2004 financial year.

6.29 Mr Milroy told the Committee:

We had some discussions very early in the piece to try to come up with some common terms and conditions, and I think that has been an issue that has been around for some years, even prior to the establishment of the ACC. A director of corporate services has been going around, talking to each individual commissioner, or representatives of the commissioners, to look at a better way of recruiting seconded officers, so that there is a bit more equity in the process. Whether that is a model of leave without pay – which is quite common in a number of jurisdictions, whereby we would advertise the terms and conditions to come and work at the ACC on a leave without pay arrangement – it is still a secondment, and all the legal and administrative issues would still be addressed.²¹

6.30 In their submission the Police Federation of Australia told the Committee that for some time they had been attempting to negotiate a national secondment package for all police secondees to the ACC. The Federation considers this is necessary, because all secondees are subject to the employment conditions of their home police force; this results in inconsistencies of employment conditions including salary and benefits²² as well as limiting the possibilities for promotion in the home jurisdiction. Discussions were held in May 2004 between the Police Federation and the ACC but there has been little progress since.

6.31 Mr Mark Burgess, explained a little of the history of secondees with the NCA:
...we found that members working together in an office were on various terms and conditions attached to their home jurisdiction. Decisions would

20 *Committee Hansard*, Canberra, 7 October 2005, p.67

21 *Committee Hansard*, Canberra, 11 October 2005, p. 7

22 Police Federation of Australia, *Submission 3*, pp. 1-2

be made on who would work overtime, who would be on call and who would work weekends, based obviously on the terms and conditions in their home jurisdiction to minimise any cost to the NCA, which meant that some officers in some jurisdictions found themselves doing all those sorts of tasks whereas others who perhaps had better terms and conditions were not being called on as much to do those tasks. That is what brought it to a head in the first place. There were a number of difficulties ...the one that still has not been overcome is: who is the employer of the police officers attached to the ACC?²³

6.32 There is also a clear imperative to resolve this issue for reasons of efficiency in the ACC's administration of its staff. Running a system of multiple pay and conditions reflecting those of each Australian jurisdiction imports a degree of administrative complexity and cost that is unacceptable in the longer term. As Mr Burgess noted:

From the employer's perspective, it would be far simpler administratively. They would not be dealing with potentially eight different awards or enterprise agreements across the country; they would be dealing with one common set of terms and conditions.²⁴

6.33 The Committee also notes the important relationship between the management of secondments generally and the integrity and disciplinary issues of those secondees. This matter was discussed in detail in Chapter 5 on accountability and will not be revisited here, except to stress the Committee considers that the integrity and disciplinary issues are part of the broader picture of the employment status of secondees within the ACC. An agreement which has been in existence for eleven years, and which was devised in a completely different employment and organisational environment should be revised, and the issues surrounding employment of state and federal police officers clarified.

6.34 The Committee notes the more practical model used for police secondees to overseas missions: they are on leave without pay from their home forces, and are sworn as special constables of the AFP, and are subject to the integrity regime, pay and conditions of the AFP.

6.35 If applied to the ACC, this model could work in two ways. Either, police secondees are seconded to the ACC specifically using the AFP pay and conditions as a reference standard, or, they are seconded to the AFP, which then assigns them to the ACC.

6.36 Either option resolves the current complexity of secondment arrangements, and also avoids the resources required to negotiate a specific ACC secondment package that could result in an expensive 'highest common denominator' approach to

23 Mr Mark Burgess, Chief Executive Officer of the Police Federation of Australia, *Committee Hansard*, Canberra 13 October 2005, p. 7

24 Mr Burgess, *Committee Hansard*, 11 October 2005, p. 7

these diverse conditions. The latter option has the added advantage of resolving the police powers issues discussed in chapter 3, although the Committee recognises that it may be considered undesirable by some jurisdictions to have secondees posted via the AFP.

Recommendation 16

6.37 The Committee recommends that the issue surrounding the employment of secondees be addressed as a priority. Any review should address the standardisation of salary and working conditions through the development of a common secondment arrangement, as well as the implications of this system on the integrity and disciplinary framework.

ACC secondees to other agencies

6.38 One final, albeit rather minor matter, in relation to secondees is the potential for transfers in the other direction. Mr Michael Monaghan Deputy Commissioner, Serious Non-Compliance, at the ATO, told the Committee that while there were are ATO secondees at the ACC, no ACC officers have been seconded to the ATO, although there are both AFP and ASIC officers on interchange:

I have had discussions with the ACC about potentially having an officer placed in the ATO for a while as a broadening experience.²⁵

6.39 The Committee considers that there would be some merit in ACC staff being seconded to other agencies where there is some mutual benefit. However the Committee does not believe that this should occur until the issues surrounding secondments are resolved.

The need for additional examiners

6.40 The ACC submission indicates that in 2003, 171 examinations were conducted, rising to 515 in 2004, and – as at June 2005 – 375 examinations had been conducted.²⁶ The Attorney General's Department indicated that the examiners are:

fully occupied exercising their coercive powers and conducting examinations but that that examination workload is increasing significantly. Without prejudicing the independence of the examiners, we believe it may be useful to consider what options may be available to the ACC under the act to manage the increasing examination workload. For example, would there be scope for longer terms for examiners or for the engagement of part-time examiners?²⁷

6.41 Since the ACC Act does not stipulate the number of examiners to be appointed, any increase may be done administratively, noting the requirement that the

25 Mr Michael Monaghan, *Committee Hansard*, Canberra, 11 October 2005, p.21

26 ACC and ACC Board, *Submission 14*, p. 15

27 Mr Miles Jordana, *Committee Hansard*, Canberra, 7 October 2005, p. 3

IGC must be consulted prior to any appointment. However, appointing part-time examiners would require an amendment to the Act.

6.42 While mindful of the rising workloads of the examiners, either course of action outlined by the Attorney General's Department has wider implications that should be considered.

6.43 The Committee has already discussed (in Chapter 3 on Powers) the way a limited number of examiners indirectly provides an effective brake on any inappropriate expansion in the use of coercive powers. As the Hon Duncan Kerr SC MP observed:

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.²⁸

6.44 As to the suggestion of part-time examiners, in its *Report on the ACC Establishment Bill* the then Committee expressed some concern at the suggestions that part-time examiners could be appointed. The Committee noted at the time the potential creation of inappropriate incentives for such examiners to 'make work' for themselves:

if the remuneration of your part-timers depends on getting more work, you could have the forum shopping that you alluded to.... After due consideration, the government is not disposed to have part-timers of that kind that is paid on an hourly, daily or use rate.²⁹

6.45 In the absence of any persuasive argument to the contrary, the Committee considers that part-time examiners should not be used by the ACC.

6.46 The Committee also considers that there may be a case for an increase in the number of examiners at some future date, but this is not presently justified. The Committee takes the view that there should be a provision within Part II Division 3 Subdivision B of the Act to prescribe the maximum number of examiners who can be appointed, while also authorising regulations to allow for an increase when this is necessary. The Committee considers that the unstated assumption when the ACC was established that the number of examiners would be limited to three should not be altered without Parliamentary oversight.

28 The Hon Mr Duncan Kerr SC MP, *Committee Hansard*, Canberra, 7 October 2005, p. 3

29 *Report on the Australian Crime Commission Establishment Bill 2002*, p. 28 referring to *Committee Hansard*, 14 October 2002, p. 142

Recommendation 17

6.47 The Committee recommends that Section 46B of the *Australian Crime Commission Act 2002* be amended to provide that the maximum number of examiners allowed to work with the Commission at any one time be limited to three. The Committee also recommends that a further provision be inserted allowing the regulations to review and prescribe a higher number of examiners if and when the need arises.

Allocation of staff to regional offices

6.48 In her submission to the Inquiry, the Hon Michelle Roberts Minister for Police in Western Australia said:

It is understood that when the ACC office first opened in WA in 2001, there were eight investigators on staff. Today there is now only one investigator at the Perth office of the ACC. On all objective standards this is insufficient to operate an effective and fully functional investigative team.

6.49 The ACC was asked about this resource issue. Mr Milroy told the Committee that when the minister visited and put in her submission, there was recruitment action being undertaken and the numbers were down. Mr Milroy continued:

we try to advise the law enforcement agencies of the dates when the secondees are returning, to try to facilitate their replacement so there is no gap, but unfortunately that was the position then. I think the numbers are up to two or three more officers, and when she visited there was only one. I think it is important to understand, of course, that we ensure that the balance and mix of our specialist resources in any location around the country are allied to our national requirements. Although the numbers might fluctuate up and down depending on the balance and mix of resources, it is required to operate in that environment to deal with a specific board-approved menu of work. So it does vary, and it is not the same as it was in 2003 when we first started because our menu of work has varied.³⁰

6.50 The Committee appreciates that the Minister had some cause for alarm, and accepts that the fluctuations in personnel numbers are evaluated in terms of work of the Commissioner at any given time.

30 Mr Alastair Milroy, *Committee Hansard*, 11 October 2005, p. 7

Chapter 7

Results

Introduction

7.1 This chapter attempts some general assessment of the results achieved by the ACC after nearly three years in operation.

7.2 Overall, the reactions to the ACC by other institutional participants in the Australian law enforcement world have been very positive. The Australian Federal Police submission, for example, states that:

The first years of the ACC have been a period of achievement in a difficult environment with a new agency emerging from the shadows of its three predecessors under a new legislative framework.

In the AFP's view, the Board and the ACC has produced tangible outcomes strategically and operationally and the ACC has emerged as an effective national law enforcement body.¹

7.3 Chief Commissioner Nixon of the Victoria Police states:

...the ACC is operating effectively and I am confident that the ACC will become a far more effective organisation moving forward.²

7.4 Detective Superintendent Gollschewski of the Queensland Police described the ACC's role as integral to the national law enforcement capability,³ while the Queensland Crime and Misconduct Commission said:

The history of cooperation between the CMC and the ACC has been notable and allowed for some significant achievements in the fight against organised crime.⁴

7.5 In this context, this chapter examines the development of internal and external institutional arrangements, its criminal intelligence capability, investigations and finally, the evolving issue of performance measures.

Internal institutional arrangements

7.6 The first challenge for a new organisation is to both establish the internal working arrangements and begin the process of building a coherent sense of corporate

1 AFP, *Submission 10*, p. 13

2 Victoria Police, *Submission 8*, p. 1

3 Detective Superintendent Steve Gollschewski, *Committee Hansard*, Brisbane, 19 August 2005, p. 20

4 CMC, *Submission 6*, p. 1

identity and purpose. The former entails taking the broad institutional frameworks created by the Act and developing the practical relationships and procedures that make these frameworks into a functional organisation. This is a significant challenge in itself, given the organisational and political complexity of the ACC's governance environment. The latter task was made particularly challenging by the need to bring together three existing entities – the National Crime Authority, the Australian Bureau of Criminal Intelligence and the Office of Strategic Criminal Assessments – each with their own purpose, history and culture.

7.7 Mr Milroy outlined his view of these challenges:

As the commission nears the completion of its third year of operation, it has faced many challenges including the need to: ensure a smooth integration of the structures, people and processes of its antecedent agencies; establish a head office in Canberra; put in place an appropriate organisational structure; identify its future menu of work; and progressively deal with a range of difficult work force planning and management issues.⁵

7.8 According to Mr Keelty, Chairman of the ACC Board:

The ACC has had to manage the transition from three distinct existing agencies to a single new agency with new governance arrangements involving a new act and a board with considerable powers vested in it. The difficulty of this task alone cannot be underestimated.⁶

7.9 At a basic level, these tasks are reflected in the production of a range of corporate documents, such as the Corporate Plan 2004-07, the Business Plan, the Professional Standards and Integrity Management Plan, as well as the various Policies and Procedures documents.

Policy capacity

7.10 The AFP also suggested the ACC could further develop its capacity for policy development. As Mr Keelty told the Committee, this is an area of high importance:

the demands placed on the ACC are quite distinct to the demands placed, for example, on the AFP's policy area, and the ACC, by virtue of its role, will form a view as an organisation in areas of policy. I think for all of us the current environment of policy making in law enforcement has been so volatile and so voluminous that the ACC can value-add in those areas because it does and will see things differently to how the AFP will see them. It needs to be resourced in that area to enable it to make a positive contribution to policy.⁷

5 Mr Alastair Milroy, *Committee Hansard*, Canberra, 7 October 2005, p. 60

6 Mr Mick Keelty, *Committee Hansard*, Canberra, 7 October 2005, p. 22

7 Mr Mick Keelty, *Committee Hansard*, Canberra, 7 October 2005, p. 34

7.11 The AFP submission also referred to this, arguing that: 'The ACC's position in having multiple stakeholders across multiple agencies further reinforces our view that the ACC should have a dedicated Policy capability.'⁸

7.12 In response, the ACC advised that, as of 1 July 2005, there is now such a dedicated unit, with policy responses and initiatives coordinated through the Strategy and Governance area, and has also been strengthened with the creation of a General Manager Strategic Policy.⁹

Relationship development

7.13 As a new nationally focused law enforcement agency, the ACC faces the significant challenge of finding its place in the law enforcement community, and avoiding the danger of counterproductive turf warfare.

7.14 Mr Milroy identified the need to acknowledge 'that this is an area of responsibility for a lot of bodies.'¹⁰ He also said that the organisation is strongly focused on the need to establish and build the ACC's relationships with law enforcement agencies. Mr Milroy explained that:

we realised that there was clearly a need for us to improve our relationship management. ... We realise we have to understand our partners and we have to brief them on what we are trying to achieve for their benefit in national criminal intelligence.¹¹

7.15 This has seen the establishment of working groups at various levels including groups such as joint management groups in each jurisdiction,¹² the National Criminal Intelligence and Operations Forum and the National Information Sharing Working Group.¹³ According to Mr Milroy, as a result, the ACC has:

established productive and robust working relationships with its board, national law enforcement partners and other stakeholders, including private sector organisations; and developed robust investigative management and accountability governance structures.¹⁴

7.16 These efforts have also been recognised by Mr Keelty:

A key aspect of the ACC's progress has been the practical cooperation displayed between agencies represented on the board on a day-to-day basis

8 AFP, *Submission 10*, p. 11

9 ACC, *Submission 14B*, Attachment G

10 Mr Alastair Milroy, *Committee Hansard*, Canberra, 7 October 2005, p. 69

11 Mr Alastair Milroy, *Committee Hansard*, Canberra, 7 October 2005, p. 69

12 Mr Alastair Milroy, *Committee Hansard*, Canberra, 7 October 2005, p. 69

13 Detective Superintendent Steve Gollschewski, *Committee Hansard*, Brisbane, 19 August 2005, pp 19 & 27

14 Mr Alastair Milroy, *Committee Hansard*, Canberra, 7 October 2005, p. 60

on matters that are major to law enforcement in this country, particularly the area of the creation of multi-agency task forces.¹⁵

7.17 Similarly, Detective Superintendent Gollschewski of the Queensland Police described how the ACC has:

established and maintained a close collaborative working relationship with the Queensland Police Service in both the intelligence and investigative areas.¹⁶

7.18 Strong working relations appear also to have been developed with the Police Federation of Australia, which represents police at a national level.¹⁷

7.19 The Committee also notes the ACC's endeavours in building relationships with international agencies. Mr Kitson told the Committee that:

I think one other thing that needs to be recognised is that the development of the ACC has seen us build some very strong partnerships domestically and peripherally in the international field. We have to continue to strengthen those and we have to continue to be able to collect intelligence from the widest range of areas. That is a process that is ongoing. We have built some spectacularly strong relationships and we have had some very encouraging returns from some of our partners. We must continue to build that aspect, because it is that global reach and that global perspective that will give us, I think, a true dimension and give meaning to our work in terms of strategic criminal intelligence.¹⁸

Private sector

7.20 The Committee is aware that the ACC has also been working to establish dialogue and information sharing relationships with the elements of the private sector.¹⁹ It is also clear to the Committee that this is likely to become an increasingly important aspect of investigating organised crime, driven by the growing trends in financial and insurance fraud, money laundering, and the use of high technology communications.

7.21 The Insurance Australia Group submission also draws attention to the need for enhancing the level of collaboration between law enforcement agencies and the private sector to more effectively respond to organised crime involvement in motor

15 Mr Mick Keelty, *Committee Hansard*, Canberra, 7 October 2005, p. 22

16 Detective Superintendent Steve Gollschewski, *Committee Hansard*, Brisbane, 19 August 2005, p. 19

17 Mr Mark Burgess, Police Federation of Australia, *Committee Hansard*, Canberra, 13 October 2005, p. 14

18 Mr Kevin Kitson, *Committee Hansard*, Canberra, 7 October 2005, p. 66

19 Note also the comments in IAG, *Submission 19*, p. 3

vehicle theft and re-birthing, and fraud.²⁰ Further, the Wheeler review observes that Australia appears to be 'lagging behind leading Western countries ...in integrating intelligence exchange between the public and private sectors'.²¹

7.22 However, the Committee also notes the discussion in Chapter 3 of this report, which examines the legislative limits to the sharing of information with the private sector.²²

7.23 This is an interesting developing area. Clearly, given current crime trends, the degree of cooperation and information exchange will need to develop, whilst balancing the proper protection of privacy. The Committee notes that as far as it has been possible, the ACC has ventured into sharing expertise with the private sector. However, as noted in chapter 3, priority should be given to resolving the policy and integrity issues which arise from a public sector/private sector interface in order to further develop this aspect of the ACC's operations.

Criminal intelligence

7.24 The core function of the ACC is the collection, analysis and dissemination of criminal intelligence. In a quantitative sense, the achievements of the ACC can be measured in the establishment of a series of products, including the endorsement by the board of the National Criminal Intelligence Priorities and the delivery of:

- National criminal threat assessments
- Picture of Criminality in Australia
- Criminal Intelligence Reports²³
- Alerts
- Illicit Drug Data Report²⁴

7.25 These represent the products of the board approved special investigations detailed earlier in the report.

7.26 Another important area of ACC activity is the development and maintenance of key intelligence databases such as:

- Australian Criminal Intelligence Database (ACID)
- Australian Law Enforcement Intelligence Network (ALEIN)

20 IAG, *Submission 19*, p. 4

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

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

23 For a more extensive listing of these reports, see the ACC Annual Report 2003-04, p. 34

24 ACC & ACC board, *Submission 14*, p. 6

- Violent Crime Linkage Analysis System (ViCLAS)
- Australian Identity Fraud Protection Registers (AIPR)²⁵

7.27 A second level of assessment is a qualitative one: how useful and effective has all this criminal intelligence product been in 'reducing the incidence and impact of serious and organised criminal activity' in Australia? As Mr Lenihan, a former senior officer of the NCA, points out, judging the quality of the intelligence depends on the views of the users of that intelligence, who are primarily the police services.²⁶ As has been noted elsewhere in the report, the lack of response from the many of the police services limits the capacity of the Committee to form a view. However, what evidence the Committee has received suggests that the recipients of the ACC's intelligence products are satisfied with their quality, timeliness and content. Mr Jordana, a Deputy Secretary in the Attorney General's Department, told the Committee that:

The ACC is meeting its objectives by enhancing national law enforcement capacity through improved criminal intelligence collection and analysis, setting clear national criminal intelligence priorities and conducting intelligence-led investigations into nationally significant criminal activity. Through its criminal intelligence function, the ACC is fulfilling an important role of supporting and informing whole-of-government policies and decision making on nationally significant criminal threats.²⁷

7.28 The Department also detailed the useful contribution the ACC's intelligence has made to national policy development in areas such as firearms, people trafficking for sexual servitude, and illicit drugs.²⁸

7.29 Detective Superintendent Gollschewski of the Queensland Police Service described the ACC product as 'easily read and easily understood' and one that is based on a useful template and methodology that the Queensland Police are themselves adopting.²⁹

7.30 The Committee also notes that Mr Keelty described 'the areas is the streamlining of the intelligence reporting, the breadth of its dissemination and also the quality of the reports' as one of 'two key areas where the ACC has really moved beyond our expectations'.³⁰ The Committee commends the ACC for these achievements, and also notes the commitment by the ACC to publish a public version of the Picture of Criminality in Australia. This document will make an important

25 ACC & ACC board, Submission 14, p. 9

26 Mr Lenihan, *Submission 20*, p. 2

27 Mr Miles Jordana, *Committee Hansard*, Canberra, 7 October 2005, p. 2

28 AGD, *Submission 17*, p. 3

29 Detective Superintendent Steve Gollschewski, *Committee Hansard*, Brisbane, 19 August 2005, p. 29

30 Mr Mick Keelty, *Committee Hansard*, Canberra, 7 October 2005, p. 30

contribution to the national public debate on the emerging trends in organised crime and the extent of the threat it poses.

Strategic intelligence capacity

7.31 Evidence to the inquiry has raised two issues in relation to the ACC's criminal intelligence services: the extent of its strategic intelligence products and the extent of the use of core ACC systems by partner agencies.

7.32 Mr Keelty, perhaps speaking more in his capacity as Commissioner of the AFP, told the Committee that he wishes to see the ACC further develop its strategic criminal intelligence capabilities:

One of the things I think we have to maintain within the ACC – because nobody else is doing it to the level that the ACC can – is that over-the-horizon view[.]

7.33 He noted the emergent trends of identity crime and people-smuggling without it having being predicted:

I think that the over-the-horizon product is critical and will be more important to us in the future, particularly when you consider how the funding processes operate in cycles and how we need to be very prepared for new policy initiatives to be in the cycle of the budgetary process in order to acquire resources in time to have an impact. In law enforcement one of the problems is that we are always lagging because of that process.³¹

7.34 The importance of this role was accepted by Mr Milroy:

the responsibility for us to have an over-the-horizon-capability is warranted. It is one of the major roles that the ACC should be involved in.³²

7.35 However, according to the Australian Federal Police Association, it is a role that has been neglected, pointing to the disbanding of the Emerging Issues section within the intelligence directorate, and the discontinuance of the futures forecasting previously undertaken by OSCA.³³

7.36 The ACC reject this criticism, arguing that while the form of strategic reporting has changed, the function has not. As Mr Kitson, the Director of National Criminal Intelligence explained:

It has not endured in the way that might make it immediately visible if you were to inspect our structure or organisation charts today; you might not readily recognise the capacity that is there. That is because we have taken an approach that integrates it across a number of our functional areas. An

31 Mr Mick Keelty, *Committee Hansard*, Canberra, 7 October 2005, p. 30

32 Mr Alastair Milroy, *Committee Hansard*, Canberra, 7 October 2005, p. 65

33 AFPA, *Submission 16*, p. 4

outcome of that is that we have embedded that outlook capacity in documents like Picture of Criminality.³⁴

7.37 A component of the Picture of Criminality report is the Strategic Environment for Law Enforcement which focuses on likely patterns and trends that might occur in criminal markets over the next five years. The principal strategic intelligence products are the Strategic Criminal Intelligence Products (SCIAs), which generally relate to an issue identified in the Picture of Criminality report. The Board endorses a program of these each year, with twelve planned for 2005-06.³⁵

7.38 At an organisational level, the ACC created a new section in August 2005, with responsibility for preparing the Picture of Criminality report, the SCIAs, and developing a strategic warning program. This capability is further enhanced by the creation of a newly formed research area.³⁶

7.39 These organisational changes represent 'quarantined' resources working on a predetermined menu of work:

We set a menu of strategic criminal intelligence reports which is endorsed by the board. That is our over-the-horizon product. That is a menu of work that we propose to the board each year, with a rationale for each piece of work that is in there. ...

In the current cycle of work proposed for strategic assessment, we have some ambitious projects in areas that are perhaps seen by some as almost peripheral to law enforcement – issues of wider labour exploitation, potential criminal exploitation of international trading systems and the potential impact on criminality in Australia, of democratic patterns and shifts.³⁷

7.40 An important point was made by Mr Kitson, that 'strategic' in this context means no more than around five years out:

the nature of crime does not change in its broad sweep; it changes in its minute detail. It changes in its method of operation rather than in its actual style. So I think it is more useful to concentrate on saying: 'This is how we see it in the next five years. This is how law enforcement needs to adjust its focus in that period.' I think it is useful nonetheless to speculate on some of the issues that might confront us beyond the immediate five-year period, and indeed our Picture of criminality does do that. For example, it touches on the potential of, say, a pandemic to significantly affect regional and global dynamics in economic, political and social contexts. Our capacity to

34 Mr Kevin Kitson, *Committee Hansard*, Canberra, 7 October 2005, p. 65

35 ACC, *Submission 14B*, Attachment F

36 ACC, *Submission 14B*, Attachment F

37 Mr Kevin Kitson, *Committee Hansard*, Canberra, 7 October 2005, p. 68

explore that in a criminal environment that has meaning for our readership is really rather limited.³⁸

7.41 The Committee commends the ACC for these initiatives and is satisfied that the issues raised are being addressed.

Use of ACC intelligence products

7.42 An area of concern to the Committee is the limited extent to which the core ACC products, such as ACID/ALEIN are being adopted for use by other state and federal agencies.

7.43 While information from State police was generally not available, Detective Superintendent Stephan Gollschewski from the Queensland Police Service told the Committee:

We are a little different from most other jurisdictions in that we use the Australian Criminal Intelligence Database, ACID, as our primary intelligence database. We are in fact the only jurisdiction that does that. So the ACC's role in maintaining that database and in collecting intelligence is pivotal to how we do business.³⁹

7.44 It is unclear why only one state has adopted ACID as its principle database, and whether it is due to a lack of faith on the part of the other states in the information contained in ACID – although Queensland appears quite satisfied – or whether the other states have their own well established systems. In either case, it appears to the Committee to be a matter that warrants further inquiry.

7.45 Of greater concern to the Committee though, is the willingness of the other jurisdictions to contribute information to the ACC's intelligence systems. The AFPA submission observed that: 'A number of Board agencies have been remiss in not providing information on which they are the Australian experts to the ACC'⁴⁰ and that the quality of the information contained on ACID may have suffered because:

The ACC has been unsuccessful in convincing most law enforcement agencies to contribute meaningfully [sic] data in an ongoing capacity to [ViCLAS and ACID]⁴¹

7.46 This problem appears to reflect the earlier difficulties experienced by the Australian Bureau of Criminal Intelligence. According to Mr Lenihan:

38 Mr Kevin Kitson, *Committee Hansard*, Canberra, 7 October 2005, p. 65

39 Detective Superintendent Steve Gollschewski, *Committee Hansard*, Brisbane, 19 August 2005, p. 21

40 AFPA, *Submission 16*, p. 3

41 Australian Federal Police Association, *Submission 16*, p.4

The Bureau's greater difficulty ... was that most forces would not give it current information and intelligence, so that it was nearly always a long way behind the game.⁴²

7.47 He notes further that;

Some jurisdictions do not contribute to the serial sexual and violent offenders database (ViCLAS). There can hardly be any operational considerations preventing such contributions – as there may be in other areas – and the unwillingness to share such information is puzzling and disturbing.⁴³

7.48 Mr Bob Bottom also identified a lack of willingness to share information on the part of some agencies:

I think it is a bit of jealousy between agencies and the like. But this is why this organisation is so important. Police forces are like that; they are territorial.⁴⁴

... a lot of the things the royal commissions recommended and police chiefs promised et cetera are not being delivered.

7.49 It seems self-evident to state that the capacity of the ACC to fulfil its statutory role as a national criminal intelligence agency depends on the willingness of its partner agencies to place their own information holdings in the shared national databases. The Committee is concerned that the reluctance of most jurisdictions to use these shared databases as their principal systems may be a symptom of a persisting reluctance to engage fully with a national approach. If this is the case, it is extremely disappointing that this remains a problem three years after the inception of the ACC, particularly given the participation of each of the police commissioners on the ACC Board.

7.50 So long as individual jurisdictions maintain their own hermetically sealed information streams, any effective national response to organised crime will continue to be hamstrung by criminals that operate freely across jurisdictional boundaries. The Committee considers this to be a matter deserving close scrutiny in the coming year.

Investigations

7.51 In the almost three years of the ACC's operations, there has been significant investigative work done through the formation of task forces and joint investigations. Mr Milroy told the Committee that:

The integration of intelligence functions with the ACC's investigative capability through national taskforces and joint tactical operations has been

42 Mr Denis Lenihan, *Submission 20*, p. 3

43 Mr Denis Lenihan, *Submission 20*, p. 3

44 Mr Bob Bottom *Committee Hansard*, Brisbane 19 August 2005, p. 5

instrumental in disrupting the criminal activities of some of the country's key organised crime syndicates and individuals. The strategic placement and unique role of the ACC's criminal intelligence investigative functions, supported by its coercive powers, have allowed the commission to develop informed positions on nationally significant criminal matters beyond the capacity of single law enforcement agencies.⁴⁵

7.52 Detective Superintendent Gollschewski explained the significance of this operational activity for Queensland:

With respect to operational collaborations, to date the QPS has conducted 21 joint investigations with the Australian Crime Commission. The majority of the investigations have been complex, long-term, protracted investigations resulting in significant criminal networks being disrupted, numerous persons being arrested and charged with serious criminal offences and the seizure and restraint of assets valued at multimillions of dollars. Over this period 332 coercive examinations have been conducted and 221 notices to produce have been issued for jointly investigated matters.⁴⁶

7.53 The ACC Annual Report gives further details of a number of other significant investigations that have operated across areas of drug trafficking, money laundering and illegal firearms. The ACC concludes that it has 'made a significant impact, particularly on serious and organised crime groups ... through its investigative role'. Evidence of this claim is provided by a table summarising operational results since 2003.⁴⁷

Measuring performance

7.54 The final consideration in this chapter is to return to the issue of how to measure performance. This has been a matter of perennial interest to most of the ACC's governance bodies and the ACC itself. The Intergovernmental Committee directed the ACC through its board, to conduct further work on refining and improving the ACC performance reporting measures, while this Committee discussed issues relating to performance measurement at some length in its report on the last ACC Annual Report.⁴⁸

7.55 At that time, the Committee warned of the dangers of a focus on the wrong performance measures, which can create perverse incentives that drive the organisation in the wrong direction.

45 Mr Alastair Milroy, *Committee Hansard*, Canberra, 7 October 2005, p. 61

46 Detective Superintendent Steve Gollschewski, *Committee Hansard*, Canberra, 19 August 2005, p. 19

47 ACC & ACC Board, *Submission 14*, p. 10

48 PJC on the ACC, *Examination of the Annual Report of the Australian Crime Commission 2003-04*, para 2.42 et seq

7.56 According to Mr Keelty, these matters have been the subject of considerable efforts by the ACC, such that performance reporting is 'one of two key areas where the ACC has really moved beyond our expectations.'⁴⁹ This work has involved collaboration and comparison with other agencies to incorporate the best elements of all these systems into the ACC model.⁵⁰

7.57 The difficulties inherent in performance reporting for an organisation such as the ACC, were addressed by the Families and Friends for Drug Law Reform (FFDLR). The submission suggests that the performance criteria for the ACC should not be activity focused, but should instead assess effectiveness by measuring the 'extent to which law enforcement effort reduces the quantity of drugs needed to satisfy the demand of the Australian market.'⁵¹ Pointing to a wider range of indicators of supply and demand factors such as price, purity and availability, they argue that much more accurate measures of the effectiveness of law enforcement activities directed against the drug trade are possible.

7.58 The submission discusses this extensively, providing illustrations and examples, including a 1996 study which states that interdiction and reduction in availability are important measures of effectiveness in dealing with illicit drugs.

7.59 The Committee agrees with much of this submission, however does not wholly agree with its conclusion. A full assessment of all the variables raised by the FFDLR is certainly appropriate and necessary to permit a sensible understanding of the illicit drug problem in Australia and should underpin the assessment and ongoing refinement of Australia's anti-drugs policies.

7.60 Applying these measures to the ACC as performance criteria is more problematic. The ACC's tasks are set by government policy, and the agency has little scope to vary that policy. Measures such as those proposed by the FFDLR – while of great relevance to policy formulation – are largely outside the control of the agency. As such, the agency can only be judged on their success in carrying out government policies, and their use of public resources to do so. To that extent, activity levels summarised by the numbers of arrests, prosecutions, seizures, etc, are a relevant performance measure.

7.61 Nevertheless, the analysis proposed by the FFDLR should be done and published, and – as the FFDLR suggest – the ACC may be an ideal agency to perform this task in the context of its intelligence assessments and the Illicit Drug Data Report.

7.62 The Committee commends the agency for the work it has done on developing performance measures and will continue to monitor the evolution of performance indicators for the ACC.

49 Mr Mick Keelty, *Committee Hansard*, Canberra, 7 October 2005, p. 30

50 Mr Mick Keelty, *Committee Hansard*, Canberra, 7 October 2005, p. 33

51 *Submission 15*, p. 1

Conclusion

7.63 The three years since the establishment of the ACC have seen extensive changes in the criminal law environment, and there is no evidence that this will alter in the near future. The challenge for the ACC is to keep the medium to long term future well within view, as its continuing effectiveness will be determined in large part by its ability to anticipate future trends in organised criminal activity and position itself accordingly.

7.64 The ACC has shown itself to be a flexible and responsive organisation of rapidly developing capabilities that seems well placed to meet these challenges.

Chapter 8

Legislative Change

Introduction

8.1 The ACC Act is three years out from its commencement. From the submissions and evidence, there appear to be no major structural issues which require amendment or attention. However, there are some important matters identified in this report which have been the subject of recommendations. These include:

- Developing legislation to clarify the position of a person summonsed under section 28 of the ACC Act who is the subject of criminal proceedings or who becomes the subject of criminal proceedings or confiscation of proceeds of crime proceedings, during the course of his or her contact with the Australian Crime Commission.
- Amending section 55AA of the ACC Act 2002 to broaden the scope of the Commonwealth Ombudsman's briefing to the PJC to include any matter relating to the operations of the ACC.

8.2 The Attorney General's Department's submission notes that the Department and the ACC continually review the effectiveness of the Act.¹ However, particular attention has been given to the section 28 matter noted above together with:

- the powers and immunities of staff members and in particular the specially commissioned officers as well as secondees;
- non-compliance at examination; and
- the dissemination of criminal information and intelligence – in particular to the private sector.²

8.3 The Committee has already expressed a view in relation to each of these matters, and notes that they remain the subject of ongoing discussion with the ACC.

Caselaw

8.4 A body of case law challenging various aspects of the ACC legislation is being generated in the Federal Court: the main areas of challenges are noted in Chapter 3. From those the Committee notes that the most pressing is the section 28 issue noted above, and the effect of the recent decision in *AA Pty Ltd and Mr BB v Australian Crime Commission* [2005] FCA 1178.

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

2 Commonwealth Attorney General's Department, *Submission 17*, pp 11-14

8.5 The problem identified by Finkelstein J is whether the ATO can be construed as a law enforcement agency under the ACC Act. While saying that it could not, His Honour suggested that the matter might be remedied by regulation.³ While the case is being appealed by the ACC the decision has implications for the ACC and ATO, and in particular Operation Wickenby in which the ACC, the ATO and the AFP are jointly engaged. Again this is a matter which the Committee would like to see resolved as a matter of priority.

Availability of legal aid at examinations – ACT Legal Aid office

8.6 The Committee notes in Chapter 3 the position in relation to Legal Aid and examinations by the ACC. Mr Chris Staniforth of the Legal Aid Office of the ACT told the Committee:

The act was clearly drafted ...in a way which would make you think that legal aid would be available through a legal aid commission. There is a distinction made allowing a person working for a legal aid commission to come to know material which would not otherwise be allowed. I think any citizen in any democracy should have access to legal advice in the most accessible form we can achieve it.⁴

8.7 The present arrangement for a person seeking assistance for an Examination is through an application to the Attorney General's Department. This matter is discussed in Chapter 3.

8.8 The Committee considers that the implications for a person called to an ACC examination are considerable, and not all witnesses before an examination are 'Mr Bigs' who can be assumed to be capable of affording legal assistance. For this reason, the Committee makes the following recommendation:

Recommendation 18

8.9 The Committee recommends that regulatory, or if necessary legislative changes be introduced to allow persons summonsed for an Examination to be eligible for legal aid from the legal aid commissions, subject to the usual means tests.

3 *AA Pty Ltd and Mr BB v Australian Crime Commission [2005] FCA 1178, para 23*

4 Mr Chris Staniforth, *Committee Hansard*, 13 October, 2005, p. 1

Circulation of draft legislative or regulatory proposals

8.10 The Committee also suggests that proposals for amendments of relevant legislation be circulated to the Committee while the legislation is being developed. This would make the evaluation stage more efficient, and would allow the Committee to express views before the matter becomes a matter for pressing Parliamentary attention.

Senator Santo Santoro
Committee Chair

APPENDIX 1

List of submissions

- 1 Mr Bob Bottom & Rev. Canon B.A. Ballantine-Jones, OAM
- 1a Mr Bob Bottom
- 2 The Police Association Victoria
- 3 Police Federation of Australia
- 4 Commonwealth Ombudsman
- 5 Legal Aid Office (ACT)
- 6 Queensland Crime & Misconduct Commission
- 7 AUSTRAC
- 8 Victoria Police
- 9 Minister for Police & Emergency Services (NT)
- 9a Minister for Police & Emergency Services (NT)
- 10 Australian Federal Police
- 11 Commissioner of Taxation
- 12 Government of South Australia
- 12a Commonwealth Director of Public Prosecutions
- 13 Commonwealth Director of Public Prosecutions
- 14 Australian Crime Commission & the Australian Crime Commission Board
- 14a Australian Crime Commission
- 14b Australian Crime Commission
- 15 Families & Friends for Drug Law Reform (ACT) Inc
- 15a Families & Friends for Drug Law Reform (ACT) Inc

- 16 Australian Federal Police Association Branch
- 17 National Security & Criminal Justice, Attorney-General's Commonwealth Department
- 18 Law Council of Australia
- 18a Law Council of Australia
- 19 Insurance Australia Group Limited
- 20 Mr Denis Lenihan

APPENDIX 2

Witnesses who appeared before the Committee

Brisbane, Friday 19 August 2005

Mr Robert Bottom, Private capacity

Mr Gary Crooke, QC, Private capacity

Queensland Police Service

Detective Superintendent Stephan Gollschewski, Intelligence Support Group, State Crime Operations Command

Australian Council for Civil Liberties

Mr Terence O'Gorman, President

Sydney, Friday 9 September 2005

Independent Commission Against Corruption

The Hon. Jerrold Cripps, Commissioner

Mr John Pritchard, Deputy Commissioner

Australian Transaction Reports & Analysis Centre

Mr Neil Jensen, Director

Ms Wendy Ward, Acting National Manager, Partner Liaison & Support

Mr Aziz Melick, SC **Private Capacity**

Melbourne, Friday 16 September 2005

Mr Peter Faris, QC, **Private Capacity**

Police Association of Victoria

Mr Paul Mullet, Secretary

Mr Anthony Walsh, Discipline Advocate

Criminal Defence Lawyers Association

Ms Sarah Westwood, Vice President

Canberra, Friday 7 October 2005

Commonwealth Attorney General's Department

Mr Miles Jordana, Deputy Secretary (National Security and Criminal Justice)

Office of the Commonwealth Director of Public Prosecutions

Mr Ian Bermingham, Deputy Director

Mr James Carter, Senior Assistant Director (Policy)

Mr Mark de Crespigny, Assistant Director

Australian Federal Police

Mr Mick Keelty, Commissioner

Law Council of Australia

Mr Ross Ray, QC Treasurer

Ms Pradeepa Jayawardena, Policy Lawyer

Mr Frank Costigan QC **Private Capacity**

Australian Crime Commission

Mr Alastair Milroy, Chief Executive Officer

The Hon John Hannaford, Examiner

Mr Kevin Kitson Director, National Criminal Intelligence

Mr Lionel Newman Director, Strategy and Governance

Mr Michael Outram Director, National Operations

Canberra, Tuesday 11 October 2005

Australian Crime Commission

Mr Alastair Milroy, Chief Executive Officer

The Hon John Hannaford, Examiner

Mr Jeff Pope, Acting Director National Criminal Intelligence

Ms Debbie Wauchop, General Manager Strategic Policy

Mr Michael Outram, Director National Operations

Australian Taxation Office

Mr Michael Monaghan, Deputy Commissioner, Serious Non-Compliance

Ms Jennie Granger, Second Commissioner

Commonwealth Ombudsman

Professor John McMillan

Ms Heather Bridson, Acting Director, Inspections Team

Ms Vicki Brown, Senior Assistant Ombudsman, Law Enforcement

Australian Customs Service

Mr LB Woodward, CEO

Canberra, Thursday 13 October 2005

Legal Aid Office ACT

Mr Chris Staniforth, Chief Executive Officer

Police Federation of Australia

Mr Mark Burgess, Chief Executive Officer

Families and Friends for Drug Law Reform

Mr Brian McConnell, President

Mr John Ley, Vice President

Mr Bill Bush, Member

Melbourne, Friday 28 October 2005

Victoria Police

Mr Keiran Walshe, Assistant Commissioner

APPENDIX 3

Report by Professor Davis into the role and functions of the Committee

Introduction

I have been asked to inquire into the role and functions of the Parliamentary Joint Committee on the Australian Crime Commission, established under Part III of the *Australian Crime Commission Act 2002*. In particular, I have been asked to consider:

- the appropriateness of that role and those functions, and
- the effectiveness of the Committee in fulfilling its statutory charter with regard to
 - scrutinising the activities of the Australian Crime Commission and its use of its special investigatory powers; and
 - contributing to policy debate in relation to emerging trends and patterns in organised criminal activity.

This inquiry is being conducted at the same time as, and to some extent in tandem with, an inquiry by the Committee itself, under section 61A of the *Australian Crime Commission Act 2002*, into the operation of the Act. In that inquiry, the Committee has been considering the effectiveness of not only the Australian Crime Commission (**the ACC**) and its principal officers but also the Board of the ACC and the Inter-Governmental Committee. The Committee has also been considering whether the roles, powers and structure of the ACC remain relevant to meeting the challenge of organised crime in the twenty-first century, and whether, in the light of its considerations, there needs to be any amendment of the *Australian Crime Commission Act 2002*.

Role and functions of the Committee

The role and functions of the Parliamentary Joint Committee are set out in section 55 of the Australian Crime Commission Act 2002. That section provides:

- (1) The duties of the Committee are:
 - (a) to monitor and to review the performance by the ACC of its functions;
 - (b) to report to both Houses of the Parliament, with such comments as it thinks fit, upon any matter appertaining to the ACC or connected with the performance of its functions to which, in the opinion of the Committee, the attention of the Parliament should be directed;

- (c) to examine each annual report on the ACC and report to the Parliament on any matter appearing in, or arising out of, any such annual report;
 - (d) to examine trends and changes in criminal activities, practices and methods and report to both Houses of the Parliament any change which the Committee thinks desirable to the functions, structure, powers and procedures of the ACC; and
 - (e) to inquire into any question in connection with its duties which is referred to it by either House of the Parliament, and to report to that House upon that question.
- (2) Nothing in this Part authorises the Committee:
- (a) to undertake an intelligence operation or to investigate a matter relating to a relevant criminal activity; or
 - (b) to reconsider the findings of the ACC in relation to a particular ACC operation/investigation.
- (3) To avoid doubt, the Committee may examine, and report to both houses of the Parliament on, information given to it under section 59.

Is this statutory charter appropriate?

In my view, the role and function of the Committee, as set out in section 55, are not only appropriate but essential. The particular matters specified in the five paragraphs of subsection 55(1) may be divided broadly into two categories: first an oversight function, set out in detail in paragraphs (a), (b) and (c), and secondly a policy function, spelt out in paragraph (d), of considering the broad trend of criminal activities, and proposing to the Parliament any amendments which appear to be necessary as a result of that consideration.

It may be argued that there are other bodies that may carry out one or both of those functions, raising the question of the need for the Committee. It might be said, for instance, that the ACC is subject to more than enough oversight from a range of different organisations and offices, and that consideration of the need for change and proposals for amendment are already well catered for. To rebut these possible arguments, one may consider each in turn.

Oversight of the ACC

It may be conceded that the ACC is subject to considerable oversight. The one body set up by the *Australian Crime Commission Act 2002* for that purpose is the Inter-Governmental Committee, comprising the Minister for Justice and Customs and a Minister from each of the States and mainland Territories. The functions of that Committee are specified in section 9 as including the general monitoring of the work of the ACC and of the Board of the ACC, overseeing the strategic direction of the ACC and its Board and passing relevant information from the Board of the ACC to each of the governments represented on the Inter-Governmental Committee.

Apart from that Committee, the conduct of the ACC and its officers is also subject to review by the Commonwealth Ombudsman, under his or her general powers in the *Ombudsman Act 1976*, as well as by the Auditor-General and the Privacy Commissioner. Furthermore, the Ombudsman is given particular oversight over the ACC's use of controlled operations under Part IAB of the *Crimes Act 1914*, as detailed in Division 2A of that Part, and the ACC's use of surveillance devices, by virtue of subsection 55(2) of the *Surveillance Devices Act 2004*. In addition, under section 82 of the *Telecommunications (Interception) Act 1979* the Ombudsman may inspect the ACC's records relating to telephone intercept warrants, to ensure that it has complied with the requirements of that Act.

While this oversight by both the Inter-Governmental Committee and the Commonwealth Ombudsman is necessary, it is, I suggest, qualitatively different from the oversight which the Parliamentary Joint Committee exercises. The Parliamentary Joint Committee, unlike either the Inter-Governmental Committee or the Commonwealth Ombudsman, is a surrogate of the Parliament itself, and thus is uniquely able to provide an oversight of the ACC which ensures all of the checks and balances that democracy demands. While the Inter-Governmental Committee would report any matters of concern to the Governments from which its members are drawn, and while the Ombudsman would report any issues of concern to the ACC and, in the last resort, to the Prime Minister, the Parliamentary Joint Committee is able to bring the public into the arena of discussion and debate about the operations of the ACC. As its most recent inquiry amply demonstrates, the Parliamentary Joint Committee is able, and willing, to conduct public hearings around the country, and invite a broad range of comment from every interested party. Armed with such information, it is able to provide a particularly well-informed report to the Parliament of the way in which the ACC is operating. The public can rest assured that the body which its representatives in Parliament set up by the legislation which created the ACC is under continuing scrutiny by those same representatives, or at least the members of the Committee charged with that task.

It should be a matter of some pride for the Committee that the operations of the ACC are subject to a much greater level of scrutiny and accountability than similar organisations in the United Kingdom. In 1992, the Home Office in the United Kingdom set up the National Criminal Intelligence Service, with powers very broadly similar to the ACC. However, that Service did not have a statutory basis until the passage of the *Police Act 1997*. It appears that the only measures of oversight and scrutiny of that Service – and these were measures that were introduced by the *Police Reform Act 2002* – were that complaints against members of the National Criminal Intelligence Service would be dealt with by the Independent Police Complaints Commission, and that the conduct of the Service was subject to inspection as to its efficiency and effectiveness by the Inspectors of Constabulary. The National Criminal Intelligence Service, together with the National Crime Squad, are to be replaced by the Serious Organised Crime Agency with effect from 2006, as provided for in the

Serious Organised Crime and Police Act 2005. However, the statutory measures for oversight and scrutiny will remain unchanged under the new legislation.

Consideration of the need for change

Paragraph (d) of subsection 55(1) of the *Australian Crime Commission Act 2002* obliges the Parliamentary Joint Committee to:

examine trends and changes in criminal activities, practices and methods and report to both Houses of the Parliament any change which the Committee thinks desirable to the functions, structure, powers and procedures of the ACC.

This provision has remained unchanged in the legislation since it was first included as paragraph 55(1)(d) of the *National Crime Authority Act 1984*, apart from the replacement of the reference to the National Crime Authority with a reference to the ACC. In my view, it is a provision which remains as relevant today as it was in 1984.

The impetus for any reform of the statute-book may come from a variety of sources. While it is often those who are affected by legislation who see most clearly the need for change, there are strong grounds for arguing that of the various entities which are connected with the work of the ACC, the Parliamentary Joint Committee is exceptionally well-placed to consider and promulgate change.

Those who are closely connected to the ACC, such as the Board and the Inter-Governmental Committee, may be seen as too close to the day-to-day operations of the ACC to be able to stand back and take a long view of trends and developments in criminal activities. Those other entities which are concerned more with oversight of the operations of the ACC, such as the Ombudsman, the Auditor-General and the Privacy Commissioner, may be seen as focussed on the particular issues which have arisen, and which call for their attention, and not as much concerned with broader trends and developments. Furthermore, while the Minister and officers of his or her Department will naturally keep the operations of the ACC under continuous review, and put forward proposals for change as and when they are regarded as necessary, it may be suggested that the Minister and Departmental officers have a wide range of other responsibilities, all of which demand attention competing with that to be given to the ACC.

On the other hand, since it is the Parliament which will, if necessary, make any changes to the legislation relating to the ACC, it should be the Parliament – or at least the Parliamentary Committee charged with particular oversight of the ACC – which is the natural starting place for any broad-ranging review of trends and developments in criminal activities and consideration of the need for amendment to the legislation. Especially is this the case with this particular Committee, drawn as it is from both Houses of the Parliament, and with representation from minor parties as well as from the major parties.

Of course, in order to fulfil this function as fully as possible, it is essential that the membership of the Committee remain relatively stable, despite the changes arising

from elections and retirements. It is only with such stability of membership that the Committee is able to develop the longer view, which is the factor that sets it apart from the other entities and organisations concerned with reviews of the *Australian Crime Commission Act 2002*.

As with the oversight of the operations of the ACC, referred to above, the Parliamentary Joint Committee is uniquely placed to seek the widest possible public consideration of any changes which it regards as desirable. In the course of its public hearings around the country, the Committee is able to canvass public reaction to any proposals which it may have developed, and put the results of that consultation forward to the Government.

How effective is the Committee?

My terms of reference require me to consider the effectiveness of the Committee in relation to the two matters considered in the preceding part of this Report, namely scrutiny of the ACC's activities, and the Committee's contribution to the policy debate of the ways in which the ACC should respond to emerging trends and patterns in organised criminal activity. As I have done above, I propose to consider each issue separately.

Scrutiny of the ACC's activities

The various Reports of the Parliamentary Joint Committee (PJC) make it clear that, until relatively recently, there has been a continuing tension between the PJC and the National Crime Authority (NCA), as predecessor of the ACC, relating to the amount of information about operational matters which the NCA was prepared to divulge to the PJC.

In the Report of the PJC on the then NCA of November 1991 entitled *Who is to Guard the Guards?*, Chapter 7 considered in some detail the interplay between section 51 and subsection 55(2) of the then Act. Section 51 (then as now), broadly expressed, obliged members of the then NCA and of the staff of the Authority not to make a record of any information acquired in the course of their duties under the Act, nor to divulge or communicate that information to anyone else – including, of course, the PJC. Subsection 55(2), when dealing with the functions of the PJC, expressly limited those functions by declaring that they did not authorise the PJC:

- (a) to investigate a matter relating to a relevant criminal activity; or
- (b) to reconsider the findings of the [National Crime] Authority in relation to a particular investigation.

[Subsection 55(2) of the current legislation has been amended to some extent, but the above provisions remain.]

In its Report of November 1991, the PJC concluded that these two provisions needed to be amended, as they were conducive to differences of opinion between the PJC and the then NCA as to the degree to which the NCA could properly divulge information

to the PJC. A Bill to amend the NCA legislation was introduced in 1992, many of the amendments drawing on the PJC's report. However, the proposals to amend either or both of section 51 and subsection 55(2) were not included in the Bill, as is recorded, with some frustration, in paragraphs 5.76 to 5.78 of the PJC's Third Evaluation of the National Crime Authority of April 1998.

In that Third Evaluation Report, the Committee concluded its discussion of Parliamentary supervision with Recommendation 18:

That sections 51 and 55 of the National Crime Authority Act 1984 be amended to clarify that the Parliamentary Joint Committee on the National Crime Authority has access to all information held by the Authority which is not of a sensitive nature.

The efforts of the PJC finally bore fruit in the *National Crime Authority Legislation Amendment Act 2001*. That Act amended section 55 by adding subsection 55(3), under which the Parliamentary Joint Committee is expressly empowered to 'examine, and report to both Houses of the Parliament on, information given to it under section 59.' Section 59 was also amended by the addition of subsections 59(6A) to (6D). The only subsequent amendment to those subsections has been the technical amendments, made by the Australian Crime Commission Establishment Act 2001, to change references to the National Crime Authority to the Australian Crime Commission. The subsections are currently in the following terms:

- (6A) Subject to subsection (6B), the Chair of the Board:
 - (a) must comply with a request by the Parliamentary Joint Committee on the Australian Crime Commission for the time being constituted under Part III (the PJC) to give the PJC information relating to an ACC operation/investigation that the ACC has conducted or is conducting; and
 - (b) must when requested by the PJC, and may at such other times as the Chair of the Board thinks appropriate, inform the PJC concerning the general conduct of the operations of the ACC.
- (6B) If the Chair of the Board considers that disclosure of information to the public could prejudice the safety or reputation of persons or the operations of law enforcement agencies, the Chair must not give the PJC the information.
- (6C) If the Chair of the Board does not give the PJC information on the ground that the Chair considers that disclosure of the information to the public could prejudice the safety or reputation of persons or the operations of law enforcement agencies, the PJC may refer the request to the Minister.
- (6D) If the PJC refers the request to the Minister, the Minister:
 - (a) must determine in writing whether disclosure of the information could prejudice the safety or reputation of persons or the operations of law enforcement agencies; and

-
- (b) must provide copies of that determination to the Chair of the Board and the PJC; and
 - (c) must not disclose his or her reasons for determining the question of whether the information could prejudice the safety or reputation of persons or the operations of law enforcement agencies in the way stated in the determination.

The PJC has indicated that it feels this provision still to be somewhat restrictive of its right to obtain information from the ACC. In the PJC's Report on the Australian Crime Commission Establishment Bill 2002, published in November 2002, it was noted, at para 2.63, that the Bill:

only proposes technical amendments to the provisions of the NCA Act relating to the disclosure of information concerning an investigation ...Clearly a continuation of the status quo is envisaged.

The PJC went on, in para 2.64, to reiterate its then belief that 'if it is to conduct its oversight role effectively it must have access to operational information.' It concluded this section of the Report with Recommendation 9:

The PJC recommends that the [Australian Crime Commission Establishment] Bill be amended to provide that the ACC is obliged to provide the Parliamentary Committee overseeing its operations with any information sought by the Committee except where that information would identify any particular individual suspected of criminal conduct ... or would, in the opinion of the CEO [of the ACC], risk prejudicing a current inquiry.

This Recommendation was not accepted by the Government of the day.

It is suggested that the above Recommendation goes too far, and that the compromise arrived at in 2001, which found expression as subsections 59(6A) to (6D), strikes a reasonable balance between the PJC's quite proper desire to ensure that it is fully informed on operational matters and the ACC's equally proper concern that there is an inherent risk in the dissemination of any information gathered by it beyond what is essential for the conduct of the particular operation.

Although the PJC, in its Report of November 2002 on the Bill to establish the ACC, stated (as quoted above) that 'a continuation of the status quo is envisaged', it may be observed that the status quo there referred to had been set up little more than a year previously, when the *National Crime Authority Legislation Amendment Act 2001* added subsections 59(6A) to (6D) with effect from 12 October 2001.

It may further be noted that paragraph 59(5A)(a) obliges the Chair of the Board of the ACC to provide to the PJC information 'relating to an ACC operation/investigation that the ACC ... is conducting', and then puts the onus on the Chair of the Board to show cause why the information ought not to be released, with any deadlock between the PJC and the Chair of the Board being resolved by the Minister. It is suggested that these subsections go a long way to meet the concerns that the PJC has expressed.

Reference might also be made to the fact that, in the course of the hearings conducted by the PJC under section 61A of the Act from August to October 2005, the Commonwealth Ombudsman suggested, both in his submission to the PJC and in oral evidence, that a further means by which the PJC could obtain information on the ACC's operations would be for the scope of the Ombudsman's annual briefings of the PJC to be expanded. Currently, section 55AA obliges the Ombudsman to brief the PJC at least once every year about the ACC's involvement in 'controlled operations' – ie, operations under which members of the ACC engage in conduct which would otherwise be unlawful, in order to obtain information about the possible commission of serious offences. The Ombudsman suggested that his obligation be expanded to include any matter relating to the ACC. Acceptance of this suggestion would appear to resolve any lingering difficulties that the PJC might have about the extent of the information that it receives from the ACC about its operations.

Furthermore, the point has been made above, when discussing the appropriateness of the PJC's statutory charter, that the great strength of the Committee, and the fact which sets it apart from the other entities with oversight of the ACC, is its power to conduct open inquiries, in capital cities and major centres around the country, in order to foster and encourage public debate about the conduct of the ACC. It may be suggested that vigorous and open debate by those concerned in whatever way with the conduct of the ACC provides a better means of oversight of the Commission than may be derived from the PJC's ability to obtain operational information about some of the ACC's investigations or operations.

Scrutiny of the ACC's special investigatory powers

Under sections 28 and 29 of the *Australian Crime Commission Act 2002* examiners have very wide coercive powers to summon witnesses, take evidence and compel the production of documents for the purposes of furthering a special operation or a special investigation. Failure to comply with a summons to attend to answer questions or to produce documents is a criminal offence under subsections 29(3A) and 30(6), and by virtue of subsections 29(4) and 30(4) an examinee's privilege against self-incrimination is substantially limited.

It may be observed that these powers, while wide, are by no means unique to the ACC. The Senate Standing Committee for the Scrutiny of Bills maintains a watching brief on those provisions in all legislation introduced into either House of the Parliament which impose criminal liability on any person for failure to provide information to a public authority. The incidence of such provisions may be ascertained from the relevant Table to that Committee's Alert Digests.

It may also be observed that the abrogation of an examinee's privilege against self-incrimination under the *Australian Crime Commission Act 2002*, while more extensive than the norm, is also not unique. By virtue of subsections 30(4) and (5), the answers provided by an examinee, or the document or thing which he or she has produced, are generally not admissible in evidence against the examinee in a criminal proceeding, or in a proceeding for the imposition of a penalty. But the subsections do not give

immunity for information obtained as a direct or indirect consequence of the giving of that information, commonly referred to as a “derivative use” immunity. In that respect, the provisions go further than most of those which abrogate the privilege against self-incrimination. However, in a paper entitled *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by authority of the Minister for Justice and Customs, the comment is made on page 87 that the more circumscribed immunity given to examinees under this legislation has 'been accepted as appropriate' for legislation governing the Australian Securities and Investment Commission, the Australian Prudential Regulation Authority and the Australian Competition and Consumer Commission. As the paper goes on to note, it has been 'accepted that a full "use" and "derivative use" immunity would unacceptably fetter investigation and prosecution of corporate misconduct offences.' Doubtless the same policy objectives were behind the drafting of subsections 30(4) and (5) of the *Australian Crime Commission Act 2002*.

For all that the powers of examiners under the *Australian Crime Commission Act 2002* find an echo in some other Commonwealth legislation, it is nevertheless true that those powers are wider than those available to most police forces. The exercise of those powers is therefore a matter about which the PJC, it might be thought, should be especially vigilant. Regrettably, scrutiny by the PJC of the exercise of these powers is to all intents and purposes impossible. The only information provided by the ACC as to that exercise are statements in its Annual Reports of the number of examinations that have been held under section 28, and the number of notices requiring the production of documents that have been issued under section 29, in the year under review. No information is provided about the nature of the information obtained, its use in achieving outcomes, or even the number of occasions on which an examinee sought protection from giving information on the ground of possible self-incrimination.

It is, unfortunately, not clear what sort of information the ACC might provide to the PJC relating to the former's exercise of its special investigatory powers, but it is suggested that this is an issue which the PJC may care to consider further. One possible means of resolving the difficulty is by accepting the suggestion of the Commonwealth Ombudsman, referred to above, that section 55AA of the Act be expanded to oblige the Ombudsman to brief the PJC about all aspects of the ACC's performance, rather than, as at present, the briefing be confined to the ACC's involvement in 'controlled operations'.

Contribution to policy debate

My terms of reference required me to consider the effectiveness of the Committee in contributing to policy debate in relation to emerging trends and patterns in organised criminal activity relevant to the ACC. In my view, the Committee has, at least over the past few years, been highly effective in fulfilling this aspect of its statutory charter.

The Reports prepared by the Committee may be broadly divided into three categories

- occasional reports on specific aspects of the work of the ACC, resulting from an own motion inquiry conducted under paragraph 55(1)(d) of the Australian Crime Commission Act 2002, the most recent of these being the *Report on Cybercrime*, of March 2004, the *Report of An Inquiry into the Trafficking of Women for Sexual Servitude*, of June 2004, and a *Supplementary Report on the Trafficking of Women for Sexual Servitude* of August 2005;
- the examination of each of the ACC's Annual Reports, a duty cast on the PJC by paragraph 55(1)(c) of the *Australian Crime Commission Act 2002*; and
- the septennial evaluations of the former National Crime Authority and the current ACC, comprising the *Initial Evaluation Report* tabled in May 1988, the Report entitled *Who is to Guard the Guards?*, tabled in November 1991 and the *Third Evaluation Report*, tabled in April 1998.

Each Report in each of these categories is generally thorough, comprehensive and pulls together a wide range of information which is distilled into a series of cogent recommendations for changes either in the law or in the way in which the ACC might handle its affairs.

On my review of the changes proposed to the former *National Crime Authority Act 1984* and the current *Australian Crime Commission Act 2002*, I have been pleasantly surprised by the extent to which the proposals put forward by the PJC have, in due course, found their way into amendments to the legislation. Sometimes the change has been slow in coming, and not necessarily as comprehensive as the PJC may have wished – a clear example of this being the response to the Committee's proposals for more, and more timely, information about the conduct of the NCA's and the ACC's operations. But one cannot judge proposals for reform of either the law or the operation of the former NCA and current ACC by their apparent "success rate" in being adopted by the Government of the day, or the Board of the NCA or ACC respectively. There are bound always to be a variety of views on the extent to which reform is necessary or desirable, and the fact that the PJC takes one view on such an issue does not mean that those charged with implementing the proposal will necessarily agree. It must be borne in mind that the duty of the PJC, under paragraph 55(1)(d) of the *Australian Crime Commission Act 2002*, is to 'examine trends and changes in criminal activities and methods and report to both Houses of the Parliament any change which the Committee thinks desirable'. The PJC, in other words, is required to alert the Parliament to the need for change and initiate discussion on the form of possible changes. But the essence of the democratic system is that the form which legislation finally takes is the product of a whole range of views, from often widely divergent starting points. The strength of the PJC, and its core role in this aspect of its work, is to be the initiator of the process of change, while leaving to the Parliament as a whole the decision on the final form of that change.

On those occasions when it more particularly considers trends and changes in criminal activities, the PJC has shown that it remains vigilant to the need regularly to monitor for possible change.

In the *Report on Cybercrime*, published in March 2004, the Committee commented at the outset of its Report that the issue of the inter-relationship of new technology and the criminal law had been examined only three years previously, in the then PJC's Report on Law Enforcement Implications of New Technology, published in August 2001. But it considered, in the *Report on Cybercrime*, that 'the complexity of technology has continued to increase exponentially, as have the opportunities for applying technology to criminal activity.' It therefore took the view that it was completely appropriate to inquire into the general issue of technologically assisted criminal activities, with particular reference to child pornography, credit card fraud, money laundering and threats to national critical infrastructure. The Report concluded with eleven Recommendations for action by a wide variety of bodies, including Parliamentary committees, the Government, Government Departments and the ACC.

Some time after the PJC had commenced an inquiry into the trafficking of women for sexual servitude the Government introduced a National Action Plan to combat that trade. The Committee felt that it was unable, in the course of its inquiry, to offer any assessment of that Action Plan. However, 12 months after the Committee had completed its initial Report it considered it timely to review the whole situation, in the light of the Government's Action Plan and proposals for legislative change which had been introduced. The Committee consequently issued its *Supplementary Report on the Trafficking of Women for Sexual Servitude*, which made three further recommendations directed to the ACC, the Government and the Australian National Audit Office.

Conclusion

The former National Crime Authority and the current Australian Crime Commission have been in existence for 21 years, a period which has seen considerable change in organised criminal activity. With the growth in technology, especially over the last few years, those changes are occurring with increasing speed. In the face of such changes, it is essential that the Parliament regularly monitors the way in which its primary weapon against organised criminal activity is operating. The Parliamentary Joint Committee is therefore to be congratulated on continuing the process of septennial reviews of the whole of the operation of the ACC, its staff and Board and the associated entities involved in the organisation. But, in an echo of the title to the first of those septennial reviews – *Who is to Guard the Guards?* – it is also appropriate that the work of the Parliamentary Joint Committee be itself reviewed.

As I have sought to demonstrate in the preceding pages, it is my view that the statutory charter of the Parliamentary Joint Committee, as contained in section 55 of the *Australian Crime Commission Act 2002*, continues to be as appropriate to the current ACC as it was to the original NCA in 1984. It continues to be essential that the Parliament maintains a watching brief over the activities of such a powerful body as the ACC. And, since Parliament as a whole cannot realistically maintain that watching brief, its role is fully and completely played by its surrogate, the Parliamentary Joint

Committee. Furthermore, that Committee has demonstrated, by its activities over the last few years, that, with the exception of the question of scrutinising the exercise of the ACC's special investigative powers, it remains effective in fulfilling the role of maintaining oversight of the ACC's operations together with initiating policy changes that flow from the Committee's longer term view of the fight against organised criminal activity.

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3 November 2005