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SECRETARY OFFICE OF THE  
CHIEF EXECUTIVE

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The Hon Senator Santo Santoro  
Committee Chair  
Parliamentary Joint Committee on the Australian Crime Commission  
Parliament House  
CANBERRA ACT 2600

Dear Senator Santoro

This submission provides supplementary information by the ACC to the PJC in relation to questions and issues raised during ACC appearances at the PJC hearings on 7 and 11 October 2005.

Attached are ACC responses on the following subjects:

- Attachment A: Examinations and Use of Coercive powers – advice on the release of ACC Examination policy and procedures (Hansard, 7 October 2005, p 62), advice on issues relating to Examination transcripts (Hansard, 11 October 2005, p 2 & 3) and a case study to show how coercive powers are used in practice (Hansard, 11 October 2005, p 14).
- Attachment B: Challenges to ACC Powers – updated advice on the status of challenges to ACC powers (Hansard, 11 October 2005, p 14).
- Attachment C: Management of Secondees – advice on integrity issues, performance management and common terms and conditions.
- Attachment D: Use of Special Constables/AFP Member Powers – advice on the use of APS staff requiring police powers (Hansard, 11 October 2005, p 11) and a resourcing table (Hansard, 11 October 2005, p 12).
- Attachment E: Informants – advice on protocols for handling ACC informants and their information (Hansard, 11 October 2005, p 14). Includes Protected Annexe.
- Attachment F: Intelligence – advice on international roles (Hansard, 11 October, p 14) and over the horizon reporting.
- Attachment G: Policy Role – advice on the ACC's current strategic policy function.

Please do not hesitate to contact me if you require clarification on the matters raised in this letter.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M. Outram', is written over a horizontal line.

Michael Outram  
Acting Chief Executive Officer, 21 October 2005

## **Attachment A: Examinations and Coercive Powers**

### **Release of ACC Examination Policy and Procedures**

The ACC considers that the public release of the ACC Examinations Policy and Procedures would not be appropriate. There are aspects of that document which reveal operational considerations of the ACC which it would not be in the public interest to be released. These sections provide advice on matters to be considered in preparing for an examination and for the briefing of an Examiner in preparation for a hearing. It is not desirable that these operational considerations be released publicly.

The ACC is however cognisant of the benefits that may be derived from better public awareness of the practices adopted by Examiners in the conduct and management of examination hearings. It is the intention of the ACC to improve such awareness through the development and release of a public information bulletin.

### **Examination Transcripts**

#### ***Advice on transcript dissemination policies and processes***

The Examiner makes a direction at the end of an examination as to the persons or organisations to whom any evidence or material should be published. That decision is made based upon the nature of the information that is received by the Examiner and any submissions that may be made by counsel assisting the Examiner, by the witness or the representative of the witness.

In making such a decision the Examiner is cognisant of the discretion that is afforded the Examiner by section 25A(9) of the Australian Crime Commission Act and the mandatory obligations that are imposed upon the Examiner by that section where the Examiner's attention is drawn to information about matters that may prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been, or may be, charged with an offence.

Each decision must be based upon the facts that arise during the particular examination and are not affected by predetermined policies or processes.

#### ***Advice on transcript use after their immediate application***

Where it is necessary for information to be provided to a person or organisation after a non-publication direction is made by the Examiner the decision to release that information is made by the CEO pursuant to section 59 of the ACC Act. Such a decision is made cognisant of the directions made by the Examiner or as varied or revoked pursuant to sections 25A(10) and (11) of the Act. Such a decision may be made also by the delegate of the CEO.

A decision pursuant to section 59 is made having regard to the nature of the information that is sought to be disseminated and the then known issues concerning that information and the person from whom it was obtained. Significant regard is had to the obligations imposed upon the CEO by sections 25A(10) and (11) of the ACC Act. In making any such decision the CEO also directs consideration to any restrictions that ought to be imposed upon access to and the use to which that information may be put by the receiving person or agency. Subsection 25A(14) provides that it is an offence to breach a direction in relation to the non-publication of ACC examination material.

#### ***Advice on the extent transcripts are susceptible to subpoena by defendants in criminal trials***

Except where a prosecution does not derive from an ACC investigation (in which case the secrecy provision in s51 of the ACC 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 for public interest immunity) but that is subject to the general law as it applies to such claims before the courts.

#### ***Advice on security arrangements when transcripts are provided to other agencies***

At the time of dissemination the CEO or delegates may impose restrictions upon access to and the use to which the information is provided, pursuant to section 59 of the ACC Act. This will usually involve a caveat to the recipient person or agency that it is not to be disseminated further to any third party without the express approval of the ACC. In the case of disseminations which include ACC examination transcripts, the terms of the non-publication directions may be narrowed to ensure that only the specific intended use is permitted.

#### **Use of Coercive Powers in Practice**

The ACC Examination Policy and Procedures Manual identifies that:

*“The first step in planning an Examination is to identify the outcomes and results the ACC or taskforce partner agencies are seeking from the Examination process. The range of potential results available, directly or indirectly, from such an exercise of coercive powers include;*

1. *evidence for inclusion in a brief to a prosecuting authority;*
2. *improved knowledge of the criminal environment;*
3. *assistance with confiscation action over property;*
4. *uncovering investigative leads;*
5. *identifying cooperative witnesses;*
6. *target development.”*

This process does not significantly vary between an examination that is for a special intelligence operation or a special investigation. It is however noted that if the examination relates solely to an intelligence operation that will restrict access to certain investigatory tools such as telephone interception/listening device powers but such restrictions may be minimised if there is a parallel investigation under another ACC Board authorisation.

Examiners seek to conduct an examination in a manner that allows the mosaic of the criminal activity to be most adequately understood. Understanding the mosaic generates a better understanding of the inter-relationship of the persons involved in the activity. For this reason it is usual that an examination of most of the peripheral operators will be conducted before an examination is conducted of those persons who are the more significant players.

Examinations may also involve questioning of individuals who are able to contribute to the ACC's understanding of specific areas of interest for example industry representatives, individuals, expert in particular fields including from government agencies, and representatives of legitimate businesses.

#### **Case Study**

The following case study outlines the application of the process.

ACC Intelligence revealed a planned drug importation that would draw upon the finances and resources of organised crime groups across a number of jurisdictions in Australia and a number of overseas countries. An investigation was triggered which enabled the full use of all investigatory resources.

To assist in identifying the financial resources of the group, the Examiners issued s.29 notices to a number of organisations. Financial analysts identified from this information persons who may have had information concerning interstate and international transfer of funds.

An examination plan was prepared by investigators to develop a strategy for the conduct of the examination. Persons included in the examination list were those persons who may have had information concerning the criminal activity and for whom it was felt necessary to hold an examination as traditional police inquiries may not have resulted in a satisfactory completion of inquiries. The Examiner was consulted in connection with the proposed examination plan.

Pursuant to that plan s28 notices were issued for the examination of persons connected with the financial aspects of the planned importation to ascertain what information they may have concerning the sources for the receipt of these funds and the persons to whom the funds were delivered.

Persons who may have had a peripheral involvement in the planning or execution of the importation were then questioned.

Examinations may take place during the course of the investigation; or, at the time that the investigation is being brought to a close by the seizure of the drugs; or, prior to any final decision being taken to arrest or charge persons associated with the activity; or, after an arrest is made. It is totally an operational decision as to when a request may be made to an Examiner to consider the issue of a summons and to conduct an examination.

Examinations have revealed that there existed wrong understandings of the significance of certain of the persons of interest. Persons who were believed to be non-active players have been revealed as significant financial partners of the enterprise. There has been revealed misunderstandings by investigators of the significance of relationships which have necessitated altered directions for an investigation.

Examinations can provide information which:

- may inform applications for the freezing and seizure of assets;
- may have the effect of restricting the explanations that may be generated as to the sources of any assets the subject of any such freezing and seizure proceedings;
- may provide information that will be of assistance to for example the ACC, the Australian Taxation Office, the Australian Federal Police, Australian Customs Service or other justice agencies;
- may provide information that will preclude persons involved in an organised criminal activity from generating alibis or generating exculpatory information concerning the activity;
- may be used to derive other information which may assist in a prosecution; or
- may be used to assist with the prosecution of another person.

## Attachment B: Challenges to ACC Powers

### Status of Challenges

Nineteen challenges to the exercise of powers under the ACC Act have been finalised since the establishment of the ACC.

The ACC has been successful in 17 of those cases. There have been two adverse decisions – in the first, the Federal Court set aside a direction by an Examiner to exclude a legal practitioner from an examination, and in the second the Federal Court held that the ACC cannot disseminate information to the ATO as it is not a 'law enforcement agency' as defined in the Act (currently on appeal to the Full Federal Court).

Challenges have had the effect of delaying the operation or investigation. Most of the challenges have related to the operation of the privilege against self-incrimination, while others have concerned spousal privilege, legal professional privilege, and whether examinations could proceed where the witness was involved in other court proceedings.

There are currently eight challenges (as well as two further challenges anticipated within the week) and two appeals before the Federal Court which are expected to be heard next year. All challenge the validity of section 4A of the ACC Act, the determination and the summons.

### List of Challenges

Citation:	Year:	Grounds/nature of challenge:
Mansfield v Australian Crime Commission	2003	Whether the ACC Act abrogates the privilege against self-incrimination and legal professional privilege; interference with the administration of justice. Subsequent proceedings for costs. Outcome – no order made.
A v Boulton	2004	Whether the ACC Act abrogates the privilege against self-incrimination, whether the ACC should be permitted to examine the applicant in relation to a crime for which he was being investigated, and in relation to which he claimed he was shortly to be charged. Outcome – application dismissed.
Hannaford v Choi	2004	Show cause why respondents should not be ordered pursuant to subsection 24(1) of the ACC Act to deliver to the ACC examiner any passport issued to them. Outcome – respondent to deliver passport.
Hak Song Ra v Australian Crime Commission	2004	Whether ACC summonses were invalid on the grounds that they were for an improper purpose, namely to assist the conduct of a criminal proceedings. Outcome – application dismissed.
A v Boulton	2004	Appeal against earlier case. Confirmed ACC Act abrogates the privilege against self-incrimination. Outcome – appeal dismissed.
Barnes v Boulton	2004	Resolution of procedural issues, self-incrimination regarding State/Territory offences, interference with the jurisdiction of State Courts, access to reasons for issue of summons. Outcome – application dismissed.
X v Australian Crime Commission	2004	Challenge to the validity of the Board's amendment of an authorisation and determination, abrogation of self-incrimination in relation to offences against the law of a foreign country, meaning of 'instrument'. Outcome – application dismissed.
Loprete v Australian Crime Commission	2004	Held in conjunction with X v ACC. See above. Outcome – application dismissed.
Watt v Australian Crime Commission	2004	Whether the examiner is restrained from requiring the applicant to answer questions on the grounds of his involvement in a separate action in the NT Supreme Court. Outcome – application dismissed.
Stoten v Sage	2005	Whether spousal privilege is abrogated by the ACC Act. Outcome

		– application dismissed.
Hogan v Australian Crime Commission	2005	Whether the ACC Act abrogates privilege against self-incrimination; right to legal representation by chosen adviser. Outcome – order of examiner set aside.
S v Australian Crime Commission	2005	Whether section 4A of the ACC Act is beyond the power of the Commonwealth to enact and is invalid; validity of the summons. Outcome – application dismissed.
B v Australian Crime Commission	2005	Whether section 4A of the ACC Act is beyond the power of the Commonwealth to enact and is invalid; validity of the summons. Outcome – application dismissed.
P v Australian Crime Commission	2005 (under appeal)	Challenge to validity of determination – application dismissed. Applicant has appealed.
AA v Australian Crime Commission	Current	Challenge to validity of section 4A, the determination and the summons.
BB v Australian Crime Commission	Current	Challenge to validity of section 4A, the determination and the summons.
C v Australian Crime Commission	Current	Challenge to validity of section 4A, the determination and the summons.
R v Australian Crime Commission	Current	Challenge to validity of section 4A, the determination and the summons.
D v Australian Crime Commission (NSW)	Current	Challenge to validity of section 4A, the determination and the summons.
A v Australian Crime Commission	Current	Challenge to validity of section 4A, the determination and the summons.
D v Australian Crime Commission (South Aust)	Current	Challenge to validity of section 4A, the determination and the summons.
CC v Australian Crime Commission	2005	Application to restrain the examination of the applicant. Outcome – injunction refused.
Smith v Australian Crime Commission	2005	Question of payment of costs. Outcome – applicant to pay respondents specified costs.
S v Boulton and Australian Crime Commission	2005 (under appeal)	Whether spousal privilege applies; if so, whether applies to de facto relationship. Outcome – application dismissed. Applicant has appealed.
B v Australian Crime Commission (No2)	2005	Whether the name of the applicant should be suppressed from publication along with anything tending to identify him. Outcome – order declined.
AA Pty Ltd v Australian Crime Commission	2005 (under appeal by ACC)	Whether the ATO is a 'law enforcement agency'. Outcome – ATO is not a 'law enforcement agency'. ACC has appealed.
B2 v Australian Crime Commission	Current	Challenge to validity of section 4A, the determination and the summons.
M v Australian Crime Commission	Anticipated within the week	Challenge to validity of section 4A, the determination and the summons.
S v Australian Crime Commission	Anticipated within the week	Challenge to validity of section 4A, the determination and the summons.

## **Attachment C: Management of Secondees**

### **Police Secondees and Professional Standards and Integrity**

Police Secondees to the ACC remain responsible to their home forces for discipline and integrity issues. This responsibility was formalised in agreements between the former NCA and Police Commissioners in 1994 and remains current as a consequence of NCA-ACC transitional arrangements. There are a number of reasons for this situation:

- The ACC cannot impose a sanction on a police officer if a complaint is substantiated. Any ACC finding would have to be referred to the home force and the home force would have to undertake its own investigation before it could impose a sanction. Running two investigations on the same matter is a misuse of resources.
- Some complaints involve allegations of criminal offences. Such matters are always referred to a police force.
- Some complaints relate to secondees exercising their powers and responsibilities as police officers. Police forces have professional/ethical standards units which are best equipped to undertake such investigations.

Secondees are nevertheless, by definition under section 4 of the ACC Act 2002, 'members of the staff of the ACC'. It is appropriate therefore that they are also covered by the ACC's professional standards and integrity regime because they are under the direction of the ACC, use ACC powers, use ACC equipment and resources, are accommodated in ACC premises and work in conjunction with other staff who are subject to the ACC's professional standards and integrity regime.

A complicating factor is that many secondees, and other ACC staff, are cross-sworn as special members of other police forces to facilitate the investigation of multi-jurisdictional criminal activity. Police forces have a vested interest in maintaining the integrity of such arrangements.

Police Force and ACC integrity regimes complement each other.

### **Performance Management Practices**

As with integrity regimes the ACC's performance management practices for secondees complement, where possible, home Police Force practices. A number of secondees participate in the ACC's Performance Development Scheme (PDS) and seconded AFP officers are required to comply with AFP PDS practices.

The ACC's PDS has a primary focus on performance improvement and professional development and is designed to:

- align Individual Work Plans with the ACC's strategic direction;
- facilitate staff and managers identifying work outcomes and the associated skill levels and behaviours required
- provide feedback on performance
- improve the preparation and implementation of practical plans for skills improvement, career development and job satisfaction

### **Common Terms and Conditions**

The ACC does not believe that it is possible to negotiate "common terms and conditions" for police secondments to the ACC because the employment and remuneration structures in each police force in Australia are fundamentally different. A possible solution might be, subject to appropriate consultation, for the ACC to employ (under the Public Service Act,

1999) police who would take leave without pay (LWOP) from their home force. Employment conditions would then be governed by ACC workplace agreements.

Pending the outcome of the Review of the ACC Act, the ACC has continued the current arrangements under which secondments are sought on existing home force terms and conditions. It is also seeking the views of police forces on changing to a model of employment of police under LWOP.



## Attachment D: Use of Special Constable / AFP Special Member Powers

### APS staff requiring Special Constable / AFP Special Member powers

The ACC needs to employ a select number of experienced, trained former police officers as investigators and other specialist categories to retain a capacity that includes a mix of investigator capability that provides:

- continuity to ACC investigations and an enduring skills and knowledge base when secondees conclude their two year secondments;
- a understanding of how investigative skills are employed and secondees managed in the context of the ACC's operating environment, including the focus on use of coercive powers and multidisciplinary team approaches;
- ability to command and lead investigative staff;

These staff need to be experienced, trained and have access to appropriate powers.

The ACC needs police powers in order to provide first level command and leadership to those already holding such powers. In the ACC's context there is a need for leaders who can also ensure that the use of such powers are directed towards meeting the ACC's objectives and are within its accountability framework.

### Resource Tables

#### ACC Staffing as at 30 September 2005

	APS (ongoing and non-ongoing)	Seconded - funded by ACC	Seconded - funded by jurisdictions	Total	Members of Taskforces - funded by jurisdictions
Sydney	144	26	-	170	13
Melbourne	89	23	3	115	10
Brisbane	54	16	1	71	2
Adelaide	15	7	-	22	35
Perth	22	4	-	26	6
Canberra	87	-	10	97	-
<b>Total</b>	<b>411</b>	<b>76</b>	<b>14</b>	<b>501</b>	<b>66</b>

**APS Staff with Special Constable Police Powers as at 30 September 2005**

<b>Job Title</b>	<b>Total</b>
Covert Operative	3
Deep Cover Operative Controller	2
Financial Investigator	1
Investigator	5
Manager Operations	1
Manager Technical Surveillance	2
Physical Surveillance Operative	5
Team Leader Investigations	2
Team Leader Physical Surveillance	10
Team Leader Proceeds of Crime	1
Technical Surveillance Operative	7
<b>Total</b>	<b>39</b>

*The above includes*

- *2 AFP Staff Member Status (can't carry a gun) Sydney*
- *3 Non-going APS staff members 1 in Melbourne & 2 in Sydney*

Direct recruitment by the ACC of specialist categories produces efficiencies and increases knowledge-retention and expertise through lower turnover.

## **Attachment E: Informants**

### **ACC Informants Policy**

The ACC's policy and procedures relating to the management of covert human intelligence sources provides extensive protocols on security of information given by informants, the security of informants and, as far as possible ensures that information provided by informants is sound and can be used effectively in prosecutions.

The classified annexe to this attachment provides a detailed explanation of these protocols.

## **Attachment F: Intelligence**

### **International Roles**

The AFP have responsibility for international liaison and where possible, the ACC utilises the AFP Liaison Officer network to assist in facilitating either the collection of intelligence or the identification of appropriate agencies and experts in foreign countries.

The ACC acknowledges that intelligence collection is not the primary function of the Liaison Officers and that various demands placed on Liaison Officers leaves little capacity to proactively identify and collect intelligence. This is a current challenge for the AFP and subsequently the ACC, as access to timely and relevant foreign criminal intelligence impacts on the ACC's ability to deliver over the horizon strategic products, particularly with respect to new trends and abuse of technology experienced overseas.

To work through these challenges, the ACC and AFP Intelligence Executives have formed a working party which has met twice in recent months and will continue to focus on this issue.

Recently, the ACC provided the AFP with its enduring intelligence collection requirements that support and underpin the ACC's Harms Statement process. The AFP has been very supportive in this process and is presently incorporating this into their national and international collection capabilities.

### **Over the Horizon Reporting**

Forward-looking, over-the-horizon (estimative) intelligence is recognised within the ACC as a critical component of its intelligence function.

This forward-looking component of ACC intelligence production is tailored to customer requirements and is approved by the ACC Board annually in conjunction with the Picture of Criminality in Australia (PoCA).

At the national strategic level the 'future' relevant to decisions on broad policy and capability development in law enforcement agencies is normally out to five years. This timeframe is sufficient to enable strategies to be developed on a whole-of-government level and to allow time for the development of targeted strategies. It is this area of intelligence that is generally referred to as 'over-the-horizon'.

Within the ACC's Intelligence Directorate, the main product around which this 'futures' work is built is the Strategic Criminal Intelligence Assessment (SCIA). The ACC consults widely with all relevant Australia and overseas agencies in the preparation of this product and its foundation studies.

The SCIA's are an important component in the development of the PoCA. They provide the information and insight necessary to ensure that the national criminal intelligence priorities process remains reflective of the changing criminal environment. Indicating the importance of these intelligence products to the PoCA process, the ACC Board annually endorses a menu of ACC work that includes provision for the writing of SCIA's on a variety of criminal issues. In most instances, the SCIA topic relates to an issue identified in the PoCA as representing a possible significant future criminal threat to Australia and its interests. In some cases, the ACC identifies a requirement from defined intelligence gaps. The ACC plans to deliver twelve SCIA's to the ACC Board in 2005-2006.

A component of the PoCA is the Strategic Environment for Law Enforcement to 2010. Its primary focus is on likely patterns and trends that might occur in criminal markets over the

next five years as a result of a changing environment, and the potential consequences and implications of such changes.

To ensure that in its day-to-day activity the ACC remains focused on the important over-the-horizon strategic issues, a new section was formed in August 2005 with responsibility for preparation of the PoCA and the SCIA's. This section, staffed with highly experienced analysts, represents a significant capability in terms of experience in estimative intelligence. The section also has responsibility for development of the ACC Board-endorsed strategic warning program – a program designed specifically to ensure the Board receives as early an indication as possible of the potential emergence of certain crime issues which could present significant challenges for law enforcement.

This section is focused on providing a dedicated strategic intelligence capability that concentrates on how the future might be unfolding and what might specifically occur. In addition, all ACC intelligence analysts, regardless of their allocation to desk and product, must as a core component of their analysis consider aspects of the national criminal environment that might inhibit or facilitate trends in future criminal behaviour.

The section is also complemented by a newly formed research area which is focused on broader research questions, such as the relationship between organised crime and volume crime. The outputs of this broader research will support and drive enhanced strategic criminal intelligence assessments.

## **Attachment G: Policy Function**

### **ACC Policy Function**

The ACC has an existing policy function. Policy responses and initiatives are coordinated through the Strategy and Governance area which was formed on 1 July 2005 and is an expansion of the existing policy capacity of the former Executive Services directorate. This expansion included the creation of a General Manager Strategic Policy position.

Strategy and Governance (as did Executive Services before it) liaises with relevant departments and agencies to provide proactive ACC contributions to national policy discussions. It also has responsibility for co-ordinating and reporting on the progress of ACC policy responses and initiatives to inter-departmental committees and national working groups, the ACC Board, the Minister for Justice and Customs, Ministerial Council on the Administration of Justice committees and other relevant Ministerial council committees.